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A TREATISE

ON

FEDERAL PRACTICE

CIVIL AND CRIMINAL

INCLUDING

PRACTICE IN BANKRUPTCY, ADMIRALTY, PATENT CASES, FORECLOSURE OF RAILWAY MORTGAGES, SUITS UPON CLAIMS AGAINST THE UNITED STATES, PROCEEDINGS BEFORE THE INTERSTATE COMMERCE COMMISSION AND THE FEDERAL TRADE COMMISSION,

EQUITY PLEADING AND PRACTICE, RECEIVERS AND INJUNCTIONS

IN THE STATE COURTS

BY

ROGER FOSTER

OF THE NEW YORK BAR

AUTHOR OF COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES, TREATISES ON THE FEDERAL JUDICIARY ACTS OF 1875 AND 1887, THE FEDERAL INCOME TAX OF 1894, THE FEDERAL INCOME TAX OF 1913 AND 1914, LIBERTY OF CONTRACT, ATTACHMENT, REMOVAL OF CAUSES, TRIAL BY NEWSPAPER, &C., FORMERLY LECTURER ON FEDERAL JURISPRUDENCE AT THE LAW SCHOOL OF YALE UNIVERSITY.

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IN FOUR VOLUMES

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TABLE OF ERRATA

At page 65, § 18, note 6, beginning of note, insert "Supreme Lodge Knights of Pythias v. England"; also in last line of first column before "Rev. St. Ind. 1881," insert "Supreme Lodge Knights of Pythias v. England."

At page 98, § 27, note 4, strike out "583" in first line and insert "804," and after "Comp. St." insert "§ 1233a."

At page 127, § 40, line 4 text, change "she" to "he."

At page 128, § 40, note 23, before "715" insert "713."

At page 728, § 120, 2nd line from end of text, change "plaintiffs and defendants" to "plaintiffs or defendants."

At page 730, § 120, in note 51, after "42" insert "Fed. 337."

At page 959, § 166b, line 5, over reference to note 2, "need" should read "no need."

At page 1035, § 180n, note 3, add to end, "as amended April 13, 1876, ch. 56, 19 St. at L. 32, Comp. St. § 1708."

At page 1037, § 180n, note 28, insert "U. S." in front of "R. S." and strike out "1710," inserting "1709."

At page 1383, § 276d, strike out note 1 and insert "Ch. 53, § 1, 40 St. at L. 276, Comp. St. § 3115⅛e."

At page 1412, § 281, note 5, last line after "See Harrison," insert "v. St. Louis & San Francisco R. R. Co."

At page 1486, § 302a, in note 14, 10 lines from bottom of column, change "103 Fed. 107" to "103 Fed. 47."

At page 1534, § 305b, note 14, in second line after "128 Fed.," insert "209."

At page 1547, § 308, note 1, 1st line from end, change "44" to "30."

At page 1728, § 339a, note 32, strike out "§ 1218" and insert "§ 2, 18."

At page 1732, § 339b, note 15, after "§ 7" insert "39 St. at L 1126"; strike out "Comp. St. § 3369h" and insert "Comp. St. § 3422¼e."

At page 1926, § 392, 14th line of text, change "one month" to "twenty days."

At page 1926, § 392, note 14, strike out "83" and insert "66."

At page 2128, § 430a, note 45, at end of 6th line, 2nd column, after "Craig" insert "266 Fed. 230."

At page 2413, § 473c, note 19, 2nd line, change "59 Fed. 982" to read, "59 Fed. 989."

At page 2414, § 473d, note 6, 2nd line, strike out "184 Fed. 370" and insert "184 Fed. 570."

At page 2419, § 473h, note 1, 8th line, change "29 Fed. 89" to "29 Fed. 489;" and in the last line change "190 Fed. 572" to "199 Fed. 572."

At page 2460, § 477b, note 18, change "10 Fed." to "50 Fed."

At page 2507, § 480a, second line from end of text, strike out quotation marks before the words "Congress has."

At page 2508, § 480a, seventh line of text, strike out quotation marks.

At page 2598, § 490c, note 14, 3rd line should read "St. § 10114, § 3," instead of "St. § 3593, § 2."

At page 2783, § 522b, note 8, strike out "1911" and insert "1919."

At page 2826, § 526, strike out the sentence beginning "The charges of counterfeiting" and ending "with a felony[10]" and insert "All offenses which may be punished by death, or imprisonment for a term exceeding one year, shall be deemed felonies. All other offenses shall be deemed misdemeanors.[7]"

At page 2826, § 526, strike out notes 7, 8, 9 and 10, insert new note 7. Criminal Code § 335, 35 St. at L. 1152; Comp. St. § 10509.

At page 3041, § 554, 6th line of text, insert the word "not" after "to remand has."

At page 3054, § 555, note 16, reference to Statutes at Large should read, "41 St. at L. 554."

At page 3297, § 617, strike out sentence "a corporation cannot be a voluntary bankrupt[1]." Insert "any corporation except a municipal corporation, railroad, insurance, or banking corporation, may be a voluntary bankrupt."

At page 3297, § 617, note 1, strike out all after first line of this note and insert "as amended June 25, 1910, 36 St. at L. 838."

TABLE OF CONTENTS

VOLUME IV.

CHAPTER XXXV.

COURT OF CLAIMS.

		Page
§ 670.	Organization of Court of Claims	3597
§ 671.	Jurisdiction of Court of Claims	3598
§ 671a.	Equitable jurisdiction	3607
§ 671b.	Jurisdiction in patent cases	3609
§ 672.	Statute of limitations in Court of Claims	3610
§ 673.	Parties plaintiff	3612
§ 673a.	Right of assignees to sue	3614
§ 673b.	Petitions and claims	3617
§ 674.	Pleadings by defendant in Court of Claims	3620
§ 675.	Amendments in Court of Claims	3621
§ 675a.	Consolidation	3623
§ 676.	Attorneys in Court of Claims	3623
§ 677.	Motions and notices in Court of Claims	3625
§ 678.	Abatement and revivor	3625
§ 679.	Discontinuances and withdrawals of papers	3626
§ 680.	Trials in Court of Claims	3626
§ 681.	References by Court of Claims	3631
§ 682.	Evidence before the Court of Claims	3631
§ 683.	New trials	3641
§ 684.	Judgments in Court of Claims	3645
§ 685.	Costs in the Court of Claims	3648
§ 686.	Appeals from Court of Claims	3648

CHAPTER XXXVI.

WRITS OF ERROR AND APPEALS.

§ 687.	Writs of error and appeals. In general	3651
§ 688.	Direct review by the Supreme Court of decisions of the Federal Courts of the United States	3657
§ 688a.	Review by the Supreme Court of the decisions of the Circuit Courts of Appeals	3672
§ 689.	Review by the Supreme Court through *certiorari* of decisions of the Circuit Courts of Appeals	3676

PAGE

§ 689a. Review by the Supreme Court through *certiorari* of decisions of the Court of Customs Appeals 3679
§ 689b. Review by the Supreme Court through *certiorari* of decisions of the Court of Appeals of the District of Columbia 3679
§ 689c. Review by the Supreme Court through *certiorari* of decisions of the Supreme Courts of Hawaii, Porto Rico and the Philippine Islands 3680
§ 689d. Review by the Supreme Court through *certiorari* of decisions of the State Courts 3681
§ 689e. Practice upon applications to the Supreme Court for *certiorari* 3684
§ 689f. Certification of questions for instruction 3688
§ 690. Review of decisions of Court of Claims 3693
§ 691. Review by Supreme Court of decisions of the courts of the District of Columbia 3695
§ 691a. Review by Supreme Court of decisions of the District Court of Alaska 3698
§ 691b. Review by the Supreme Court of decisions of the Courts of the Island Territories 3699
§ 691c. Review by the Supreme Court of decisions of the District Court of the Canal Zone 3701
§ 692. Writs of error from the Supreme Court of State Courts 3701
§ 692a. Determination whether Federal question was decided 3709
§ 692b. Raising Federal question in State Court 3713
§ 692c. Practice upon writs of error to State Courts 3718
§ 693. Writs of error from and appeals to the Circuit Courts of Appeals 3722
§ 694. Appeals from the District Courts 3736
§ 695. Judgments, orders and decrees which may be reviewed by writs of error or appeals 3740
§ 696. Value of the matter in dispute upon writs of error and appeals 3757
§ 697. Parties to writs of error and appeals 3767
§ 698. Time within which writs of error and appeals must be taken .. 3778
§ 699. Writs of error 3785
§ 700. Appeals 3793
§ 700a. Citations 3795
§ 701. Assignment of errors 3798
§ 702. Security on writ of error or appeal 3807
§ 703. Supersedeas 3809
§ 704. Return to writ of error or appeal 3824
§ 705. Motions to dismiss appeals and writs of error. In general ... 3836
§ 705a. Dismissal because of default 3840
§ 705b. Dismissal upon consent 3843
§ 705c. Dismissal because of waiver or estoppel 3845
§ 705d. Dismissal of appeals and writs of error in moot cases 3847
§ 705e. Practice upon motions to dismiss 3850
§ 705f. Motions to affirm 3853

PAGE

§ 706. Printing the record 3854
§ 707. Argument of appeals and writs of error 3858
§ 708. Rehearings 3868
§ 709. Further proof on appeal 3871
§ 710. Amendments of the original record upon appeal or error 3872
§ 711. Decisions. In general 3873
§ 711a. Final determination of the controversy 3876
§ 711b. Review of questions of discretion 3880
§ 711c. Review of findings of fact 3884
§ 711d. Review of questions of damages 3886
§ 711e. Review of rulings upon evidence 3888
§ 711f. Review of rulings upon interlocutory applications 3890
§ 711g. Objections not raised below 3892
§ 711h. Consideration of matter subsequent to proceedings brought up for review 3898
§ 711i. Review of proceedings taken by consent or by default 3899
§ 711j. Errors not prejudicial 3900
§ 712. Mandate 3904
§ 712a. Enforcement of mandate 3915
§ 713. Second writ of error or appeal 3917

APPENDIX.

I.

FORMS.

IN EQUITY.

I. Motion for leave to file bill in Supreme Court 3925
II. Original bill in equity in Supreme Court 3926
III. Bill for injunction against District Attorney, and Collector of Internal Revenue 3937
IV. Bill for injunction against District Attorney to restrain enforcement of unconstitutional act of Congress 3948
V. Bill of complaint against cabinet officer 3953
VI. Stockholders' bill for injunction against payment of income tax 3961
VII. Stockholders' bill for injunction against transfer of assets and discovery with interrogatories 3972
VIII. Stockholders' bill to regulate distribution of stock in other companies held as assets 3988
IX. Stockholders' bill for injunction against consolidation of railroad companies 4001
X. Bill for accounting by syndicate managers 4018
XI. Bill to set aside conveyances with allegations excusing laches 4023
XII. Bill in equity in patent case 4039

		Page
XIII.	Bill in equity in patent case with allegations to support interlocutory injunction	4045
XIV.	Bill in equity in copyright case	4050
XV.	Bill to protect trademark	4056
XVI.	Bill to prevent unfair competition	4060
XVII.	Petition under anti-monopoly law	4064
XVIII.	Bill in equity for appointment of receiver	4074
XIX.	Friendly bill for appointment of receiver	4085
XX.	Bill in equity for the appointment of ancillary receiver	4093
XXI.	Petition for appointment of receiver at foot of decree	4099
XXII.	Bill of foreclosure of railway mortgage	4106
XXIII.	Bill of revivor	4119
XXIV.	Supplemental bill	4122
XXV.	Bill to perpetuate testimony	4124
XXVI.	Bill of review for errors apparent	4125
XXVII.	Petition for leave to file a bill of review for new matter	4126
XXVIII.	Bill of review for new matter	4126
XXIX.	Notice of lis pendens	4128
XXX.	Answer to bill for injunction	4129
XXXI.	Answer in copyright suit in equity	4131
XXXII.	Answer in suit against directors	4144
XXXIII.	Answer to friendly bill for receiver	4158
XXXIV.	Amendments to bill in equity	4159
XXXV.	Petition for intervention in stockholders' suit with allowance thereof	4160
XXXVI.	Order of Supreme Court for intervention, injunction and receiver	4163
XXXVII.	Order of intervention as defendants	4164
XXXVIII.	Notice of motion to dismiss bill	4165
XXXIX.	Restraining order against strike	4165
XL.	Injunction order against infringement of trademark	4167
XLI.	Notice of injunction	4167
XLII.	Writ of injunction against infringement of copyright	4168
XLIII.	Writ of injunction against strikers	4170
XLIV.	Order denying injunction upon bond filed by defendant	4171
XLV.	Bond in place of injunction	4172
XLVI.	Order to show cause against appointment of receiver at foot of decree	4173
XLVII.	Order appointing receiver at the foot of decree	4174
XLVIII.	Order appointing receivers of street railway company	4175
XLIX.	Order appointing ancillary receiver	4178
L.	Order extending receivership	4180
LI.	Order for examination of third party by receivers	4181
LII.	Petition by lessor corporation for extension of receivership for its protection	4182
LIII.	Writ of ne exeat	4187

PAGE

LIV. Petition for subpoena *duces tecum* in aid of deposition *de bene esse* 4187
LV. Master's warrant or summons 4193
LVI. Master's warrant or summons in patent case 4194
LVII. Notice accompanying draft of master's report 4195
LVIII. Account of infringements of patent 4196
LIX. Order of Supreme Court consolidating causes for the purpose of taking testimony and appointing commissioner. 4197
LX. Order appointing master to supervise stockholders' meeting 4198
LXI. Final record in equity 4201
LXII. Decree 4202
LXIII. Decree for injunction and accounting in patent case 4207
LXIV. Decree for injunction and accounting in copyright case .. 4208
LXV. Decree for injunction and accounting in trademark case. 4210
LXVI. Decree of injunctions against monopoly 4212
LXVII. Petition for rehearing 4213

AT COMMON LAW.

I. Summons under Code Practice 4219
II. Return of service of summons 4220
III. Præcipe for summons in Districts of Pennsylvania 4220
IV. Summons in Districts of Pennsylvania and return of marshal 4221
V. Return by marshal of service thereof 4221
VI. Appearance under Code Practice 4222
VII. Declaration upon contract where pleadings follow practice at common law 4222
VIII. Complaint upon contract under Code Practice 4231
IX. Complaint at common law under Anti-monopoly Law ... 4237
X. Statement of claim under Pennsylvania 4243
XI. Complaint to enforce liability of withdrawing stockholder 4245
XII. Plaint or declaration in action in New Jersey District for dower 4247
XIII. Writ of dower 4249
XIV. Notice of filing and petition against United States under Tucker Act of March 3, 1887 4250
XV. Pleas where common law practice prevails 4252
XVI. Answer under Code Practice 4257
XVII. Affidavit of defense under Pennsylvania Practice Act of 1915 4260
XVIII. Similiter 4262
XIX. Reply for the plaintiff under Code Practice 4263
XX. Bill of Particulars 4264

		Page
XXI.	Notice of motion for leave to reframe common law pleading into bill in equity	4268
XXII.	Petition for leave to reframe common law pleading into bill in equity	4269
XXIII.	Order granting leave to reframe common law pleading into bill in equity	4273
XXIV.	Notice of motion to transfer part of case to equity side of the court	4274
XXV.	Affidavit in support of such notice	4275
XXVI.	Order sending part of cause to equity side of court	4276
XXVII.	Notice of motion transferring cause of action from equity to common law docket	4277
XXVIII.	Notice of trial	4278
XXIX.	Order for *dedimus potestatem*	4278
XXX.	*Dedimus potestatem*	4282
XXXI.	Notice of deposition under revised statutes	4281
XXXII.	Certificate by notary to deposition *de bene esse*	4282
XXXIII.	Certificate by notary to deposition *de bene esse* containing extracts from books and papers	4283
XXXIV.	Subpoena *duces tecum* in aid deposition *de bene esse*	4284
XXXV.	Subpoena *duces tecum* upon trial	4286
XXXVI.	Return of service of subpoena *ad testificandum*	4286
XXXVII.	Letters rogatory	4287
XXXVIII.	Stipulation waiving trial by jury	4288
XXXIX.	Order for trial by court without a jury	4288
XL.	Stipulation for reference of action at common law	4289
XLI.	Order appointing referee to try action at common law	4289
XLII.	Stipulation to proceed with eleven jurors	4290
XLIII.	Verdict in Districts of Pennsylvania	4290
XLIV.	Extract from minutes of trial and verdict inserted in judgment roll under Code Practice	4290
XLV.	Order for judgment after trial by the court without a jury	4291
XLVI.	*Postea* under common law practice	4291
XLVII.	Judgment under Code Practice	4292
XLVIII.	Execution against property or *fieri facias*	4292
XLIX.	Writ of *vendi exponas*	4293
L.	Writ of *scire facias*	4294

IN ADMIRALTY.

I.	Libel *in rem*	4295
II.	Interrogatories annexed to libel	4298
III.	Libel *in personam* with clause of foreign attachment	4299
IV.	Stipulation for libelant's costs	4303
V.	Claim of owner	4304
VI.	Claim of agent	4304

		Page
VII.	Stipulation for claimant's costs	4305
VIII.	Stipulation for value	4306
IX.	Bond to marshal	4307
X.	Order appointing appraisers	4307
XI.	Notice to appraisers	4308
XII.	Oath of appraisers	4308
XIII.	Notice of appraisement	4308
XIV.	Report of appraisers	4308
XV.	Exceptions to libel	4309
XVI.	Answer in admiralty	4309
XVII.	Petition to bring in vessel under Supreme Court Rule 56	4311
XVIII.	Interlocutory decree and default in admiralty	4312
XIX.	Interlocutory decree in admiralty	4313
XX.	Final decree in admiralty	4313
XXI.	Final decree in admiralty	4314
XXII.	Final decree in admiralty	4314
XXIII.	Final decree in admiralty for summary judgment on bond to marshal	4315
XXIV.	Final decree and order of sale in admiralty	4316
XXV.	Notice of appeal in admiralty	4316
XXVI.	Petition on appeal	4317
XXVII.	Order for mandate in admiralty	4318
XXVIII.	Mandate in admiralty	4318
XXIX.	Final decree on mandate in admiralty	4319
XXX.	Libel or petition for limitation of liability	4319
XXXI.	Order for transfer to trustee	4322
XXXII.	Transfer to trustee	4323
XXXIII.	Order for monition	4324
XXXIV.	Monition	4325
XXXV.	Final decree in proceedings for limitation of liability in admiralty	4326

IN CONTEMPT PROCEEDINGS.

I.	Rule to show cause why defendants and their attorneys should not be committed for civil contempt	4330
II.	Notice of motion for an order committing the defendants and other parties for a civil contempt	4331
III.	Petition for rule to show cause why defendants and their attorneys should not be committed for civil contempt	4331
IV.	Information for criminal contempt	4336
V.	Order adjudging party guilty of contempt	4352
VI.	Order fining defendant for contempt	4352
VII.	Attachment for contempt	4353
VIII.	Return to attachment	4353
IX.	Writ of attachment against witness for disobedience of subpoena	4354

UPON REMOVAL OF CAUSES.

		Page
I.	Notice of application for removal	4355
II.	Petition for removal for difference of citizenship	4355
III.	Petition for removal because case arises under constitution of the United States	4357
IV.	Petition for removal for a separate controversy	4359
V.	Petition for removal because of fraudulent misjoinder as well as for a separable controversy and a difference of citizenship by a realignment of the parties	4364
VI.	Notice of application for removal because of prejudice or local influence	4371
VII.	Petition for removal because of prejudice and local influence	4372
VIII.	Petition for removal of criminal case from State Court under section 643, United States revised statutes, Judicial Code, § 33	4375
X.	Petition by an officer, civil or criminal, or a soldier of the United States, for removal of a civil case from a State Court	4376
XI.	Bond on removal	4378
XII.	Certificate to the record by the clerk of the State Court	4381
XIII.	Motion for remand	4381
XIV.	Order for remand	4382
XV.	Order denying remand	4382
XVI.	Order for repleader after removal	4383

UPON APPLICATIONS FOR THE WRIT OF HABEAS CORPUS.

I.	Petition for writ of *habeas corpus to* prevent extradition	4385
II.	Writ of *habeas corpus ad testificandum*	4388
III.	Order quashing writ of *habeas corpus ad testificandum*	4388
IV.	Order discharging prisoner	4389
V.	Writ of *habeas corpus* to marshal	4389

UPON APPLICATIONS FOR WRITS OF MANDAMUS.

I.	Motion for leave to file petition for mandamus	4391
II.	Petition to Supreme Court	4392
III.	Motion for leave to file petition for mandamus to set aside receivership	4397
IV.	Petition to Supreme Court for mandamus to set aside receivership	4397
V.	Petition to Supreme Court of District of Columbia for mandamus	4405
VI.	Rule to show cause why mandamus should not issue	4409
VII.	Return to order to show cause against issue of mandamus	4410
VIII.	Return to order to show cause against issue of mandamus to set aside receivership	4413

PAGE

IX. Writ of mandamus 4416
X. Order in obedience to decision granting mandamus 4418

UPON APPLICATIONS FOR WRITS OF PROHIBITION.

I. Suggestion for writ of prohibition against admiralty proceedings 4420
II. Suggestion for writ of prohibition against admiralty proceedings 4422
III. Petition for writ of prohibition against admiralty proceedings 4428
IV. Rule to show cause why writ of prohibition should not issue against admiralty proceedings 4431
V. Motion for leave to file petition for prohibition or mandamus to prevent proceedings in equity 4431
VI. Petition for writ of prohibition or mandamus to prevent proceedings in equity 4433
VII. Return to order to show cause against issue of writ of prohibition 4439
VIII. Writ of prohibition 4439

UPON APPLICATIONS FOR THE WRIT OF CERTIORARI.

I. Writ of *certiorari* to accompany writ of *habeas corpus* 4442
II. Writ of *certiorari* in District of Columbia 4443
III. Writ of *certiorari* for removal of criminal prosecution from State to Federal Court 4443
IV. Notice of presentment to Supreme Court of petition for *certiorari* to State Court 4444
V. Notice of motion of petition from Supreme Court for *certiorari* to Circuit Court of Appeals 4445
VI. Motion for writ of *certiorari* 4446
VII. Notice of submission of answer and cross petition 4447
VIII. Motion for cross writ of *certiorari* 4447
IX. Petition for writ of *certiorari* to Supreme Court to review proceedings of State Court 4448
X. Petition to Supreme Court for writ of *certiorari* to review decision of Circuit Court of Appeals in case involving questions of international importance 4452
XI. Petition for writ of *certiorari* to Circuit Court of Appeals in admiralty case 4461
XII. Petition to Supreme Court for writ of *certiorari* to review decision of Circuit Court of Appeals in trade-mark case 4468
XIII. Petition to Supreme Court for writ of *certiorari* to review decision of Circuit Court of Appeals in case involving legitimacy of child 4474
XIV. Petition to Supreme Court to review decision of Circuit Court of Appeals in case of promise to leave legacy 4483
XV. Stipulation of dismissal of appeals annexed to petition ... 4488

		Page
XVI.	Notice of motion for writ of *certiorari* for diminution of the record	4489
XVII.	Motion for writ of *certiorari* for diminution of the record.	4490
XVIII.	Petition for writ of *certiorari* for diminution of the record	4491
XIX.	Order upon petition for writ of *certiorari* for diminution of the record	4493
XX.	Petition to State Court for stay of proceedings pending application for writ of *certiorari*	4495
XXI.	Order of State Court granting stay of proceedings pending application for writ of *certiorari*	4496
XXII.	Application to District Court for stay of proceedings under Mandate of Circuit Court of Appeals pending application to Supreme Court for *certiorari*	4497
XXIII.	Answer to petition for writ of *certiorari*	4498
XXIV.	Answer to petition for writ of *certiorari* with cross petition	4503
XXV.	Writ of *certiorari* from Supreme Court to State Court	4507
XXVI.	Writ of *certiorari* from Supreme Court to Circuit Court of Appeals	4507
XXVII.	Stipulation that transcript of proceedings in State Court previously filed stand as return	4508
XXVIII.	Stipulation that transcript of proceedings in Circuit Court of Appeals previously filed stand as return	4509
XXIX.	Return by clerk of State Court	4509
XXX.	Return by clerk of Circuit Court of Appeals	4510

PROCEEDINGS FOR REVIEW BY WRIT OF ERROR OR APPEAL.

I.	Appeal and allowance	4511
II.	Citation on appeal or writ of error	4511
III.	Writ of error from Supreme Court to District Court	4512
IV.	Writ of error from Supreme Court to Circuit Court of Appeals	4512
V.	Writ of error from Circuit Court of Appeals to District Court	4513
VI.	Writ of error to State Court	4514
VII.	Citation on writ of error	4515
VIII.	Petition for writ of error to State Court	4515
IX.	Prayer for reversal	4520
X.	Notice to join in writ of error	4520
XI.	Certificate of question of jurisdiction	4521
XII.	Supersedeas bond	4522
XIII.	Assignment of errors	4523
XIV.	Notice and petition for review of order in bankruptcy	4524
XV.	Petition or review of order of Federal Trade Commission	4526
XVI.	Order extending time to serve bill of exceptions	4527
XVII.	Bill of exceptions	4528
XVIII.	Bill of exceptions	4533

		PAGE
XIX.	Præcipe indicating portions of the record to be incorporated into the transcript upon appeal	4533
XX.	Order as to contents of return to writ of error	4535
XXI.	Stipulation authorizing certificate to return	4535
XXII.	Certificate by clerk to transcript	4536
XXIII.	Memorandum to be inserted in a common law case as provided by section 7 of rule 14 of the Circuit Court of Appeals for the Fourth Circuit	4536
XXIV.	Order for Appearance in Supreme Court	4537
XXV.	Motion to dismiss appeal	4538
XXVI.	Motions to dismiss and to affirm	4541
XXVII.	Notice of submission of motions to dismiss and to affirm	4541
XXVIII.	Order of affirmance	4542
XXIX.	Mandate	4542
XXX.	Judgment upon mandate	4544

IN CRIMINAL PROCEDURE.

I.	Complaint for warrant	4545
II.	Warrant of arrest	4545
III.	Mittimus pending examination	4546
IV.	Final mittimus	4546
V.	Recognizance of accused pending examination	4547
VI.	Final recognizance of accused	4548
VII.	Recognizance of witnesses	4549
VIII.	Certificate of proceedings	4550
IX.	Complaint for extradition warrant	4550
X.	Extradition warrant	4551
XI.	Certificate of extradition proceedings	4552
XII.	Proceedings upon application of poor convict for discharge	4552
XIII.	Mandate to jailer for the production of poor convict	4553
XIV.	Oath of poor convict	4553
XV.	Certificate of discharge of poor convict	4554
XVI.	Bench warrant or *capias*	4554
XVII.	Return to bench warrant or *capias*	4555
XVIII.	Search warrant under prohibition law	4555
XIX.	*Capias pro fine*	4556
XX.	Return to *capias pro fine*	4556
XXI.	Warrant for removal of prisoner to another district	4556
XXII.	Return to warrant for removal of prisoner	4557
XXIII.	Receipt of marshal for prisoner	4557
XXIV.	*Venire facias*	4557
XXV.	Commitment to penitentiary	4558
XXVI.	Marshal's return to commitment to penitentiary	4559
XXVII.	Criminal information	4559
XXVIII.	Indictment—General form	4559
XXIX.	Indictment for offense on the high seas	4560

PAGE

XXX. Indictment for offense committed at a place within exclusive jurisdiction of the United States..... 4561
XXXI. Consolidated indictment for violation of national banking laws 4561
XXXII. Count in indictment for violation of national banking laws 4588
XXXIII. Appearance bond on writ of error in criminal cases..... 4590

IN COURT OF CLAIMS.

I. Petition 4591
II. Findings and judgment 4593

FOR USE BEFORE THE INTERSTATE COMMERCE COMMISSION PREPARED BY THE COMMISSION.

I. Complaint 4600
II. Answer 4602
III. Petition for leave to intervene..... 4602
IV. Petition for rehearing or reargument..... 4603
V. Form of reparation statement under Rule V..... 4604
VI. Form of original complaint in reparation cases against the agent appointed by the President..... 4605

II.

Equity Rules 4607

III.

Admiralty Rules 4631

IV.

Supreme Court Rules..... 4644

V.

Rules of the Circuit Courts of Appeals..... 4665
Admiralty Rules of the Second and Ninth Circuits..... 4724

VI.

Bankruptcy Law 4729

VII.

General Orders in Bankruptcy..... 4771
Forms in Bankruptcy..... 4784
1. Debtor's petition 4784

		Page
2.	Partnership petition	4797
3.	Creditors' petition	4799
4.	Order to show cause upon creditors' petition	4800
5.	Subpoena to alleged bankrupt	4801
6.	Denial of bankruptcy	4801
7.	Order for jury trial	4802
8.	Special warrant to marshal	4802
9.	Bond of petitioning creditor	4803
10.	Bond to marshal	4804
11.	Adjudication that debtor is not bankrupt	4805
12.	Adjudication of bankruptcy	4805
13.	Appointment, oath, and report of appraisers	4806
14.	Orders of reference	4807
15.	Order of reference in judge's absence	4808
16.	Referee's oath of office	4808
17.	Bond of referee	4809
18.	Notice of first meeting of creditors	4809
19.	List of debts proved at first meeting	4810
20.	General letter of attorney in fact when creditor is not represented by attorney at law	4810
21.	Special letter of attorney in fact	4811
22.	Appointment of trustee by creditors	4812
23.	Appointment of trustee by referee	4813
24.	Notice to trustee of his appointment	4813
25.	Bond of trustee	4814
26.	Order approving trustee's bond	4814
27.	Order that no trustee be appointed	4815
28.	Order for examination of bankrupt	4815
29.	Examination of bankrupt or witness	4816
30.	Summons to witness	4816
31.	Proof of unsecured debt	4817
32.	Proof of secured debt	4818
33.	Proof of debt due corporation	4818
34.	Proof of debt by partnership	4819
35.	Proof of debt by agent or attorney	4820
36.	Proof of secured debt by agent	4820
37.	Affidavit of lost bill, or note	4821
38.	Order reducing claim	4822
39.	Order expunging claim	4822
40.	List of claims and dividends to be recorded by referee and by him delivered to trustee	4823
41.	Notice of dividend	4824
42.	Petition and order for sale by auction of real estate	4824
43.	Petition and order for redemption of property from lien	4825
44.	Petition and order for sale subject to lien	4826
45.	Petition and order for private sale	4826
46.	Petition and order for sale of perishable property	4827

PAGE

47. Trustee's report of exempted property..... 4828
48. Trustee's return of no assets..... 4828
49. Account of trustee..... 4829
50. Oath to final account of trustee..... 4830
51. Order allowing account and discharging trustee..... 4830
52. Petition for removal of trustee..... 4831
53. Notice of petition for removal of trustee..... 4831
54. Order for removal of trustee..... 4832
55. Order for choice of new trustee..... 4832
56. Certificate by referee to judge..... 4833
57. Bankrupt's petition for discharge..... 4833
58. Specification of grounds of opposition to bankrupt's discharge.. 4835
59. Discharge of bankrupt..... 4835
60. Petition for meeting to consider composition..... 4836
61. Application for confirmation of composition..... 4836
62. Order confirming composition..... 4837
63. Order of distribution on composition..... 4838
Index to General Rules..... 4839

VIII.

Tables of Citations..... 4843

IX.

Index 4861

FEDERAL PRACTICE

VOLUME IV.

CHAPTER XXXV.

COURT OF CLAIMS.

§ 670. Organization of Court of Claims. The Judicial Code provides as follows: "The Court of Claims, established by the Act of February twenty-four, eighteen hundred and fifty-five, shall be continued. It shall consist of a chief justice and four judges, who shall be appointed by the President, by and with the advice and consent of the Senate, and hold their offices during good behavior. Each of them shall take an oath to support the Constitution of the United States, and to discharge faithfully the duties of his office. The Chief Justice shall be entitled to receive an annual salary of six thousand five hundred dollars and each of the other judges an annual salary of six thousand dollars, payable monthly, from the Treasury.[1]

"On the first day of every regular session of Congress the clerk of the Court of Claims shall transmit to Congress a full and complete statement of all the judgments rendered by the court during the previous year, stating the amounts thereof and the parties in whose favor they were rendered, together with a brief synopsis of the nature of the claims upon which they were rendered. At the end of every term of the court he shall transmit a copy of its decisions to the heads of Departments, to the Solicitor, the Comptroller, and the Auditors of the Treasury, to the Commissioner of the General Land Office

§ 670. [1] § 136, 36 St. at L. 1087, re-enacting U. S. R. S., § 1049, in substance. An interesting article on the History, Jurisdiction, and Practice in the Court of Claims, by Judge W. A. Richardson, was published in 7 Southern Law Rev. (N. S.) 781, and reprinted in 17 Ct. of Cl. 1.

and of Indian Affairs, to the chiefs of bureaus, and to other officers charged with the adjustment of claims against the United States."[2]

§ 671. Jurisdiction of Court of Claims. The Court of Claims shall have jurisdiction to hear and determine the following matters:

"First. All claims (except for pensions), founded upon the Constitution of the United States,[1] or any law of Congress,[2]

[2] Ibid., § 143, re-enacting U. S. R. S., § 1057.

§ 671. [1] *Supra* §§ 96a, 96b, 96c, 96f. See Peabody v. U. S., 231 U. S. 530; Portsmouth Harbor Land & Hotel Co. v. U. S. 250; U. S. 1.

[2] *Supra*, § 96f. Where Congress recognizes the validity of a claim, appropriates money therefrom and directs a public officer to examine and pay it, a suit upon such claim against the United States may be maintained in the Court of Claims. Huffman v. U. S., 17 Ct. Cl. 55. See U. S. v. Jordan, 113 U. S. 418, 28 L. ed. 1013; Nashville, C. & St. Ry. Co. v. U. S., 113 U. S. 261, 28 L. ed. 971; U. S. v. Kaufman, 96 U. S. 567, 24 L. ed. 792. So where a statute provides for payment of a claim when it appears to the satisfaction of a Government officer that certain facts exist, and the latter finds the existence thereof, but denies payment because of an erroneous construction of the law. U. S. v. Loughlin, 249 U. S. 440, 39 Sup. Ct. 340, 63 L. ed. 696. A suit may be maintained against the United States upon an allowance made by a Commissioner of Internal Revenue to a judgment creditor, under Section 3220 of the Revised Statutes, where the collector does not object and sets up no claim himself; Nixon v. U. S., 18 Ct. Cl. 448; provided, the Commissioner has not exceeded his jurisdiction in making the allowance, Seat v. U. S., 18 Ct. Cl. 458. A suit may be maintained to recover the amount of an award under a statute giving an informer a share of the penalty; Ramsay v. U. S., 21 Ct. Cl. 443; U. S. v. Ramsay, 120 U. S. 214, 30 L. ed. 582. A suit may be maintained to recover of the United States taxes and penalties similar to those in sections 3220 and 3228 of the Revised Statutes, when a claim has been in due time presented on appeal to and allowed by the Commissioner of Internal Revenue; U. S. v. Savings Bank, 104 U. S. 728, 26 L. ed. 908. See also U. S. v. Kaufman, 96 U. S. 567, 24 L. ed. 792. So may be a suit for a draw-back under the Act of August 5, 1861, chapter 45, section 4, after payment has been refused. Campbell v. U. S., 107 U. S. 407, 27 L. ed. 592; Portland Co. v. U. S., 5 Ct. Cl. 441. When the Commissioner of the Internal Revenue has allowed a claim for the refund of a tax, and the accounting officer has disallowed the whole amount, the Court of Claims has jurisdiction of a suit to recover the same. U. S. v. Kaufman, 96 U. S. 567, 24 L. ed. 792; U. S. v. Savings Bank 104 U S. 728, 26 L. ed. 908; Edison El. Ill. Co. v. U. S. 38 Ct. Cl. 208. But see Medbury v. U. S. 173 U. S. 492, 43 L. ed. 779.

upon any regulation of an Executive Department[3] upon any contract expressed or implied, with the Government of the United States,[4] or for damages, liquidated or unliquidated, in cases not sounding in tort,[5] in respect of which claims the party would be entitled to redress against the United States either in a court of law, equity, or admiralty if the United States were suable: *Provided, however,* That nothing in this section shall be construed as giving to the said court jurisdiction to hear and determine claims growing out of the late civil war, and commonly

[3] The words, "regulation of an Executive Department," mean a rule made by the head of a department for its action when authorized by Congress to make such rule. A mere order of the President or the head of a Department is not a "regulation." Harvey v. U. S., 3 Ct. Cl. 38; Maddux v. U. S., 20 Ct. Cl. 193. The construction of the phrase giving jurisdiction over actions upon contract, express or implied, or for damages, liquidated or unliquidated, in cases not sounding in tort, is explained in §§ 96, 96a, *supra*. An owner of bonds, assumed by the United States, may maintain an action in the Court of Claims to collect the amount of the same. Morrell v. U. S., 7 Ct. Cl. 421.

[4] It has been said that to constitute an implied contract upon which a suit can be brought in the Court of Claims, "there must have been some consideration moving to the United States, or they must have received the money charged with a duty to pay it over; or the claimant must have had a lawful right to it when it was received, as in the case of money paid by mistake. Knote v. U. S., 95 U. S. 149, 157, 24 L. ed. 442, 444. See U. S. v. Great Falls *Mfg. Co.*, 112 U. S. 645, 28 L. ed. 846; Great Falls Mfg. Co. v. Attorney General, 124 U. S. 581, 31 L. ed. 527; Paine Lumber Co. v. U. S., 55 Fed. 854.

[5] With the exception of claims for the proceeds of captured or abandoned property and others arising under special statutes, the Court of Claims has no jurisdiction of claims upon torts committed by the United States, except where the claimant can waive the tort and sue upon an implied contract. U. S. R. S., § 1059; Langford v. U. S., 101 U. S. 341, 25 L. ed. 1010; Nichols v. U. S., 7 Wall. 122, 19 L. ed. 125; Gibbons v. U. S., 8 Wall. 269, 19 L. ed. 453; Basso v. U. S., 239 U. S. 602, false imprisonment; Dennis v. U. S., 2 Ct. Cl. 210; Dykes v. U. S., 16 Ct. Cl. 869; Paine Lumber Co. v. U. S., 55 Fed. 854. The United States is not liable for injury resulting from the negligence of their officers to those who are not in a contractual or *quasi* contractual relation with them. German Bank of Memphis v. U. S., 148 U. S. 573, 37 L. ed. 564; Bigby v. U. S., 188 U. S. 400, 47 L. ed. 519; Gibson's Case, 29 Ct. Cl. 18; Hayward's Case, 30 Ct. Cl. 219, see *supra*, § 96, except where a libel *in personam* can be filed in a District Court under Act of March 9, 1920, 41 St. at L. 525, quoted *supra*, § 566a.

known as 'war claims,'[6] or to hear and determine other claims, which, prior to March third, eighteen hundred and eighty-seven, had been rejected or reported on adversely by any court, department, or commission authorized to hear and determine the same. Second. All set-offs, counterclaims, claims for damages, whether liquidated or unliquidated, or other demands whatsoever on the part of the Government of the United States against any claimant against the Government in said court:[7] *Provided,*

[6] By the Act of March 4, 1915, ch. 140, § 38, St. at L. 996. "From and after the passage and approval of this Act the jurisdiction of the Court of Claims shall not extend to or include any claim against the United States based upon or growing out of the destruction of any property or damage done to any property by the military or naval forces of the United States during the war for the suppression of the rebellion; nor to any claim for stores and supplies taken by or furnished to or for the use of the military or naval forces of the United States. nor to any claim for the value of any use and occupation of any Real Estate by the military or naval forces of the United States during said war; nor shall said Court of Claims have jurisdiction of any claim which is now barred by the provisions of any law of the United States." By the Act of March 3, 1863, ch. 120, § 3, 12 Stat. 820. March 3, 1911, ch. 231, § 162, 36 Stat. 1139 "The Court of Claims shall have jurisdiction to hear and determine the claims of those whose property was taken subsequent to June the first, eighteen hundred and sixty-five, under the provisions of the Act of Congress approved March twelfth, eighteen hundred and sixty-three, entitled 'An Act to provide for the collection of abandoned property and for the prevention of frauds in insurrectionary districts within the United States,' and Acts amendatory thereof where the property so taken was sold and the net proceeds thereof were placed in the Treasury of the United States; and the Secretary of the Treasury shall return said net proceeds to the owners thereof, on the judgment of said court, and full jurisdiction is given to said court to adjudge said claims, any statutes of limitations to the contrary notwithstanding." Comp. St. § 1153; O'Pry v. U. S., 249 U. S. 323; Thompson v. U. S., 246 U. S. 547, 38 Sup. Ct. 349, 62 L. ed. 876.

[7] "Upon the trial of any cause in which any set-off, counterclaim, claim for damages, or other demand is set up on the part of the Government against any person making claim against the Government in said court, the court shall hear and determine such claim or demand both for and against the Government and claimant; and if upon the whole case it finds that the claimant is indebted to the Government it shall render judgment to that effect, and such judgment shall be final, with the right of appeal, as in other cases provided by law. Any transcript of such judgment, filed in the clerk's office of any District or Circuit Court, shall be entered upon the

That no suit against the Government of the United States, brought by any officer of the United States to recover fees for services alleged to have been performed for the United States, shall be allowed under this chapter until an account for said fees shall have been rendered and finally acted upon as required by law, unless the proper accounting officer of the Treasury fails to act finally thereon within six months after the account is received in said office."[8] This jurisdiction is concurrent with

records thereof, and shall thereby become and be a judgment of such court and be enforced as other judgments in such courts are enforced." Jud. Code, § 146, re-enacting U. S. R. S., § 1061.

The statute authorizing the Court of Claims to enter an affirmative judgment in favor of the United States against a suitor in the Court of Claims does not violate the Seventh Amendment of the Constitution. McElrath v. U. S., 102 U. S. 426, 440, 26 L. ed. 189, 192; s. c., 12 Ct. Cl. 312. This right is as comprehensive as the similar rights given to the Crown under the British Act of 1860 regulating Petitions of Right. 23 and 24 Vict. 17, ch. 34; Roman v. U. S., 11 Ct. Cl. 761. See Delancey v. The Queen, 6 L. R. Exch. 286. The Court of Claims has jurisdiction to hear and determine a counter-claim by the United States for the proceeds of their property wrongfully sold by an insolvent debtor in a suit by his assignee in insolvency on a contract between the insolvent and the United States. McElrath v. U. S., 102 U. S. 426, 26 L. ed. 189; U. S. v. Burchard, 125 U. S. 176, 31 L. ed. 662. It has been held that the United States may take an assignment from their judgment debtor, of a judgment held by him against another, and set off the same in a suit brought by the latter upon an award of Congress, notwithstanding the fact that such suitor has assigned his award to a fourth person; provided, the set-off was acquired before notice of the assignment. Boehm v. U. S., 21 Ct. Cl. 290. When a suit on a claim was brought by a firm of three, it was held that the United States could not set off a judgment against two of them. Allen v. U. S., 17 Wall. 207, 21 L. ed. 553, 5 Ct. Cl. 339; Macauley v. U. S., 11 Ct. Cl. 693. After the Government has allowed a claim and payment in full, the Government, when sued for the balance, cannot set up as a counterclaim the amount so paid, on the ground that the assignment was irregularly executed. Macauley v. U. S., 11 Ct. Cl. 693. Where an officer of the navy, upon settlement of his accounts, claimed that he would not be concluded thereby and subsequently sued for a balance claimed by him, it was held that the United States were not bound by the settlement, and could obtain judgment for moneys improperly paid him in pursuance thereof. Boehm v. U. S., 20 Ct. Cl. 142. If a claim is dismissed for want of jurisdiction, the counterclaim falls with it. McKnight v. U. S., 98 U. S. 179, 25 L. ed. 115, 13 Ct. Cl. 292.

[8] Jud. Code, § 145, 36 St. at L. 1136, 1137, re-enacting 24 St. at L.

that of the District Courts over all claims not exceeding ten thousand dollars, except those to recover the fees, salary or compensation for official services of officers of the United States.[9] An officer may sue in the Court of Claims to recover a salary allowed by an Act of Congress.[10] The amount involved does not affect the jurisdiction.

"The jurisdiction of the said court shall not extend to any claim against the Government not pending therein on December first, eighteen hundred and sixty-two, growing out of or de-

505. Ordinarily, the action of the auditing department, in either allowing or rejecting a claim, is not an essential prerequisite to the jurisdiction of the Court of Claims to hear it. U. S. v. Knox, 128 U. S. 230, 234, 32 L. ed. 465, 467. "But if such claims are presented to the department for allowance, and the department, in the exercise of its discretion, suspends action upon them until proper vouchers are furnished, or other reasonable requirements are complied with, the courts should not assume jurisdiction until final action is taken," unless there is unreasonable delay. U. S. v. Fletcher, 147 U. S. 661, 667, 37 L. ed. 321, 323, per Brown, J. A statute which confers exclusive authority upon a public officer over certain questions or claims, deprives the Court of Claims of jurisdiction concerning these. U. S. v. Babcock, 250 U. S. 328, 39 Sup. Ct. 464, 63 L. ed. 1011; Alire v. U. S., 1 Ct Cl. 233; s. c., 7 Ct. Cl. 27; Daily v. U. S., 17 Ct. Cl. 144; Bofinger v. U. S., 18 Ct. Cl. 148, 165; Chesapeake & O. Ry. Co. v. U. S., 20 Ct. Cl. 49; Davidson v. U. S., 21 Ct. Cl. 298; Marshall v. U. S., 21 Ct. Cl. 307; Dorsheimer v. U. S., 7 Wall. 166, 19 L. ed. 187; but a statute which provides that the finding of the comptroller shall be final and conclusive as to the executive department, does not render such finding conclusive on the courts. U. S. v. Gilmore, 189 Fed. 761. See *supra*, § 96. The Court of Claims has no power to make a rule requiring parties to present their claims to an executive department before suit. Such a rule is void. Clyde v. U. S., 13 Wall. 38, 20 L. ed. 479. Where an officer is directed by statute to examine claims, to report to Congress and to await further legislative action, no suit can be maintained on his report. Huffman v. U. S., 17 Ct. Cl. 55.

[9] *Supra*, §§ 96-96h.

[10] Moore v. U. S., 4 Ct. Cl. 139. It has been held that suits may be successfully maintained by a naval officer for his expenses when traveling under orders, U. S. v. McDonald, 128 U. S. 471, 32 L. ed. 506; by a public officer such as the register of a land office on an implied contract for reasonable expenses necessary for the performance of his public duties, including rent and payments for janitor's services and fuel, except where a law limits or prohibits the same, Luse v. U. S., 35 Ct. Cl. 164. For a case where letter carriers were allowed to recover upon an implied contract for working more than eight hours a day, see San Francisco Mail Carriers' Case, 33 Ct. Cl. 417.

pendent on any treaty stipulation entered into with foreign nations or with the Indian tribes." [11]

The Court of Claims has also jurisdiction over "Third. The claim of any paymaster, quartermaster, commissary of subsistence, or other disbursing officer of the United States, or of his administrators or executors, for relief from responsibility, on account of capture or otherwise, while in the line of his duty, of Government funds, vouchers, records, or papers in his charge, and for which such officer was and is held responsible." [12]

"When any claim or matter is pending in any of the Executive departments which involves controverted questions of fact or law, the head of such Department may transmit the same, with the vouchers, papers, documents and proofs pertaining thereto,

[11] Jud. Code, § 153, 36 St. at L. 1087, re-enacting U. S. R. S., § 1066. See, however, the act to provide for the adjudication and payment of claims arising from Indian depredations, 26 St. at L. 851, ch. 538. The Cherokee acts; 32 St. at L. 726, 996; 40 Stat. L. 1316; U. S. v. Cherokee Nation, 202 U. S. 101, 50 L. ed. 949; U. S. R. S., § 1067. The Omaha Act, 36 St. at L. 580, U. S. v. Omaha Tribe of Indians, 253 U. S. 275. Claims based on treaty stipulations, include those which arise solely as the result of cession of territory to the United States; but the Court of Claims has jurisdiction over claims based on contracts originally made with the former sovereign of ceded territory and assumed by the United States after the cession either expressly or by implication. Eastern Extension, Australia and China Tele. Co. v. U. S., 31 U. S. 326.

[12] Jud. Code, § 145, 36 St. at L. 1087, re-enacting U. S. R. S., § 1059. "Whenever the Court of Claims ascertains the facts of any loss by any paymaster, quartermaster, commissary of subsistence, or other disbursing officer, in the cases hereinbefore provided, to have been without fault or negligence on the part of such officer, it shall make a decree setting forth the amount thereof, and upon such decree the proper accounting officers of the Treasury shall allow to such officer the amount so decreed, as a credit in the settlement of his accounts. Jud. Code, § 147, 36 St. at L. 1087, re-enacting U. S. R. S., § 1062. The words "without fault or negligence on the part of such officer," mean such care and diligence as a prudent man would exercise in the discharge of a high public trust, or in a matter of private interest under similar circumstances. Malone v. U. S., 5 Ct. Cl. 486; Glenn v. U. S., 4 Ct. Cl. 501; Howell v. U. S., 7 Ct. Cl. 512; Hall v. U. S., 9 Ct. Cl. 270; Holman v. U. S., 11 Ct. Cl. 642; Clark v. U. S., 11 Ct. Cl. 698; Curtis v. Banker, 136 Mass. 355; Christian v. U. S., 7 Ct. Cl. 431; Whittelsey v. U. S., 5 Ct. Cl. 452; Prime v. U. S., 3 Ct. Cl. 209; Murphy v. U. S., 3 Ct. Cl. 212; Hobbs v. U. S., 17 Ct. Cl. 189; Scott v. U. S., 18 Ct. Cl. 1; Hoyle v. U. S., 21 Ct. Cl. 300.

to the Court of Claims and the same shall be there proceeded in under such rules as the court may adopt. When the facts and conclusions of law shall have been found, the court shall report its findings to the Department by which it was transmitted for its guidance and action: *Provided, however,* That if it shall have been transmitted with the consent of the claimant, or if it shall appear to the satisfaction of the court upon the facts established, that under existing laws or the provisions of this chapter it has jurisdiction to render judgment or decree thereon, it shall proceed to do so, in the latter case giving to either party such further opportunity for hearing as in its judgment justice shall require, and shall report its findings therein to the department by which the same was referred to said court. The Secretary of the Treasury may, upon the certificate of any auditor, or of the Comptroller of the Treasury, direct any claim or matter, of which, by reason of the subject matter or character, the said court might under existing laws, take jurisdiction on the voluntary action of the claimant, to be transmitted, with all the vouchers, papers, documents and proofs pertaining thereto, to the said court for trial and adjudication." [12a]

[12a] 36 St. at L. 1087. This statute allows judgment in favor of the claimant. U. S. v. New York, 160 U. S. 598, 40 L. ed. 551. "All cases transmitted by the head of any Department, or upon the certificate of any Auditor, or of the Comptroller of the Treasury according to the provisions of the preceding section, shall be proceeded in as other cases pending in the Court of Claims, and shall, in all respects, be subject to the same rules and regulations." Jud. Code, § 149; 36 St. at L. 1087, re-enacting U. S. R. S., § 1064. "The amount of any final judgment or decree rendered in favor of the claimant, in any case transmitted to the Court of Claims under the two preceding sections, shall be paid out of any specific appropriation applicable to the case, if any such there be; and where no such appropriation exists, the judgment or decree shall be paid in the same manner as other judgments of the said court." Ibid., § 150, re-enacting U. S. R. S., § 1065. A diplomatic claim, presented by a foreign attorney to the Secretary of State, cannot be thus transmitted. Berger's Case, 36 Ct. Cl. 243. The reference of a claim by a Department to the Court of Claims, without jurisdiction to pay, does not give the court jurisdiction. Hart v. U. S., 118 U. S. 62, 30 L. ed. 96. A claim may be referred to the Court of Claims by an Executive Department, after the accounting officers have certified a balance in favor of the claimant. McKnight v. U. S., 13 Ct.

"Whenever any bill, except for a pension, is pending in either House of Congress providing for the payment of a claim against the United States, legal or equitable, or for a grant, gift, or bounty to any person, the House in which such bill is pending may, for the investigation and determination of facts, refer the same to the Court of Claims, which shall proceed with the same in accordance with such rules as it may adopt and report to such House the facts in the case and the amount, where the same can be liquidated, including any facts bearing upon the question whether there has been delay or laches in presenting such claim or applying for such grant, gift, or bounty, and any facts bearing upon the question whether the bar of any statute of limitation should be removed, or which shall be claimed to excuse the claimant for not having resorted to any established legal remedy, together with such conclusions as shall be sufficient to inform Congress of the nature and character of the demand, either as a claim, legal or equitable, or as a gratuity against the United States, and the amount, if any, legally or equitably due from the United States to the claimant: *Provided, however,* That if it shall appear to the satisfaction of the court upon the facts established, that under existing laws or the provisions of this chapter, the subject matter of the bill is such that it has jurisdiction to render judgment or decree thereon, it shall proceed to do so, giving to either party such further opportunity for hearing as in its judgment justice shall require, and it shall report its proceedings therein to the House of Congress by which the same was referred to said court." [13]

Cl. 292. See also Delaware River S. B. Co. v. U. S., 5 Ct. Cl. 55; Winnisimmet Co. v. U. S., 12 Ct. Cl. 319. If, after the head of an Executive Department or the Secretary of the Treasury has transmitted a claim to the Court of Claims under U. S. R. S., § 1063, the claimant does not voluntarily prepare and file his petition, the court will, on motion, require him to do so. Bright v. U. S., 6 Ct. Cl. 118; s. c., 8 Ct. Cl. 326. The court cannot decline jurisdiction if the case comes within the statute. Ibid. The Court of Claims will take jurisdiction of an agreed case which the head of a Department certifies to be correct and sufficient. Broulatour v. U. S., 7 Ct. Cl. 555; Amoskeag Mfg. Co. v. U. S., 6 Ct. Cl. 99; s. c., as Mfg. Co. v. U. S., 17 Wall. 592, 21 L. ed. 715.

[13] Jud. Code, § 151; 36 St. at L. 1087, re-enacting 24 St. at L. 505, § 14. Such a reference can only be made of a bill for the payment of money; not of a bill authorizing a

Other special statutes give the Court of Claims jurisdiction in certain cases.[14]

suit. Cahalan's Case, 42 Ct. Cl. 280. It has been held that a claim against the District of Columbia cannot be referred to the Court of Claims by one House of Congress. Strachan v. District of Columbia, 20 Ct. Cl. 484.

[14] See, for example, U. S. R. S. § 5261, (suits by land-grant railroads to recover the price of freight and transportation withheld by the Secretary of the Treasury); 18 St. at L. 453 (suits by such companies to recover the value of transportation of troops or property of the United States); 20 St. at L. 171, 324; 21 St. at L. 784; 22 St. at L. 284, 469; 23 St. at L. 242, 257, 372, 381; 21 St. at L. 284; (District of Columbia claims act): District of Columbia v. Barnes, 187 U. S. 637, 47 L. ed. 344; s. c., 197 U. S. 146, 49 L. ed. 699; 21 St. at L. 284; 22 St. at L. 284, 469; 23 St. at L. 242, 257, 372, 381; 35 St. at L. 424 (suits for the recovery of additional compensation for coal from Alaska mines); 33 St. at L. 806 (suits for back pay and emoluments during the period an officer was out of the army after an enforced resignation), see McLean v. U. S., 226 U. S. 374; Act of March 2, 1919, ch. 94, § 2, 40 St. at L. 1273, Comp. St. § 3115 14/15 c (suits for compensation because of the cancellation of war contracts). Act of March 4, 1917, ch. 180, 39 St. at L. 1193 (Naval Emergency Fund Act); Act of June 15, 1917, ch. 29, 40 St. at L. 183 (Emergency Shipping Fund Act); Act of August 10, 1917, ch. 53, 40 St. at L. 279, 282, 285; Act of October 6, 1917, ch. 79, 40 St. at L. 353 (claims for land for ordinance proving ground and naval construction); Act of March 1, 1918, ch. 19, 40 St. at L. 438, 439 (claims respecting shipping board housing); Act of March 21, 1918, ch. 25, sec. 3, 40 St. at L. 454 (claims of railroads); Act of April 22, 1918, ch. 62, 40 St. at L. 535 (claims in respect to shipping board trollies or interurban railways); Act of April 26, 1918, ch. 64, 40 St. at L. 537, 538 (claims for land for ordnance proving ground); Act of May 16, 1918, ch. 74, sec. 2, 40 St. at L. 551 (claims for land taken for war housing); Act of July 1, 1918, ch. 114, sec. 5, pard. 40 St. at L. 720 (contracts for ships, war material, factories, etc.); Act of July 8, 1918, ch. 139, sec. 1, 40 St. at L. 826 (claims for buildings for war department); Joint Resolution of July 16, 1918, ch. 154, 40 St. at L. 904 (claims in relation to telegraph signals); Act of July 18, 1918, ch. 157, sec. 14, 40 St. at L. 916 (claims in relation to drydocks, wharves, warehouses, terminals, etc.); Act of Oct. 5, 1918, ch. 181, sec. 3, 40 St. at L. 1010 (claims for minerals, ores, mines, smelters, etc.); Act of Nov. 21, 1918, ch. 212, sec. 1, 40 St. at L. 1048 (claims for buildings for Department of Agriculture); Act of March 2, 1919, ch. 94, sec. 2, 40 St. at L. 1273 (claims for the adjustment of amount due upon war contracts entered into in good faith); U. S. Bedding Co. v. U. S., 55 Ct. Cl. 459. The filing of a petition in the Court of Claims under a statute providing that in that manner damages may be recovered for the taking of pri-

"The said court shall have power to establish rules for its government and for the regulation of practice therein, and it may punish for contempt in the manner prescribed by the common law, may appoint commissioners, and may exercise such powers as are necessary to carry into effect the powers granted to it by law."[15]

§ 671a. Equitable jurisdiction. The Court of Claims has no general equitable jurisdiction,[1] nor jurisdiction to enforce specific performance.[2]

"Whenever any person shall present his petition to the Court of Claims alleging that he is or has been indebted to the United States as an officer or agent thereof, or by virtue of any contract therewith, or that he is the guarantor, or surety, or personal representative of any officer, or agent, or contractor so indebted, or that he or the person for whom he is such surety, guarantor, or personal representative has held any office or agency under the United States, or entered into any contract therewith, under which it may be or has been claimed that an indebtedness to the United States had arisen and exists, and that he or the person he represents has applied to the proper Department of the Government requesting that the account of such office, agency, or indebtedness may be adjusted and settled, and that three years have elapsed from the date of such application, and said account still remains unsettled and unadjusted, and that no suit upon the same has been brought by the United States, said court shall, due notice first being given to the head of said department and to the Attorney-General of the United States, proceed to hear the parties and to ascertain the amount, if any, due the United States on said account. The Attorney-General shall represent the United States at the hearing of said cause. The court may postpone the same from time to time whenever justice shall require. The

vate property for public use, is a waiver of an objection by the plaintiff to the alleged unconstitutionality of such statute. Great Falls Mfg. Co. v. Att'y Gen., 124 U. S. 581, 31 L. ed. 527; U. S. v. Great Falls Mfg. Co., 112 U. S. 645, 28 L. ed. 846.

15 Jud. Code, § 157, re-enacting 36 St. at L. 1087.

§ 671a. 1 U. S. v. Jones, 131 U. S. 1, 33 L. ed. 90.

2 Ibid.

judgment of said court or of the Supreme Court of the United States, to which an appeal shall lie, as in other cases, as to the amount due, shall be binding and conclusive upon the parties. The payment of such amount so found due by the court shall discharge such obligation. An action shall accrue to the United States against such principal, or surety, or representative to recover the amount so found due, which may be brought at any time within three years after the final judgment of said court, and unless suit shall be brought within said time, such claim and the claim on the original indebtedness shall be forever barred. The provisions of section one hundred and sixty-six shall apply to cases under this section."[3] The Court of Claims has jurisdiction of a claim against the United States for money claimed under a contract which would resemble a right of action at common law, but for the need of help from equity to establish[4] or to reform a contract.[5] Under the Cherokee Acts,[6] the Court of Claims has enjoined the Cherokee Nation and the United States from making any discrimination between certain persons in the distribution of a fund[7] and has enjoined and directed the Secretary of the Interior to make a certain enrollment of land.[8] No suit can be sustained merely upon moral or equitable considerations, not based upon any established rule of law or equity.[9] The Court of Claims can not establish a land claim without specific statutory authority.[10] If each of

[3] Jud. Code, § 180, re-enacting 24 St. at L. 505, § 3.

[4] U. S. v. Milliken Imprinting Co., 202 U. S. 168, 174, 50 L. ed. 980, 983.

[5] District of Columbia v. Barnes, 197 U. S. 146, 49 L. ed. 699; U. S. v. Milliken Imprinting Co., 202 U. S. 168, 174, 50 L. ed. 980, 983; Cramp v. U. S., 239 U. S. 221.

[6] 26 St. at L. 36; 32 St. at L. 726, 996.

[7] Whitmire v. Cherokee Nation, 30 Ct. Cl. 138, 180.

[8] Whitmire v. Cherokee Nation, 44 Ct. Cl. 453; reversed, without considering this point, Cherokee Nation v. Whitmire, 223 U. S. 108, 56 L. ed. 370.

[9] Bonner v. U. S., 9 Wall. 156, 19 L. ed. 666; McClure v. U. S., 116 U. S. 145, 29 L. ed. 572; Tillison v. U. S., 100 U. S. 43, 25 L. ed. 543.

[10] U. S. v. Jones, 131 U. S. 1, 33 L. ed. 90, *supra*, §§ 96, 98, The papers and record of the Court of Private Land Claims, which had been abolished are on file in the Department of the Interior. 32 Stat. at L. 1083, 1144. The Commissioner of the General Land Office now exercises its powers in the approval of surveys executed under its decrees or confirmations. 33 Stat. at L. 452,

two conflicting claimants seeks to recover for the use of the same property one cannot resist by a plea to the jurisdiction that the title to land is involved.[11]

§ 671b. Jurisdiction in patent cases. By the Act of June 25th, 1910, as amended, July 1, 1918. "Whenever an invention described in and covered by a patent of the United States shall hereafter be used or manufactured by or for the United States without license of the owner thereof or lawful right to use or manufacture the same, such owner's remedy shall be by suit against the United States in the Court of Claims for the recovery of his reasonable and entire compensation for such use and manufacture: Provided, however, That said Court of Claims shall not entertain a suit or award compensation under the provisions of this Act where the claim for compensation is based on the use or manufacture by or for the United States of any article heretofore owned, leased, used by, or in the possession of the United States: Provided further, That in any such suit the United States may avail itself of any and all defenses, general or special, that might be pleaded by a defendant in an action for infringement, as set forth in Title Sixty of the Revised Statutes, or otherwise: And provided, further, That the benefits of this Act shall not inure to any patentee who, when he makes such claim, is in the employment or service of the Government of the United States, or the assignee of any such patentee; nor shall this Act apply to any device discovered or invented by such employee during the time of his employment or service."[1]

484, 485. Chapter xxxii of Foster's Fed. Pr. 4th ed. describes its practice and jurisdiction.

11 Bright v. U. S., 6 Ct. Cl. 118; s. c., 8 Ct. Cl. 326.

§ 671b. 1 36 St. at L. 851, as amended St. at L. Comp. St. § 9465. See *supra*, § 100. The statute gave no right to an employee of the United States who has made an invention out of office hours during the time of his employment by the Government. Moore v. U. S., 249 U. S. 487, 39 Sup. Ct. 322, 63 L. ed. 721. Before the amendment the statute did not authorize the recovery of royalties from the United States for the use of patents without any express or implied recognition of the rights of the patentee and against his protest. Schillinger v. U. S., 155 U. S. 163, 39 L. ed. 108; Harley's Case, 39 Ct. Cl. 105; E. W. Bliss Co. v. U. S., 253 U. S. 187. So as to the use of copyright. Lauman's Case, 27 Ct. Cl. 260. But see Hollister v. Benedict & B. Mfg. Co., 113 U. S. 59, 28 L. ed. 901; Farnham v.

Neither the Court of Claims nor any other court has jurisdiction of an action against the United States,[2] or against any officer thereof,[3] to enjoin the infringement of a patent, or to recover profits or damages from such an officer on account of the use of the article by him in his official character where he derived no personal benefit from such use.[4] Nor for an injunction to restrain a contractor from furnishing to the Government articles, not in themselves infringements, which are intended for use in an infringement.[5] This statute does not prevent a suit against a Government contractor to recover profits or damages because of an infringement by him.[6]

§ 672. Statute of limitations in Court of Claims. "Every claim against the United States, cognizable by the Court of Claims, shall be forever barred unless the petition setting forth a statement thereof is filed in the court, or transmitted to it by the Secretary of the Senate or the Clerk of the House of Representatives, as provided by law, within six years after the claim first accrues:[1] *Provided,* That the claims of married

U. S., 240 U. S. 537; U. S. v. Basic Products Co., 260 Fed. 472, 477. But where the United States had adopted an improvement covered by a patent at the request of the patentee, with notice that he claimed a patent right thereto, and with no assertion of a right to use this, the patentee might recover a reasonable royalty in a suit in the Court of Claims founded upon a contract implied from the transaction. U. S. v. Palmer, 128 U. S. 262, 32 L. ed. 442; Brook's Case, 39 Ct. Cl. 494. But see Russel v. U. S., 182 U. S. 516, 45 L. ed. 1210; Hartman's Case, 35 Ct. Cl. 106; Russel & Livermore's Case, 35 Ct. Cl. 154; Eager's Case, 35 Ct. Cl. 556; Coston's Case, 33 Ct. Cl. 438.

[2] U. S. v. Palmer, 128 U. S. 262, 269, 32 L. ed. 442, 444.

[3] Belknap v. Schild, 161 U. S. 10, 40 L. ed. 599; Dashiell v. Grosvenor, C. C. A., 66 Fed. 334. *Cf.* James v. Campbell, 104 U. S. 356, 26 L. ed. 786; *supra,* § 100. But see Head v. Porter, 48 Fed. 481.

[4] Belknap v. Schild, 161 U. S. 10, 40 L. ed. 599; International Postal Supply Co. v. Bruce, 194 U. S. 601, 48 L. ed. 1134.

[5] Crozier v. Krupp, 224 U. S. 290; Marconi Wireless Tel. Co. v. Simon, 246 U. S. 46. As to the right to an injunction against a Government contractor to restrain an infringement, see case last cited.

[6] William Cramp & Sons Ship & Engine Building Co. v. International Curtis Marine Turbine Co., 246 U. S. 28.

§ 672. [1] The statute does not begin to run until the passage of an act authorizing the suit although the facts which create the claim previously occurred. Sage v. U. S., 250 U. S. 33, 39 Sup. Ct. 415, 63 L. ed. 828; Wray v. U. S., 19 Ct. Cl. 154. A State cannot sue to recover the proceeds of swamp lands which have

women first accrued during the marriage, of persons under the age of twenty-one years, first accrued during minority, and of idiots, lunatics, insane persons, and persons beyond the seas at the time the claim accrued, entitled to the claim, shall not be barred if the petition be filed in the court or transmitted as aforesaid, within three years after the disability has ceased; but no other disability than those enumerated shall prevent any claim from being barred,[2] nor shall any of the said disabilities operate cumulatively."[3] An action for money received by the United States must be brought within six years after its reception.[4] Where money is not payable until demand, the statute does not begin to run until the demand is made.[5] No officer can

been credited to the State on the Treasury books more than six years before the suit was brought. U. S. v. Louisiana, 127 U. S. 182, 32 L. ed. 66. The statute does not begin to run on a claim for extra work under a building contract contemplating the same, until the whole contract is performed. U. S. v. Gibbons, 109 U. S. 200, 27 L. ed. 906.

[2] The plaintiff's ignorance of his ability to establish his claim does not prevent the statute from running. Green v. U. S., 17 Ct. Cl. 174. When the statute once begins to run, no subsequently occurring disability, such as insanity, suspends it. Whitney v. U. S., 18 Ct. Cl. 19; Leonard v. U. S., 18 Ct. Cl. 382. See McDonald v. Hovey, 110 U. S. 619, 28 L. ed. 269. The claimant's death does not interrupt the statute if the claim accrued during his life. Sierra v. U. S., 9 Ct. Cl. 224. If the claimant dies before the claim accrues, the statute does not begin to run until the appointment of an administrator. Fulenweider v. U. S., 9 Ct. Cl. 403. Inability to sue by reason of aid given to the Confederacy by the claimant does not prevent the running of the statute. Kendall v. U. S., 107 U. S. 123, 27 L. ed. 437.

[3] Jud. Code, § 156, 36 St. at L. 1087, re-enacting U. S. R. S., § 1069, The Tucker Act of March 3, 1887, provides that the Statute of Limitations shall not apply to claims referred to the Court of Claims by the head of a Department under section 1063 of the Revised Statutes, provided such claims were presented for settlement at the proper Department within six years after they accrued. U. S. v. Lippitt, 100 U. S. 663, 25 L. ed. 747; Winnisimmet Co. v. U. S., 12 Ct. Cl. 319. The Statute of Limitations did not apply to suits to establish a defense under Sections 1059-1062 of the Revised Statutes. U. S. v. Clark, 96 U. S. 37, 24 L. ed. 696. Nor to claims under the Abandoned Property act, Jud. Code, § 162 quoted *supra*, § 671.

[4] Clark v. U. S., 99 U. S. 493, 25 L. ed. 481.

[5] Harrison v. U. S., 20 Ct. Cl. 175; U. S. v. Cooper, 120 U. S. 124, 30 L. ed. 606. See U. S. v. Lawton, 110 U. S. 146, 28 L. ed. 100. It has been held that the statute begins to run on a claim for services, when

waive the statute, and the court must take notice that the claim is barred, if that appears.[6] When the United States submit to be sued in a State court, it seems that they may take advantage of the State statute limitations.[7]

§ 673. Parties plaintiff. A married woman, who by the law of her domicile may hold property in equity, with or without a trustee, may sue in her own name,[1] even though her husband refuses to be a party, provided the laws of her domicile permit such a suit.[2] Minors should sue through a guardian appointed in the State of their domicile instead of through the guardian appointed in the State where their property is situated.[3] A corporation organized under the laws of a State in the Confederacy, for purposes not hostile to the government, may sue under the Captured and Abandoned Property Act.[4] A principal may sue in his own name, although the contract was made in the name of an agent.[5] "After the filing of a case transmitted to the court, by the head of an Executive Department or by Congress or either House, thereof, any person directly interested in the case may appear as a party therein, by filing his petition, under oath, in accordance with Rules 15 and 16."[6] "Any person claiming to be indirectly interested in any question involved in such case may appear and be heard on the

presented. U. S. v. Wilder, 13 Wall. 254, 20 L. ed. 681; Titus v. U. S., 16 Ct. Cl. 276. An item in the account of a court commissioner for fees was held barred when the services for which he charged were rendered more than six years before proceedings. Patterson v. U. S., 21 Ct. Cl. 322. A claim for the price of property sold is barred within six years after the delivery of the property, not from the time when the Department refused to allow the payment, unless payment by the terms of the contract was postponed. Battelle v. U. S., 7 Ct. Cl. 297. An officer whose accounts are settled annually is entitled to the balance due at the end of each fiscal year. Ellsworth v. U. S., 14 Ct. Cl. 382; U. S. v. Ellsworth, 101 U. S. 170, 25 L. ed. 862.

[6] Finn v. U. S., 123 U. S. 227, 31 L. ed. 128. Acknowledgments and promises by executive officers without legislative authority do not prevent the running of the statute. Leonard v. U. S., 18 Ct. Cl. 382.

[7] Stanley v. Schwalby, 147 U. S. 508, 37 L. ed. 259, *supra*, §§ 95, 96, 183.

§ 673. [1] Meriwether v. U. S., 13 Ct. Cl. 259.

[2] Stanton v. U. S., 4 Ct. Cl. 456.

[3] Ibid.

[4] U. S. v. Insurance Cos., 22 Wall. 99, 22 L. ed. 816; Home Ins. Co. v. U. S., 8 Ct. Cl. 449.

[5] Ramsdell v. U. S., 2 Ct. Cl. 508.

[6] Ct. Cl. Rule 21.

one side or the other, as his interest may require, upon filing a petition, under oath, setting forth specifically and concisely how he claims to be interested, and submitting the questions raised to the decision of the court."[7] "If no claimant directly or indirectly interested, appears and files his petition within six months, the Attorney-General upon thirty days' notice to the parties who appear by the papers transmitted to be interested therein, may set the case down for trial upon such evidence as he may submit. Where such case was transmitted by the head of an Executive Department the court will proceed to try the case upon the statement made by the head of such department."[8]

"No person shall file or prosecute in the Court of Claims, or in the Supreme Court on appeal therefrom, any claim for or in respect to which he or any assignee of his has pending in any other court any suit or process against any person who, at the time when the cause of action alleged in such suit or process arose, was, in respect thereto, acting or professing to act, mediately or immediately, under the authority of the United States."[10] "Aliens who are citizens or subjects of any Government which accords to citizens of the United States the right to prosecute claims against such government in its courts, shall have the privilege of prosecuting claims against the United States in the Court of Claims, whereof such court by reason of their subject matter and character, might take jurisdiction."[11] The subjects of Great Britain,[12] of Belgium,[13] of France,[14] of Italy,[15] of Prussia,[16] of Spain,[17] of Switzerland,[18] and corporations created by any of these governments,[19] may sue in the Court of Claims.[20] So may a corporation chartered by Spain in the Philippine Islands, prior to their annexation to the

[7] Ct. Cl. Rule 22.

[8] Ct. Cl. Rule 23.

[10] U. S. R. S., § 1067.

[11] Jud. Code, 155, 36 St. at L. 1087, re-enacting U. S. R. S., § 1068. See 38 Stat. L. 791.

[12] U. S. v. O'Keefe, 11 Wall. 178, 20 L. ed. 131; Carlisle v. U. S., 16 Wall. 147, 6 Ct. Cl. 398.

[13] De Give v. U. S., 7 Ct. Cl. 517.

[14] Rothschild v. U. S., 6 Ct. Cl. 204; Dauphin v. U. S., 6 Ct. Cl. 221.

[15] Fichera v. U. S., 9 Ct. Cl. 254.

[16] Brown v. U. S., 5 Ct. Cl. 571.

[17] Molina v. U. S., 6 Ct. Cl. 269.

[18] Lobsiger v. U. S., 5 Ct. Cl. 687.

[19] Philippine Sugar Estates Development Co. v. U. S., 39 Ct. Cl. 225; s. c., 40 Ct. Cl. 33.

[20] U. S. R. S., § 1068.

United States;[21] and a citizen of Porto Rico.[22] A foreign government does not deny the right of an American to sue it by requiring him to give security for costs.[23] The Court of Claims has jurisdiction of an action to which a State is a party plaintiff;[24] but not of a suit to which a State is a necessary party defendant.[25]

§ 673a. Right of assignees to sue. The Revised Statutes provide as follows: "All transfers and assignments made of any claim upon the United States, or of any part or share thereof, or interest therein, whether absolute or conditional, and whatever may be the consideration therefor, and all powers of attorney, orders, or other authorities for receiving payment of any such claim or of any part or share thereof, shall be absolutely null and void unless they are freely made and executed in the presence of at least two attesting witnesses, after the allowance of such a claim, the ascertainment of the amount due, and the issuing of a warrant for the payment thereof. Such transfers, assignments, and powers of attorney must recite the warrant for payment, and must be acknowledged by the person making them, before an officer having authority to take acknowledgment of deeds, and shall be certified by the officer; and it must appear by the certificate that the officer, at the time of the acknowledgment, read and fully explained the transfer, assignment, or warrant of attorney to the person acknowledging the same.[1] "The object of Congress by this section was to pro-

[21] Philippine Sugar Estates Development Co. v. U. S., 39 Ct. Cl. 225; s. c., 40 Ct. Cl. 33.

[22] Basso's Case, 40 Ct. Cl. 202.

[23] Brown v. U. S., 5 Ct. Cl. 571.

[24] U. S. v. Louisiana, 123 U. S. 32, 31 L. ed. 69; s. c., 127 U. S. 182, 32 L. ed. 66.

[25] Milwaukee R. R. Canal Co. v. U. S., 1 Ct. Cl. 187. See *supra*, § 105.

§ 673a. [1] U. S. R. S., § 3477; Emmons v. United States, 189 Fed. 414. The statute applies to agreements giving liens upon warrants that are not issued. Nutt v. Knut, 200 U. S. 12; Calhoun v. Massie, § 53 U. S. 170. An assignment not authorized by the statute is invalid as regards creditors of a bankrupt. National Bank of Commerce v. Downie, 218 U. S. 345. And also it has been held, between the assignor and the assignee. Manhattan Commercial Co. v. Paul, 216 N. Y. 487. But where the Government paid into the Supreme Court of the District of Columbia the amount awarded upon a claim; this Court was given jurisdiction to determine the rights of the parties and to award the attorneys relief.

tect the Government, and not the claimant, and prevent fraud

The Supreme Court of the United States then said: "As to the effect of § 3477 Rev. Stat., it has been several times declared by this court that the statute was intended solely for the protection of the Government and its officers during the adjustment of claims, and that, after allowances, the protection may be invoked or waived, as they in their judgment deem proper." Goodman v. Niblack, 102 U. S. 556, 560; Bailey v. U. S., 109 U. S. 432, 439; Hobbs v. McLean, 117 U. S., 567, 576; Freedman's Saving Co. v. Shepherd, 127 U. S. 494, 506; Price v. Forrect, 173 U. S. 410, 423. But see Nutt v. Knut, 200 U. S. 12, 20. It does not invalidate contracts with attorneys for the prosecution of claims against the United States upon contingent fees. Such contracts have been enforced when the compensation was one-twentieth, Wylie v. Coxe, 15 How. 415, 14 L. ed. 753; one-tenth, Wright v. Tebbitts, 91 U. S. 252, 23 L. ed. 320; one-fifteenth per cent., McGowan v. Parish, 237 U. S. 285; one-fifth, Stanton v. Embrey, 93 U. S. 548, 23 L. ed. 983; and one-half, Taylor v. Bemiss, 110 U. S. 42, 28 L. ed. 64. See also Davis v. Commonwealth, 164 Mass. 241, 30 L.R.A. 743; Bayard v. McLane, 3 Harr. (Del.) 139; Ryan v. Martin, 16 Wis. 57; s. c., 18 Wis. 672; Stanton v. Haskin, 1 MacA. 558, 562; Voorhees v. Dorr, 51 Barb. 580. Such contracts, unless forbidden by a special statute, may be enforced by an action against the party to whom the payment is made. Ibid.; York v. Conde, 147 N. Y. 486. But see Ball v. Halsell, 161 U. S. 772, 40 L. ed. 622; Trist v. Child, 21 Wall. 441, 22 L. ed. 623.

Where after attorneys have performed substantial services under such an agreement they are discharged without their consent, they may be allowed compensation equal to that provided by the contract, McGowan v. Parish, 237 U. S. 285. A statute limiting the amount of fees collectible by attorneys in respect to claims against the Government is valid. Calhoun v. Massie, 253 U. S. 171; Newman v. Moyers, 253 U. S. 782. The statute does not apply to assignments by operation of the law to assignees in bankruptcy, Erwin v. U. S., 97 U. S. 392, 24 L. ed. 1065; to assignees in insolvency, even under voluntary assignments, Goodman v. Niblack, 102 U. S. 556, 26 L. ed. 229; Butler v. Goreley, 146 U. S. 303, 36 L. ed. 981; nor to receivers appointed by State Courts, Price v. Forrest, 173 U. S. 410, 43 L. ed. 410; nor to persons who have a right of subrogation, Am. Tobacco Co. v. U. S., 32 Ct. Cl. 207; Schwarz v. U. S., 35 Ct. Cl. 303. All of these may sue the United States in their own name. Ibid. But the purchaser of a claim at a judicial sale under a mortgage cannot. St. Paul & D. R. Co. v. U. S., 112 U. S. 733, 28 L. ed. 861. Otherwise it was held of a sale by an assignee in bankruptcy. McKay v. U. S., 27 Ct. Cl. 422.

The statute does *not* enable the original claimant to recover of the United States a sum once paid by the Government to his attorney in fact under a power of attorney made before the allowance of the claim and the issue of the warrant, no

notice of the revocation of which has been given to the United States. Bailey v. U. S., 109 U. S. 432, 27 L. ed. 988; Buffalo B. R. Co. v. U. S., 16 Ct. Cl. 238. Nor does it invalidate a contract of partnership in furnishing supplies to the United States, nor a promise by one party to another that he will pay him a sum, already due under the articles of co-partnership, out of money to be received from the Government for such supplies. Hobbs v. McLean, 117 U. S. 567, 29 L. ed. 940. Nor does it affect the right of a mortgagee of land or of a pledgee of rents to recover from the mortgagor or pledgor the rents paid by the United States. Freedmen's S. & Tr. Co. v. Shepherd, 127 U. S. 494, 32 L. ed. 163. It has been held that the statute does not apply to the claim of a witness against a marshal for witness fees paid to the marshal and withheld by him, Bollin v. Blythe, 46 Fed. 181, 183; Wallace v. Douglas, 116 N. C. 659; but that it applies to claims against a collector for duties illegally collected, Hager v. Swayne, 149 U. S. 242, 37 L. ed. 719. It seems that the statute does not invalidate the assignment of a judgment against the United States or against collectors, Burke v. Davis, 63 Fed. 456, 458, 12 A. G. Op. 216; nor does it invalidate an assignment made before the United States assumed the indebtedness, U. S. v. Griswold, 30 Fed. 604; s. c., 12 Sawyer, 398. Neither does it apply to claims against funds received from foreign governments by the State Department for distribution among citizens of the United States. Hubbell v. U. S., 15 Ct. Cl. 546, 592. Otherwise, the statute applies to every claim against the United States. U. S. v. Gillis, 95 U. S. 407, 24 L. ed. 503; McKnight v. U. S., 98 U. S. 179, 25 L. ed. 115; St. Paul & D. R. Co. v. U. S., 112 U. S. 733, 28 L. ed. 861; Hager v. Swayne, 149 U. S. 242, 247, 37 L. ed. 719, 721; Ball v. Halsell, 161 U. S. 72, 79, 40 L. ed. 622, 624. No assignee as such can maintain a suit against the United States in any court. Ibid. It was held that a negotiable draft by the claimant upon his attorneys, payable out of the proceeds of the claim, which was accepted by the attorneys before collection and transferred to a purchaser in good faith and for a valuable consideration, gave him no right to enjoin the acceptors from surrendering or the drawer from receiving the warrant after it had been issued to the acceptors. Spofford v. Kirk, 97 U. S. 484, 24 L. ed. 1032. No action will lie by an attorney against the head of a Department for informing claimants that they were under no legal obligation to respect an assignment invalidated by the statute. Spalding v. Vilas, 161 U. S. 483, 40 L. ed. 780. It seems that an injunction might be granted restraining the Secretary of the Treasury from paying a fund received by the United States from a foreign government for distribution when the United States makes no claim against the fund. Ridgway v. Hays, 5 Cranch, C. C. 23. But an injunction against the Secretary of the Treasury was denied to an attorney who claimed under an assignment of part of an award in favor of an Indian. McElrath v.

upon the Treasury.[2] Assignments not made in conformity with this statute are void against the trustee in bankruptcy of the assignor."[3] "No contract or order, or any interest therein, shall be transferred by the party to whom such contract or order is given to any other party, and any such transfer shall cause the annulment of the contract or order transferred, so far as the United States are concerned. All rights of action, however, for any breach of such contract by the contracting parties are reserved to the United States."[4] This prevents a suit by the assignee in his own name against the United States.[5] An assignee for creditors may sue in the name of his assignor.[6]

§ 673b. Petitions and claims. "Suits shall be commenced by petition, verified in the manner provided by law, and filed in

McIntosh, 1 H. & H. 348. *Cf.* Trist v. Child, 21 Wall. 441, 22 L. ed. 623; National Bank of Commerce v. Downie, 218 U. S. 345, affirming C.C.A., 161 Fed. 839; Guarantee Title & Trust Co. v. First Nat. Bank, C.C.A., 185 Fed. 373.

[2] Price v. Forrest, 173 U. S. 410, 423, 43 L. ed. 749, 753, per Harlan, J., and cases cited by him.

[3] Ibid. Nat. Bank of Commerce v. Downie, 218 U. S. 345.

[4] U. S. R. S., § 3737. See Burck v. Taylor, 152 U. S. 634, 647, 38 L. ed. 578, 583; Wheeler's Case, 5 Ct. Cl. 504; Bailey v. U. S., 15 Ct. Cl. 490; Dougherty v. U. S., 18 Ct. Cl. 496; Francis' Case, 11 Ct. Cl. 638; Mills v. U. S., 19 Ct. Cl. 79; McCord's Case, 9 Ct. Cl. 155; Mason's Case, 14 Ct. Cl. 59; Bowe v. U. S., 42 Fed. 761, 782; Coates v. U. S., 53 Fed. 989, 991.

[5] U. S. v. Gillis, 95 U. S. 407, 24 L. ed. 503; s. c., *sub nom.* Gillis v. U. S., 12 Ct. Cl. 704. See also authorities cited *supra*. Judge Deady held, in the Circuit Court for the District of Oregon, that an assignee may sue the United States in his own name in a District or Circuit Court. Emmons v. U. S., 48 Fed. 43. *Contra*, Forehand v. U. S., 23 Ct. Cl. 477, 482.

[6] Morgan v. U. S., 14 Ct. Cl. 319. Before the Bowman Act it was held when the suit was brought in the name of the assignor for the use of his assignee, the assignor must verify the petition, or the assignee must file a warrant of attorney or prove the assignment. Silverhill v. U. S., 5 Ct. Cl. 610; Crowell v. U. S., 6 Ct. Cl. 23. If the assignor died *pendente lite*, a verification by his executor was sufficient. Pullen v. U. S., 7 Ct. Cl. 507. When the assignor and assignee joined as co-claimants, the assignor verifying the petition which alleged that the suit was for the assignee, there was no need of proving the assignment. Tebbetts v. U. S., 5 Ct. Cl. 607. The assignor may repudiate a void assignment and sue in his own name. Belt v. U. S., 15 Ct. Cl. 92. If the legal title to real property has been divested out of the owner and vested in a trustee authorized to collect past and future rents, the trustee may sue. Mills v. U. S., 19 Ct. Cl. 79.

the office of the clerk, with one extra copy in print or typewriting. The clerk will note thereon the day of filing, and will cause a copy to be forwarded to the Attorney-General. Within twenty days thereafter, the claimant shall have printed thirty copies of such petition, retaining ten copies for the trial record and filing the remaining copies in the clerk's office, unless the court, on motion, for good and sufficient cause, waives the printing of the petition. Ten of said copies shall be for the Attorney-General."[1] "The claimant shall in all cases fully set forth in his petition the claim, the action thereon in Congress or by any of the departments, if such action has been had, what persons are owners thereof or interested therein, when and upon what consideration such persons became so interested; that no assignment or transfer of said claim or any part thereof or interest therein has been made, except as stated in the petition;[2] that said claimant is justly entitled to the amount therein claimed from the United States after allowing all just credits and offsets; that the claimant and, where the claim has been assigned, the original and every prior owner thereof, if a citizen, has at all times borne true allegiance to the Government of the United States, and, whether a citizen or not, has not in any way voluntarily aided, abetted, or given encouragement to rebellion against the said Government, and that he believes the facts as stated in the said petition to be true. The said petition shall be verified by the affidavit of the claimant, his agent or attorney."[3]

"In any case of a claim for supplies or stores taken by or furnished to any part of the military or naval forces of the United States for their use during the late Civil War, the petition shall aver that the person who furnished such supplies or stores, or from whom such supplies or stores were taken, did

§ 673b. [1] Ct. Cl. Rule 15.

[2] The provision requiring a denial of any transfer of the claim does not apply to a transfer of the property out of which the claim arose. Morgan v. U. S., 14 Ct. Cl. 319.

[3] Jud. Code, § 159, 36 St. at L. 1087, re-enacting U. S. R. S., § 1072. "The said allegations as to true allegiance and voluntary aiding, abetting, or giving encouragement to rebellion against the Government may be traversed by the Government, and if on the trial such issues shall be decided against the claimant, his petition shall be dismissed." Ibid., § 160.

not give any aid or comfort to said rebellion, but was throughout that war loyal to the Government of the United States, and the fact of such loyalty shall be a jurisdictional fact; and unless the said court shall, on a preliminary inquiry, find that the person who furnished such supplies or stores, or from whom the same were taken as aforesaid, was loyal to the government of the United States throughout said war, the court shall not have jurisdiction of such cause, and the same shall, without further proceedings, be dismissed."[4] "The petition must comply with section 159 of the Judicial Code and must set forth: (1) The title of the action, with the full Christian and surnames of all the claimants. (2) A plain, concise statement of the facts, giving venue and date, free from argumentative, irreletive, and impertinent matter. (3) In cases transmitted by the head of a Department, or by either House of Congress a copy of the order of transmission and a definite statement of the amount for which he demands judgment, or the relief for which he prays."[5] "When the claimant cannot state his case with the requisite particularity without an examination of papers in one of the Executive Departments and has been unable to obtain a sufficient examination of such papers on application, he may file a petition stating his claims as far as is in his power, and specifying as definitely as he can the papers he requires, and thereafter may file a motion for a call upon the proper department for such information or papers as may be deemed necessary, and when the same are furnished the petition may be amended and take the place of the original petition."[6] "If the claimant be an executor, administrator, guardian, or other representative appointed by a judicial tribunal, a duly authenticated copy of the record of the appointment must be filed with the petition."[7] "If the claim be founded upon an act of Congress, or upon a regulation of an Executive Department, the act and the section thereof upon which the claimant relies must be specified, and the particular regulation of the Department must be stated in terms."[8] "If the claim be founded upon an express contract with the United States, the substance of such contract must be set forth in the petition, and, if it be in writing,

[4] Jud. Code, § 184, 36 St. at L. 1087.
[5] Ct. Cl. Rule 15.
[6] Ct. Cl. Rule 24.
[7] Ct. Cl. Rule 27.
[8] Ct. Cl. Rule 16.

the original or a copy must be annexed thereto. If it be founded upon an implied contract, the facts upon which the claimant relies to prove a contract must be specified. If it consists of several matters or items, each must be separately stated."[9] "If the petition be verified by any one other than the claimant, a power of attorney authorizing him to prosecute the suit or make the verification must be annexed to the petition and filed therewith. In all cases where a petition is dismissed, and the court has jurisdiction so to do, a formal judgment shall be entered against the claimant in favor of the United States."[10] "A claimant desiring to amend his petition or to introduce new parties may do so at any time before he has closed his testimony, without special leave, by filing an amended petition embodying the amendments desired and serving a copy thereof on the Attorney-General. But any such amendments or the right to introduce new parties shall be subject to the objection of the defendants either before or at the trial. Any subsequent amendments must be by leave of court."[11] "If upon the face of the petition it does not appear when the claim first accrued, the court may require the claimant to make the petition definite and certain in that regard, and in default thereof may dismiss the suit."[12]

§ 674. Pleadings by defendant in Court of Claims. "Demurrers and pleas must be filed within sixty days after the filing of the petition, unless the court extend the time."[1] "If a demurrer be sustained, the claimant may, by leave of court, amend his petition within such time as the court may direct; but if he decline or fail to amend, judgment will be rendered dismissing the petition. If a demurrer be overruled the defendants may of right, plead to the petition within such time as the court may direct; but if they decline so to do, the claimant may pro-

[9] Ct. Cl. Rule 17.
[10] Ct. Cl. Rule 19.
[11] Ct. Cl. Rule 25.
[12] Ct. Cl. Rule 18.

§ 674. [1] Ct. Cl. Rule 29. The defendant may demur at any time before pleading to the merits; and a plea in bar may, by leave of the court, be withdrawn and a demurrer filed. Matthew's Case, 35 Ct. Cl. 595. An objection to the right of the petitioner's action should be raised by demurrer or plea. Pennsylvania Co. v. U. S., 7 Ct. Cl. 401. It has been held that if the objection is to the jurisdiction only, it should be by plea. Ibid. The United States may obtain leave after issue has been joined to plead specially to the allegations of loyalty. Pierce v. U. S., 1 Ct. Cl. 195.

ceed with the case, but shall not have judgment for his claim or for any part thereof, unless he shall establish the same by proof satisfactory to the court."[2] "Within three months after the filing of a set-off or counterclaim by the defendants, the claimant must answer the same by replication under oath unless the court extend the time."[3] "When the Attorney-General pleads, under section 1086 of the Revised Statutes that the claimant has practiced or attempted to practice fraud, he shall set forth the facts with sufficient particularity to enable the claimant to answer the same in detail, and the claimant shall, within three months after the filing of said plea, reply to the same with like particularity under oath, unless the court extends the time."[4] If the Attorney General fails to file a pleading or notice, a general traverse is considered as entered.[5] "The Court will take notice that a claim is barred by the Statute of Limitations, when that appears, although the defense is not raised by the defendant's pleadings."[6] Special rules of pleading do not bind the Court of Claims, but are usually followed, although the pleadings are construed liberally.[7]

§ 675. Amendments in Court of Claims. "If a demurrer be sustained, the claimant may, by leave of court, amend his petition, within such time as the court may direct; but if he decline or fail to amend, judgment will be rendered dismissing the petition."[1] Amendments of errors which have not misled the other party and which may be corrected without injustice, are usually allowed.[2] "A claimant desiring to amend his petition

[2] Ct. Cl. Rules 30, 31.

[3] Ct. Cl. Rule 32.

[4] Ct. Cl. Rule 33.

[5] Ct. Cl. Rule 34.

[6] Finn v. U. S., 123 U. S. 227, 31 L. ed 128.

[7] Little v. Dist. of Col., 19 Ct. Cl. 323. A plea was held bad for duplicity when it set up a recovery in a previous action, and objected that the cause of action now sued upon accrued prior to the trial of such action, and might have been tried therein. Shrewsbury v. U. S., 9 Ct. Cl. 263.

§ 675. [1] Ct. Cl. Rule 30.

[2] Thomas v. U. S., 15 Ct. Cl. 335; Jones v. U. S., 1 Ct. Cl. 383. A petition which is not verified may be corrected by amendment. Griffin v. U. S., 13 Ct. Cl. 257, unless a special statute makes verification jurisdictional. Cherokee Indians v. Cherokee Nation, 19 Ct. Cl. 35. An amendment showing that the suit is brought in a representative capacity, and that a decedent owned the property claimed, may be allowed. Thomas v. U. S., 15 Ct. Cl. 335. A petition by joint owners may be so amended as to ask for separate judgments. Mott v. U. S., 3 Ct. Cl. 218;

or to introduce new parties may do so at any time before he has closed his testimony, without special leave, by filing an amended petition embodying the amendments desired and serving a copy thereof on the Attorney General. But any such amendments or the right to introduce new parties shall be subject to the objection of the defendants either before or at the trial."[3] If services rendered under the contract sued upon subsequently to the commencement of suit are brought into the case by consent, the whole matter will be disposed of as if a single cause of action.[4] An amendment may be allowed to the petition more than six years after the Statute of Limitations began to run.[5]

Eager v. U. S., 33 Ct. Cl. 336. A change of parties claimant may be allowed by amendment, when no new cause of action is introduced, and the effect is to substitute one representative for another. Cote v. U. S., 3 Ct. Cl. 64. The assignor may be substituted for the assignee by amendment. Burke v. U. S., 13 Ct Cl. 231. See U. S. v. Gillis, 95 U. S., 407, 24 L. ed. 503. The vendee of the assignee may be substituted, although the claimant had assigned to another prior to his bankruptcy. Ches. & O. R. Co. v. U. S., 19 Ct. Cl. 300. An administrator or executor of a decedent may be substituted for his heirs, Cowan Infants' Case, 5 Ct. Cl. 106; Woodruff and Bouchard's Case, 7 Ct. Cl. 605. An administratrix for herself as widow. Skelly v. U. S., 32 Ct. Cl. 227; Thomas v. U. S., 15 Ct. Cl. 335. It has been held that a new party cannot be substituted by amendment when not in privity with the original ones. Ches. & O. R. Co. v. U. S., 19 Ct. Cl. 300. In a suit against the United States and a tribe of Indians, another tribe was substituted for the latter after the statute of limitations had expired. Duran v. U. S., 31 Ct. Cl. 353. The successor of one corporation to the franchises and property of another which had brought a suit in the Court of Claims was not allowed a substitution. Ches. & O. R. Co. v. U. S., 19 Ct. Cl. 300. Unnecessary parties may be stricken out by amendment. Molina v. U. S., 6 Ct. Cl. 269; Benton v. U. S., 5 Ct. Cl. 692; Roddin v. U. S., 6 Ct. Cl. 308. A person who at the time when the suit was commenced was under a disability, may be made a party by amendment. Stanton v. U. S., 4 Ct. Cl. 456. When a claim has been referred by Congress, a party who claims as assignee cannot intervene unless the act making the reference permits his intervention. Atocha v. U. S., 6 Ct. Cl. 69. A partner cannot intervene when the firm claims the same property. Bellocque v. U. S., 8 Ct. Cl. 493. See § 211, *supra*.

[3] Ct. Cl. Rule 25. See Shaw v. U. S., 9 Ct. Cl. 301. When a case is remanded for further proof, and the order specifies the amendment allowed, further leave need not be granted. Shaw v. U. S., 9 Ct. Cl. 301.

[4] Cape Ann G. Co. v. U. S., 20 Ct. Cl. 1.

[5] Griffin v. U. S., 13 Ct. Cl. 257. See also Devlin v. U. S., 12 Ct. Cl. 266.

§ 675a. Consolidation. Suits, in the Court of Claims, may be consolidated.[1] "It has been a common and convenient practice in this court, where there are two suits between the same parties growing out of the same contract or cause of action, to consolidate them, to the end that the evidence in the first need not be duplicated in the second, and that both may be disposed of by one trial and argument. Conversely, under all conditions, parties have been allowed to bring in subsequently accruing demands by amendments. In such cases it is manifestly immaterial whether the second cause of action be brought in by a second suit, and the two suits be then consolidated, or whether it be brought in by directly making it a count in the original suit. The difference will be only one of form. But this practice extends properly only to cases where the cause of action is substantially the same in both suits, as for instalments successively becoming due on the same contract, or rents for different periods on the same lease. In such cases an adjudication in the first suit would be operative as *res adjudicata* or by way of estoppel in the second; that is to say, if the contract or lease has been established in the first suit, all that the plaintiff will have to show in the second will be that another instalment has become due; and, conversely, if the contract or lease has been declared void in the former suit, the defendants, in the latter one, can use the adjudication by way of estoppel."[2]

§ 676. Attorneys in Court of Claims. "Suits may be commenced by the claimant in person, or an attorney of this court. If the claimant is represented by an attorney, an employment in writing must be filed with the clerk, and its execution must be proved or acknowledged before an officer authorized to take acknowledgments of deeds."[1]

"Any person of good moral character who has been admitted to practice in the Supreme Court of the United States, or in the highest court of the District of Columbia, or in the highest court of any State or Territory, may be admitted, on motion in open court, to practice as an attorney of this court.

§ 675a. [1] Bellocque v. U. S., 8 Ct. Cl. 493. *Cf. supra*, § 472.

[2] Eager v. U. S., 33 Ct. Cl. 336, 337, per Mott, C. J.

§ 676. [1] Ct. Cl. Rule 6.

He may also be admitted by an order at chambers on its being shown by affidavit or otherwise that he is qualified as above provided."[2] "Whoever, being elected or appointed a Senator, Member of, or Delegate to Congress, or a Resident Commissioner, shall, after his election or appointment, and either before or after he has qualified, and during his continuance in office, practice in the Court of Claims, shall be fined not more than ten thousand dollars and imprisoned not more than two years; and shall, moreover, thereafter be incapable of holding any office of honor, trust, or profit under the Government of the United States."[3] "There shall be but one attorney of record for the claimant in any case at any one time. A firm of attorneys will be regarded as the attorney of record."[4] "Petitions, pleadings, and motions on the part of the claimant must be signed by the attorney of record; pleadings and motions on the part of the United States by the proper Assistant Attorney General."[5] "Attorneys of record, or the claimant, if he appear in person, on appearing in a suit will register with the clerk of the court a post-office address, to which all notices required by these rules or ordered by the court may be sent."[6] "Counsel, other than the attorney of record may be heard on either side at the trial or at any stage of the proceedings, but shall not be entitled to file pleadings, give notices, or make motions."[7] Counsel cannot make motions in their own name nor in the name of the attorney of record without this authority.[8] "A claimant may change his attorney on such conditions as the court may prescribe. The moving party must produce the consent of the attorney of record or his duly authorized representative or must certify or show by affidavit that the attorney of record has been notified of the filing of the motion. If no objection to the substitution be filed by the attorney of record within ten days thereafter, the motion will be allowed. If the attorney of record resides at a distance, the court will not act on the motion until a reasonable time has elapsed for his objection to be filed. The motion when

[2] Ct. Cl. Rule 7.

[3] Jud. Code, § 144; 36 St. at L. 1087, re-enacting in substance U. S. R. S., § 1058

[4] Ct. Cl. Rule 8.

[5] Ct. Cl. Rule 10.

[6] Ct. Cl. Rule 13.

[7] Ct. Cl. Rule 12.

[8] In the Matter of Counsel, 32 Ct. Cl. 231.

submitted must be accompanied either by a power of attorney from the claimant containing a power of substitution or by the certificate of the attorney of record that the substitution is made with the knowledge and assent of the claimant."[2]

§ 677. Motions and notices in Court of Claims. "Motions must be in writing and come to the court or judge through the clerk's office. Those consented to or which indicate by indorsement thereon that they are not objected to by the opposite party may be acted upon in the first instance by the chief justice or a judge at chambers, or, in his discretion, they may be referred to the court in conference or sent to the Law Calendar for argument. Motions for calls upon the executive department shall be served by the claimant or his attorney upon the Attorney General for an indorsement of his objection, if any, thereto before the same are considered by the court or a judge thereof."[1] "Briefs for claimants or defendants, when not printed, must be in typewriting. * * * The typewriter ribbon must be black and the carbon blue. * * *"[2] "Parties filing petitions, pleadings, and motions, except motions for calls on Departments, must at the same time leave with the clerk written notice thereof, addressed to the attorney of the adverse party, and the clerk will mail the same and note the fact on the general docket. All other notices to adverse parties may be served in like manner. The clerk's entry on his docket will be *prima facie* evidence of the service. In the computation of time the day of the service will be excluded, and the day on which a party is required to appear or on which an act is required to be done will be included."[3]

§ 678. Abatement and revivor. "If the claimant die pending the suit, his death may be suggested on the record, and his proper representative, and on filing a duly authenticated copy of the record of his appointment as executor or administrator, may be admitted to prosecute the suit without special leave, but subject to the objection of the defendants either before or at the trial."[1] "If the claimant die pending this suit, his death

[2] Ct. Cl. Rule 9.

§ 677. [1] Ct. Cl. Rule 35.

[2] Ct. Cl. Rule 78.

[3] Ct. Cl. Rule 89.

§ 678. [1] Ct. Cl. Rule 28. See Ct. Cl. Rule 45, quoted § 674 *supra*.

may be suggested on the record, and his proper representative, on filing a duly authenticated copy of the record of his appointment as executor or administrator, may be admitted to prosecute the suit without special leave, but subject to the objection of the defendants, either before or at the trial. If the suggestion of death be made when the case is called for trial, the court may allow time within which a personal representative may be appointed or appear. It is the duty of the claimant's attorney to suggest the death of a claimant when the fact becomes known to him. Before the rendition of judgment the court may require the attorney of record to satisfy it that the claimant is still living."[2] Where there is a dispute as to the proper party to revive, the proceedings may be stayed till the determination of the State Court of probate.[3]

§ 679. Discontinuance and withdrawal of papers. A claimant cannot dismiss his own suit without the consent of his attorney or the permission of the court.[1] When two suits have been brought upon the same claim, that first brought must first be tried, unless it is discontinued by permission of the court.[2] "Any person having an interest wishing to see any papers on file in the clerk's office will apply therefor to the chief or assistant clerk. No papers shall be permanently withdrawn or temporarily taken out of the clerk's office except on motion for good cause shown and upon such terms as the court or a judge may order."[3]

§ 680. Trials in Court of Claims. "The Court of Claims shall hold one annual session at the city of Washington, beginning on the first Monday in December and continuing as long as may be necessary for the prompt disposition of the business of the court. Any three of the judges of said court shall constitute a quorum, and may hold a court for the transaction of business. Provided, That the concurrence of three judges shall be necessary to the decision of any case."[1] "When the claimant has closed his evidence he shall enter the case in the notice

[2] Ct. Cl. Rule 28.

[3] Cosgrove Adm'x v. U. S., 33 Ct. Cl. 167.

§ 679. [1] Redfield's Case, 27 Ct. Cl. 473.

[2] Ibid.

[3] Ct. Cl. Rule 97.

§ 680. [1] Jud. Code, § 138, 36 St. at L. 1087, re-enacting U. S. R. S., § 1052.

book kept by the clerk. When the defendants have closed their evidence they shall enter the fact in the notice book, and as soon thereafter as the claimant shall file his request for findings of fact and brief, as required by Rule 73, and note the same upon the notice book, the case shall be placed upon the trial calendar. The taking of testimony by either party shall be deemed closed upon the filing of a brief, and thereafter no witness shall be reexamined or other testimony taken by such party without leave of court on motion showing reasons thereof. The calendar will be made up at the beginning of every term and cases will be placed thereon in the order in which they are ready. At the end of each month cases which have subsequently become entitled to be placed upon the calendar will be placed at the foot. Defendants are expected to prepare their defense and to file briefs, so far as practicable, in the order of the entry of cases in the notice book. Should defendants unreasonably delay the preparation of the defense, claimants may move that the case be placed upon the calendar."[2] "Within 60 days from the conclusion of the taking of evidence on both sides the claimant shall file in the clerk's office his request for findings of fact in the case and his brief. He shall have printed not less than 25 copies of his brief, 15 of which he shall file in the clerk's office and 10 of which he shall retain for making up the trial record. If the request for findings of fact be not printed with the brief, the claimant shall also have printed not less than 25 copies of the request for facts, 15 of which he shall file in the clerk's office and 10 of which he shall retain for making up the trial record. Six typewritten copies of the brief and request for facts in lieu of printed copies may be filed by leave of the court."[3] "The claimant shall make a concise statement of his case, and shall present and discuss in his original brief all propositions upon which he relies for a recovery, and any not so presented shall be deemed waived unless thereafter presented by leave of court. The defendant's brief shall be addressed, first, to any desired discussion of the propositions presented in claimant's brief, and, second, to the presentation of such other propositions as are relied on in defense of the action. Statements of fact or propositions of law

[2] Ct. Cl. Rule 79.

[3] Ct. Cl. Rule 73.

presented in the defendant's brief as matter of defense and not properly within the scope of the claimant's original brief may be discussed by the claimant in a reply brief, but matters within the proper scope of the claimant's original brief shall not be again discussed in the reply brief. The reply brief shall be filed within 30 days after the date of notice of the filing of defendant's brief mailed by the clerk to the attorney of record or to the claimant, and no brief shall be received after the prescribed time except upon order of the court for good cause shown; neither shall any brief other than those above referred to be received at any time except upon such order. The requests for findings and briefs must be in distinct type, not less than long primer type, on unglazed paper, and there shall be an unprinted margin between the print and the outer edge of the page of not less than 2 inches, so as to admit of marginal notes and the cutting it down subsequently for the purposes of a permanent binding of the record. The requests for findings and briefs shall be attached to, but need not be firmly bound to, the balance of the printed record at the time of submission. Where the claimant by leave of court has filed six typewritten copies of his brief and request, as provided for by rule 75, the defendants may also file typewritten copies."[4] "Briefs for claimants or defendants, when not printed, must be in typewriting, upon pure white bond paper 8 inches in width and 10½ inches in length, weighing not less than 2½ and not more than 4 pounds to the ream of 500 sheets. The typewriter ribbon must be black and the carbon blue. When a brief and abstract of evidence will together exceed 50 pages, the abstract must be made a separate document. Before any case is called for trial the claimant, if the record be not printed as required by rule 88, shall have five complete and legible copies of the pleadings, evidence, or abstract of evidence (as the rules require), requests for findings of facts and briefs fastened together in consecutive order in book or pamphlet form for the use of the court on the trial. This rule shall apply to cases submitted. No case will be considered ready for trial until this rule has been complied with."[5] "Such request must be in the following terms: '*The claimant, considering the facts hereinafter set forth to be*

[4] Ct. Cl. Rule 76.

[5] Ct. Cl. Rule 78.

proven, and deeming them material to the due presentation of this case in the findings of fact, requests the court to find the same as follows:' Following this request must be a statement in the form of distinct numbered proposition, of the facts which the party desires to have found; and each proposition must be so prepared with respect to its length, subject, and phraseology that the court may conveniently pass upon it; and they must be so arranged as to present a concise statement, in orderly and logical sequence, of the whole case, as the party desires it to appear in the findings of fact. Subjoined to each proposition must be references to the pages of the record or to the unprinted evidence relied on in its support; but no evidence must be set out. Documents which may enter into the findings of fact need not be presented in the statement, but may be referred to therein by the pages of the record."[6] "Upon the filing of claimant's request for findings of fact and his brief, notice of such filing shall be given to the Attorney General. Within 60 days from the filing of claimant's brief and the notice thereof the defendants shall file in the clerk's office at least 15 copies of their objections to claimant's request for findings and their request for other or additional findings and their request for other or additional findings of fact in the case and their brief, and shall furnish to the claimant or his attorney of record, to be used in making up the trial record, 10 copies of such printed brief, trial record, 10 copies of such printed brief, objections to claimant's requested findings, and their request for other or additional findings. Where claimant's requested findings of fact are objected to the defendants shall point out specifically their objections to each requested finding and the part or parts of each requested finding to which objection is made, with appropriate references to the parts of the record relied upon to sustain their objections, and may suggest any changes in the request of claimant they may desire. After this is done the defendants may request such additional findings as they may deem material. Their request for other or additional findings must be in form and substance like that required of claimant by rule 74."[7] "The attorney of each party shall append to his brief a table of depositions, letters, documents, or other papers which he may offer

[6] Ct. Cl. Rule 74.

[7] Ct. Cl. Rule 75.

in evidence on the trial, with references to the pages of the record, and if they be not of the page record, then to the places where they may be found."[8] "In all cases in which either party is entitled to appeal to the Supreme Court, the Court of Claims shall make and file their finding of facts, and their conclusions of law therein, in open court, before or at the time they enter judgment in the case."[9] "In every such case, each party, at such time before trial, and in such form as the court may prescribe, shall submit to it a request to find all the facts which the party considers proven and deems material to the due presentation of the case in the findings of facts."[10] "Should defendants unreasonably delay the preparation of the defense claimants may move that the case be placed upon the calendar. The court may be at any time, upon the motion of their party or upon its own motion, order any case to be placed upon the trial calendar after the lapse of six months from the filing of the petition, and may dismiss the same for nonprosecution if when the case is called the claimant does not show cause against such dismissal."[11] "Demurrers and pleas to the jurisdiction of the court will be placed upon the law calendar by the clerk immediately upon being filed, and will be heard and disposed of before the taking or printing of testimony on the merits."[12] "Whenever, in any case which the claimant has not put on the Calendar, it shall be shown to the court on motion that an early decision thereof is important to the interests of the Government, the case may, in the discretion of the court, be placed on the Calendar by the defendants."[13] "No case in which a printed record is required will be heard unless the claimant makes up under the supervision of the clerk, and has ready at the time of trial a complete record of the case, consisting of the printed pleadings, evidence, and requests for facts and briefs, paged consecutively. All citations from or references to, such pleadings, evidence and briefs must be by the consecutive paging of such book. Each book shall contain on the first page thereof a complete index of its contents. At the time of trial of the case

[8] Ct. Cl. Rule 77. As to French Spoliation Cases see Ct. Cl. Rule 102.
[9] Appeals from Ct. Cl. Rule 4.
[10] Appeals from Ct. Cl. Rule 5.
[11] Ct. Cl. Rule 79.
[12] Ct. Cl. Rule 80.
[13] Ct. Cl. Rule 83.

the claimant shall furnish a copy of such printed record to each member of the court, and shall furnish one copy for the defendants and deliver one copy to the bailiff for binding. This rule shall also apply to cases submitted." [14]

§ 681. References by Court of Claims. The Court of Claims cannot delegate its powers, but may refer cases involving complicated accounts and facts to a special commissioner to state the accounts, marshal the assets, and adjust the losses.[1] Where several persons seek to recover the proceeds of property from a common fund, a reference is proper.[2] If the claimant's neglect to furnish items makes a reference necessary, he must bear the expense.[3] Notice of a reference must be given to all parties thereto.[4] Exceptions should be taken if a party is not satisfied with the commissioner's findings.[5]

§ 682. Evidence before the Court of Claims. The following statutes and rules regulate evidence before the Court of Claims: "The Judges and clerks of said court may administer oaths and affirmations, take acknowledgments of instruments in writing, and give certificates of the same." [1] "When a petition is filed and issue of fact has been joined, either party may proceed to take testimony; but if issue is pending on demurrer such issue must be disposed of before testimony is taken." [2] "The Court of Claims shall have power to appoint Commissioners to take testimony to be used in the investigation of claims which come before it, to prescribe the fees which they shall receive for their services, and to issue commissions for the taking of such testimony, whether taken at the instance of the claimant or of the United States." [3] "When it appears to the court in any case that the facts set forth in the petition of the claimant do not furnish any ground for relief, it shall not authorize the taking of

[14] Ct. Cl. Rule 86. The right of succession to the property of a decedent is regulated by the State law and the judicial construction of a will, made by a State court of competent jurisdiction will be followed by the Court of Claims. Utcrhart v. U. S., 240 U. S. 598.

§ 681. [1] Intermingled Cotton Cases, 92 U. S. 651, 23 L. ed. 756.

[2] Persons v. U. S., 10 Ct. Cl. 502; Crowell v. U. S., 6 Ct. Cl. 23.

[3] Jones v. U. S., 4 Ct. Cl. 197.

[4] Ibid.

[5] Bright v. U. S., 12 Ct. Cl. 646.

§ 682. [1] Jud. Code, § 158, 36 St. at L. 1087, re-enacting U. S. R. S., § 1071.

[2] Ct. Cl. Rule 36.

[3] Jud. Code, § 163, re-enacting U. S. R. S., § 1075.

any testimony therein."[4] "Unless the court order a witness to testify orally on the trial the evidence of witnesses must be by deposition, taken either before a commissioner of the court or a judge of a court of the United States, or a judge of a court of record in a State or Territory of the United States, or a United States commissioner, or a notary public."[5] "When a witness can be conveniently examined before a judge of this court either party, at any time prior to the examination, may move for an order directing that his deposition be so taken. The court may order a witness or a claimant to be produced before the court or one of the judges thereof for examination."[6] "At the request of either party a person whom either expects or intends to call as a witness in the same case or in any kindred case, shall be excluded from the room where the testimony of a witness is being taken. If such a person remain in the room, or within hearing of the examination, after such request has been made, he shall not thereafter be admitted to testify in the case, or any kindred case, except by the consent of the party who requested his exclusion."[7]

"Depositions obtained in foreign countries must be taken on written interrogatories sent out under a special commission issued by the clerk. Depositions may be taken in like manner within the United States, by consent of parties, or when authorized by the court, or by the chief justice or a judge in vacation. The written interrogatories must be filed in the clerk's office, and notice thereof given to the adverse party. Within fifteen days after such notice the adverse party may file objections to any of the interrogatories, specifically stating the grounds of objection and may either file cross-interrogatories, or a notice that he will cross-examine the witnesses orally, which notice shall be attached to the special commission. If he file cross-interrogatories, the other party may, within fifteen days thereafter, file objections thereto, specifically stating the grounds of objection. No objections to an interrogatory or a cross-interrogatory will be considered at the trial unless taken before the commission issues."[8] "When a deposition is taken upon writ-

[4] Ibid., § 165, re-enacting U. S. R. S., § 1077.
[5] Ct. Cl. Rule 37.
[6] Ct. Cl. Rule 38.
[7] Ct. Cl. Rule 51.
[8] Ct. Cl. Rule 41.

ten interrogatories and written cross-interrogatories, neither the Attorney-General, nor the claimant, his agent or attorney, nor any other person, shall be present at the examination of the witness, which fact shall be certified by the officer taking the depositions, who shall, in such cases, propound the interrogatories and cross-interrogatories to the witness in their order, and reduce his answers to writing in the witness' own words."[9] "The party proposing to take depositions on oral examination shall cause fifteen days' notice to be given thereof to the other party, or his attorney. The notice must be in writing, and state the names of the witnesses to be examined, the day of the month, the hour, and the place of taking the deposition, and, if practicable, the name of the officer before whom such depositions are to be taken. But no deposition, except by consent of parties or the order of court, shall be taken during a day when the attorney of record for the claimant or the attorney of the Department of Justice charged with preparation of the case or cases in which the deposition is to be used is so engaged in the trial of cases in court that he cannot attend. It shall be the duty of the attorney receiving a notice to take depositions, in case he can not attend for the reason stated herein, to notify the attorney on the opposite side without delay that he will be unable to attend at the time and place stated in the notice. When the claimant proposes to take a deposition and the witness resides more than 500 miles from Washington, or when the defendants propose to take the deposition, and the witness resides more than 500 miles from the claimant or his attorney, one day's further notice shall be given for every additional hundred miles."[10] "When depositions are taken on notice, as provided in Rule 43, if both parties are present or represented at the time and place specified in the notice, either party may, after the examination of the witnesses produced under the notice, be entitled to produce and examine other witnesses; but in such case one day's notice must be given to the adverse party, or his attorney, there present, unless such notice is waived."[11] "If a deposition is to be taken on

[9] Ct. Cl. Rule 42.

[10] Ct. Cl. Rules 43, 44.

[11] Ct. Cl. Rule 49. A stenographer may be employed. Ct. Cl. Rule 58. There must be no record of any comment, explanation or argument by examining counsel. Ct. Cl. Rule 48. As to comparison

behalf of the claimant in the District of Columbia three days' notice shall be sufficient; and if it be taken on behalf of the defendants, a like notice shall be sufficient when the claimant's attorney resides or has an office within the District. But if there be no reason for taking the deposition on such short notice the court or a judge thereof will enlarge the time." [12]

"The court may, at the instance of the attorney or solicitor appearing in behalf of the United States, make an order in any case pending therein, directing any claimant in such case to appear, upon reasonable notice, before any commissioner of the court and be examined on oath touching any or all matters pertaining to said claim. Such examination shall be reduced to writing by the said commissioner, and be returned to and filed in the court, and may, at the discretion of the attorney or solicitor of the United States appearing in the case, be read and used as evidence on the trial thereof. And if any claimant, after such order is made and due and reasonable notice thereof is given to him, fails to appear, or refuses to testify or answer fully as to all matters within his knowledge material to the issue, the court may, in its discretion, order that the said cause shall not be brought forward for trial until he shall have fully complied with the order of the court in the premises." [13] "In taking testimony to be used in support of any claim, opportunity shall be given to the United States to file interrogatories, or by attorney to examine witnesses, under such regulations as said court shall prescribe; and like opportunity shall be afforded the claimant, in cases where testimony is taken on behalf of the United States, under like regulations." [14] "The commissioner taking testimony to be used in the Court of Claims shall administer an oath or affirmation to the witnesses brought before

of hand writing see Ct. Cl. Rule 64.

[12] Ct. Cl. Rule 45.

[13] Jud. Code, § 166, re-enacting U. S. R. S., § 1080. The right to investigate before the trial does not extend beyond the examination of the claimant. He is not responsible for the failure of one of his witnesses to attend; and the prosecution of the case can only be stayed in case of his refusal to testify. Macauley v. U. S., 11 Ct. Cl. 575; Atchison, T. & S. F. R. Co. v. U. S., 15 Ct. Cl. 1. A corporate claimant may be required to produce its officers for examination before trial in the same manner as if a bill of discovery had been filed against it. Atchison, T. & S. F. R. Co. v. U. S., 15 Ct. Cl. 1.

[14] Jud. Code, § 169, 36 St. at L. 1087, re-enacting U. S. R. S., § 1083.

him for examination."[15] "No person shall be excluded as a witness in the Court of Claims on account of color or because he or she is a party to or interested in the cause of proceeding; and any plaintiff or party in interest may be examined as a witness on the part of the Government."[16] "The testimony in cases pending before the Court of Claims shall be taken in the county where the witness resides, when the same can be conveniently done."[17]

"The Court of Claims may issue subpœnas to require the attendance of witnesses in order to be examined before any person commissioned to take testimony therein. Such subpœnas shall have the same force as if issued from a District Court, and compliance therewith shall be compelled under such rules and orders as the court shall establish."[18] "If a witness, having been duly summoned and his fees tendered him, shall fail or refuse to appear and testify before any officer authorized to take his testimony, a rule upon him will be issued by the court, on motion, to show cause why he should not be punished as for a contempt.[19]

"The fees of witnesses shall be such as are now, or may hereafter be, prescribed by Congress, and shall be paid by the party at whose instance the witnesses appear."[20] Subpœnas and other writs of process of the Court of Claims may be served all over the United States.[21] The territorial jurisdiction of the Court of Claims is not confined to the District of Columbia.[22]

[15] Ibid., § 170, re-enacting U. S. R. S., § 1084. It has been held that *ex parte* affidavits filed with a committee of Congress, and transmitted with the claim, are inadmissible as evidence; Smith v. U. S., 19 Ct. Cl. 690; but that *ex parte* affidavits taken by the officers of the government required to make an investigation, and transmitted with the papers, may be received. Chickasaw Nation v. U. S., 19 Ct. Cl. 133. Vouchers, papers, proofs, and documents sent by the head of a Department to the Court of Claims, under Section 1063 of the Revised Statutes, are not necessarily evidence. Brannen v. U. S., 20 Ct. Cl. 219. *Cf.* § 671, *supra*.

[16] Act of February 5, 1912, 37 St. at L. p. 61, re-enacting in substance U. S. R. S., § 1078. 24 St. at L., ch. 359, § 8, p. 506; U. S. v. Clark, 96 U. S. 37, 24 L. ed. 696.

[17] Ibid., § 167, re-enacting U. S. R. S., § 1081.

[18] Jud. Code, § 168, 36 St. at L. 1087, re-enacting U. S. R. S., § 1082.

[19] Ct. Cl. Rule 39.

[20] Ct. Cl. Rule 40.

[21] Jones v. U. S., 1 Ct. Cl. 383, 398; Sykes v. U. S., 8 Ct. Cl. 330.

[22] Ibid.

"When a deposition is taken by oral examination, each question propounded to the witness must be recorded, and his answers must be taken down in his own words."[23] "No general objection to any question shall be noticed by the officer; but where an objection is made on specifically stated grounds, the officer shall record the same."[24] Objections to relevancy may be taken on the trial.[25]

"Witnesses must be sworn or affirmed, before any questions are put to them, to tell the truth, the whole truth, and nothing but the truth, relative to the cause in which they are to testify; and each witness shall then state his name, age, occupation, and place of residence; whether he has any, and, if any, what, interest, direct or indirect, in the claim which is the subject of inquiry; and whether, and in what degree, he is related to the claimant. At the conclusion of the deposition, the witness shall state whether he knows of any other matter relative to the claim in question; and if he does, he shall state it. The testimony of the witness when completed shall be read over to him, and be signed by him in the presence of the officer. In his return the officer must show that the witness was properly sworn or affirmed, and that the answers were taken down in his presence and read over to and signed by the witness."[26] "The officer must so connect the sheets of the deposition that they cannot be tampered with, and must return them sealed together. He must sign, and make the witness sign, each sheet; and he must spare no pains to return to the court the exact evidence he has taken."[26a] "All exhibits must be carefully marked so as to be capable of immediate identification, and, when practicable, must be atttached to the deposition under seal."[27] "The officer must state in the caption of the deposition the cause in which it was taken, the place and date of taking, the name of the witness, the party by whom called, and the names of the parties and counsel present. And in the body of the deposition

[23] Ct. Cl. Rule 47.

[24] Ct. Cl. Rule 59. Objections to form or on the ground that the evidence is not the best evidence should be taken at the deposition or before the trial. Hughes v. U. S., 4 Ct. Cl. 64.

[25] Hughes v. U. S., 4 Ct. Cl. 64.

[26] Ct. Cl. Rule 52.

[26a] Ct. Cl. Rule 53.

[27] Ct. Cl. Rule 54.

must also be shown by whom the witness was examined and cross-examined. In no case shall a deposition be taken before a commissioner of the court or other officer (authorized to take depositions) who has any office connection or business employment with the parties to the suit or their attorneys except by consent of parties and when no other officer is accessible, and in his certificate to such depositions such officer shall so certify. Failure to so certify shall be deemed sufficient ground to suppress such deposition."[28] "The officer must inclose the depositions and exhibits in a packet, under his seal, and direct the same to the clerk of the Court of Claims at Washington, D. C., and deposit the package in the post-office, or in an express office, or he may transmit the same by a messenger, whose name shall be by him indorsed on the packet. Depositions reaching the clerk's office in any other way may, on motion, be stricken from the files."[29] "If the officer's fees be not paid at the time of taking the deposition, he should indorse on the outside of the packet the name and number of the case and for which party the testimony was taken, also the gross amount of his fees and disbursements, and inclose inside a detailed statement thereof. The packet when so indorsed must not be opened until the party for whom the depositions were taken deposits with the clerk the amount indorsed thereon unless such deposit be waived in writing by the officer. The clerk will then open the packet, and tax the officer's charges at the rates hereinafter provided, and will immediately transmit to him the amount taxed, returning the overplus, if any, to the party. *Provided,* That depositions taken for the Government may be opened and used by the parties in the preparation of a case without the Department of Justice furnishing a certificate that the fees of a commissioner or other officer have been paid; but such depositions cannot be read in evidence until such certificate has been furnished. The money will be transmitted by draft or registered letter, and the clerk will retain his vouchers therefor."[30] "The fee shall be 20 cents a folio of 100 words for taking in handwriting and returning depositions. When the depositions are in shorthand and typewritten, the fee shall be 25 cents a

[28] Ct. Cl. Rule 55.
[29] Ct. Cl. Rule 56.
[30] Ct. Cl. Rule 57.

folio. If the commissioner is not a stenographer, he may employ a stenographer to take down and write out the testimony of the witness. The testimony so taken down by the stenographer must, nevertheless, be given in the presence of the commissioner, who will be held responsible for the accuracy of the depositions subscribed by the witness. If the stenographer's fees be not paid at the time of taking the deposition, he may transmit a statement to the clerk, and the deposition will then be held by the clerk subject to the provisions of Rule 57. When but one deposition is taken on one notice, the commissioner shall receive not less than $3."[31] "Objections to the notice or the form and manner of taking or returning the testimony must be made in writing and filed within one month after notice of the filing of the deposition, or they will be considered as waived."[32]

"The Attorney-General may offer in evidence properly certified information and papers from any Executive Department without calling for the same under the provisions of section 1076 of the Revised Statutes. A call for such information and papers will be made on claimant's motion, on the approval of the chief justice or, in his absence, of the senior judge present. The motion must show that the evidence called for is relevant, material, and competent. A call will not be issued for evidence which presumptively is in the possession of the claimant, such as copies of letters sent by the defendants' officers to the claimant, contracts in duplicate, one of which is retained by the claimant, or any documentary evidence which the claimant can himself produce. On the receipt of an answer to the call the clerk will notify the claimant's attorney and the Attorney-General."[33] "All information and papers furnished by an Ex-

[31] Ct. Cl. Rule 58. "Any commissioner charging in excess of the prescribed fees, except under a previous written agreement with the parties, will be deemed guilty of improper and illegal conduct, and his commission will be revoked." Ct. Cl. Rule 59.

[32] Ct. Cl. Rule 60.

[33] Ct. Cl. Rule 61. A return by the head of a Department stating that to furnish information or papers would in his opinion be injurious to the public interest, is a sufficient answer to the request of the Court of Claims for such information or papers. 13 A. G. Op. 539. It has been held that the Court of Claims has no power to call upon an executive department for evidence of acknowledgments or promises, so as to take a claim out of the Statute of Limitations. Leonard v. U. S., 18 Ct. Cl. 382. As to what

ecutive Department in response to a call, or through the Attorney-General are subject to objection by either party according to the rules of evidence at the common law; but neither party will be required to produce the originals of such papers, or. to prove their execution, unless the party objecting to such papers files in the clerk's office a written denial of their genuineness. Such information and papers in reply to a claimant's call, not objected to by him before trial, will be regarded as evidence offered by claimant."[34] "Any information or papers certified from any Executive Department, and filed in any cause, may by leave of court, be used and applied in any other pending cause to which the same may be applicable or pertinent, notice thereof being filed."[35] "The court may, at the instance of the Attorney-General, order any claimant, his agent, or attorney, to produce in court, or before any officer authorized to take depositions, any letters, papers, deeds, documents, or other writings in his possession or subject to his control, in any way relating to the claim sued upon; and any claimant, his agent, or attorney, who, after due notice refuses to produce such letters, papers, deeds, documents, or other writings, when in his power to do so, shall be subject to attachment for contempt, or the court may direct the petition to be dismissed."[36]

"The testimony will not be printed except by order of the court on written motion therefor. In printing the testimony the notices and the officers' captions and certificates will be omitted; but to each deposition there must be prefixed a title in the following form: Deposition of —— ——, *for claimant* [or defendants, as the case may be], *taken at* ——, *on the* —— *day of* ——, *19—; claimant's counsel,* —— ——; *defendant's counsel,* —— ——."[37] "If the claimant objects to printing information or papers so returned and the Attorney-General request to have the same printed, the clerk will note a memorandum of such request in the copy for the printer, with his initials attached, and when such information or papers are printed the

documentary evidence is admitted, see The Ship Parkman, 35 Ct. Cl. 406, 409; Block v. U. S., 7 Ct. Cl. 406.

[34] Ct. Cl. Rule 62.
[35] Ct. Cl. Rule 63.
[36] Ct. Cl. Rule 65.
[37] Ct. Cl. Rule 66.

same will be regarded as evidence offered on the part of the defense." [38] "Before printing a return made to a call, the chief clerk will withhold from the copy for the Public Printer—First. All papers of which copies have been previously printed in the record of the case, and for this purpose he will compare the two copies, and if variations are found he will take the directions of the Chief Justice or any judge in chambers before sending the return to the printer. Second. All certificates of authenticity and certificates of acknowledgment. Third. All papers which both parties agree to omit. Fourth. All papers which a judge at chambers orders to be omitted." [39]

"If the claimant objects to printing information or papers so returned, and the Attorney-General request to have the same printed, the clerk will note a memorandum of such request in the copy for the printer, with his initials attached; and when such information or papers are printed, the same will be regarded as evidence offered on the part of the defense." [40] "The printed papers required by these rules must be in long primer type on *unglazed* paper and in royal-octavo pages, with the style and number of the case prefixed, and the paging in large distinct type in the upper corner of the page. *Provided,* That requests for findings of fact and briefs shall conform to the provisions of Rule 76. The printed paging of evidence, either for the claimant or the defendants, shall be a continuation of the record and continuous throughout the whole record and shall be properly indexed. The attorneys for the claimant and for the defendants shall see that the paging of their Request for Findings and Briefs follow the paging of that part of the record already printed when the brief is prepared." [41] "The deposition of a claimant, taken under section 1080 of the Revised Statutes, shall not be printed, unless the Attorney-General shall first have filed in the case a written declaration of his intention to read the same in evidence on the trial, and the filing of such declaration shall be considered as the exercise of the discretion vested in that officer by said section, and shall entitle the claimant to read the examination as evidence at the trial, if the Attorney-General declines to do so, unless for good cause shown the court shall otherwise order." [42]

[38] Ct. Cl. Rule 68.
[39] Ct. Cl. Rule 67.
[40] Ct. Cl. Rule 68.
[41] Ct. Cl. Rule 69.
[42] Ct. Cl. Rule 70.

After the taking of testimony is closed and the case placed on the calendar, neither party can take new testimony without an order of the court upon an application, when the new facts sought to be proved must be stated with sufficient particularity to enable the opposing party to answer them; and the withdrawal of a case that has been submitted and its remand to the calendar will not authorize the taking further evidence without such special leave.[43]

In cases referred by an Executive Department after the accounting officers have certified a balance in favor of the claimant the United States do not assume the burden of proof to establish errors by such officers; but the claimants must prove their whole case.[44] "Whenever it is material in any claim to ascertain whether any person did or did not give any aid or comfort to the forces or government of the late Confederate States during the Civil War, the claimant asserting the loyalty of any such person to the United States during said Civil War shall be required to prove affirmatively that such person did, during said Civil War, consistently adhere to the United States and did give no aid or comfort to persons engaged in said Confederate service in said Civil War."[45]

§ 683. New trials. "When judgment is rendered against any claimant, the court may grant a new trial for any reason which, by the rules of common law or chancery in suits between individuals, would furnish sufficient ground for granting a new trial."[1] "The Court of Claims, at any time while any claim

[43] Giddings' Case, 29 Ct. Cl. 12.

[44] McKnight v. U. S., 13 Ct. Cl. 292.

[45] Ibid., § 161, re-enacting in substance U. S. R. S., § 1074.

§ 683. [1] Jud. Code, § 174, 36 St. at L. 1141, re-enacting U. S. R. S., § 1087. See § 478, *supra*.

It has been held that the claimant cannot move for a new trial after the record has been sent to the Supreme Court upon appeal; Monroe's Case, 37 Ct. Cl. 79. The filing of an application for an appeal does not deprive the court of jurisdiction to grant a new trial. Cherokee Nation v. Whitmire, 223 U. S. 108, 111. In a Congressional case there can be no new trial after the case has been reported by the court to Congress; Rymarkiewicz's Case, 42 Ct. Cl. 1; but when another bill, involving the same claim, has been subsequently referred to the court by a House of Congress, that operates to return the findings to the Court of Claims, which thereupon regains jurisdiction, and may grant a new trial upon proof of fraud. Hartien's Case, 42

is pending before it, or on appeal from it, or within two years next after the final disposition of such claim, may, on motion, on behalf of the United States, grant a new trial and stay the payment of any judgment therein, upon such evidence, cumulative or otherwise, as shall satisfy the court that any fraud, wrong, or injustice in the premises has been done to the United States; but until an order is made staying the payment of a judgment, the same shall be payable and paid as now provided by law."[2] "Whenever it is desired to question the correct-

Ct. Cl. 42. The fact that the amount involved in a cause precludes an appeal is no reason for a new trial. Deeson v. U. S., 5 Ct. Cl. 626. A new trial will not be granted because a party failed to communicate to his attorney essential evidence. Armstrong v. U. S., 6 Ct. Cl. 226. Nor, if the new evidence could have been discovered with due diligence before the first trial; Garrison v. U. S., 2 Ct. Cl. 382; s. c., 7 Wall. 688, 19 L. ed. 277; nor because the claimant was insane at the first trial, and has since been restored to health, in the absence of other sufficient reasons; Bramhall v. U. S., 6 Ct. Cl. 238; nor for new evidence which is merely cumulative; Silvey v. U. S., 7 Ct. Cl. 305; Payan v. U. S., 15 Ct. Cl. 56; nor if the new evidence is merely such as impeaches the character or credit of the witness; Payan v. U. S., 15 Ct. Cl. 56; nor for an omission of the court to find a fact, which, if found, would not control the case. Rhine v. U. S., 15 Ct. Cl. 59. Motions analogous to motions to set aside a verdict because contrary to the weight of evidence will not be allowed as a matter of right. Calhoun v. U. S., 14 Ct. Cl. 193. If it appears that newly-discovered evidence may change the basis of the judgment and entitle the party to a review on the law, a new trial may be granted; Murphy v. U. S., 15 Ct. Cl. 217; or if a motion because of newly-discovered evidence appeals to the court's sense of justice, and shows the existence of strong *prima facie* reasons for doubting the correctness of a finding, a rehearing will be granted on that point; Ibid; and the findings may be amended for the better information of the Supreme Court without changing the result below. Jaeger v. U. S., 33 Ct. Cl. 214. *Ex parte* testimony admitted on the hearing of a motion is sufficient to warrant the granting of a new trial. Ayers v. U. S., 5 Ct. Cl. 712.

[2] Ibid., § 175, re-enacting U. S. R. S., § 1088. This applies to claims under the Indian Depredations Act of March 3, 1891, 26 St. at L. 851; Sanderson v. U. S., 210 U. S. 168. A new trial may be granted on motion of the United States, within two years after the "final disposition" of the claim, although the judgment of the court has been affirmed and the mandate of affirmance filed. *Ex parte* U. S., 16 Wall. 699, 21 L. ed. 507. The words "final disposition" mean the final determination on appeal, if taken, or if there is none, then its final determination in the Court of Claims. *Ex parte* Russell, 13 Wall. 664, 20 L. ed. 632. The Court of Claims has

ness or the sufficiency of the court's findings of fact or its conclusions or to amend the same, the complaining party shall file a motion which shall be known and may be considered as a motion for a new trial. All grounds relied upon for any or all of said objects shall be included in one motion. After the court has announced its decision upon such motion no other motion by the same party shall be filed unless by leave of court. Motions for new trial, except as provided by section 1088 of the Revised Statutes (sec. 175 of the judicial code) shall be filed within sixty days from the time the judgment of the court is announced."[3] "A motion for a new trial, other than under Revised Statutes, section 1088, must be founded upon one or more of the following grounds: First, error of fact; second, error of law; and third, newly discovered evidence."[4] "A motion founded upon an error of fact must specify with minuteness

the right to determine whether or not the motion for a new trial was made in time, and its decision is not subject to review if it has jurisdiction to act. Young v. U. S., 95 U. S. 641, 24 L. ed. 467; U. S. v. Crusell, 12 Wall. 175, 20 L. ed. 384. A motion on behalf of the United States need not be disposed of within two years. Bellocq v. U. S., 13 Ct. Cl. 195. A motion for a new trial on behalf of the United States may be made while an appeal is pending in the Supreme Court, and that court will not dismiss an appeal because of such motion; unless the motion is granted and a new trial ordered. U. S. v. Ayres, 9 Wall. 608, 19 L. ed. 625; s. c., as Ayers v. U. S., 5 Ct. Cl. 712; U. S. v. Young, 94 U. S. 258, 24 L. ed. 153. The right of the United States to move for a new trial is analogous to the right of an individual to file a bill of review in chancery to set aside a former decree, or a bill impeaching a decree for fraud. *Ex parte* Russell, 13 Wall. 664, 20 L. ed. 632. See *supra*, §§ 446-451. Neither the lack of diligence nor the laches of the officers of government is sufficient ground for a new trial. Child v. U. S., 6 Ct. Cl. 44. A new trial on motion of the United States will be granted, if it appears *prima facie* that wrong had been done the government. Douglas v. U. S., 11 Ct. Cl. 655; Ayers v. U. S., 5 Ct. Cl. 712; s. c., as U. S. v. Ayres, 9 Wall. 608, 19 L. ed. 625; Tait v. U. S., 5 Ct. Cl. 638. If an unsatisfied judgment which might have been pledged as a set-off existed, but was unknown to the defendant's attorney at the trial, it is cause for a new trial. Childs v. District of Columbia, 19 Ct. Cl. 332. A new trial cannot be granted to the United States, because certain evidence which was not deemed material was not offered on the first trial; nor if it will enable the defendant to interpose a technical defense against a just claim. Ford v. U. S., 18 Ct. Cl. 62, 70.

[3] Ct. Cl. Rule 90.

[4] Ct. Cl. Rule 91.

the fact or facts which are regarded as erroneously found or erroneously omitted to be found by the court, with full reference to the evidence which is relied on to support the motion."[5] "A motion founded upon error of law must specify with like minuteness the points upon which the court is supposed to have erred, with references to the authorities relied upon to support the motion."[6] "A motion by the claimant upon the ground of newly-discovered evidence will not be entertained unless it appear that the newly-discovered evidence came to the knowledge of the claimant, his attorney of record or counsel after the trial and before the motion was made; that it was not for want of due diligence that it did not sooner come to his knowledge; that it is so material that it would probably produce a different judgment if the new trial were granted, and that it is not cumulative. Such motion must be accompanied by the affidavit of the claimant or his attorney of record, setting forth—"First. The facts in detail which the claimant expects to be able to prove, and whether the same are to be proved by witnesses or by documentary evidence. Second. The name, occupation, and residence of each and every witness whom it is proposed to call to prove said facts. Third. That the said facts were unknown to either the claimant or his attorney of record, and, if other counsel was employed at the trial, were unknown to such counsel until after the close of the trial. Fourth. The reasons why the claimant, his attorney of record, or counsel could not have discovered said evidence before the trial by due diligence."[7] "Motion as for a new trial must also be accompanied by the brief of the moving party, a copy of which must be served upon the opposing party, who may file his brief in response thereto. The motion will be considered by the judges in conference upon such briefs and affidavits, if any, and will then be decided or sent to the law calendar for argument."[8] A misunderstanding as to a supposed agreement to have a case abide the result of an appeal from

[5] Ct. Cl. Rule 92.

[6] Ct. Cl. Rule 93.

[7] Ct. Cl. Rule 94. When the claimant's affidavit on the motion for a new trial shows that the witness on whom he relies is in the government employ, he may be excused for not presenting the latter's affidavit. Murphy v. U. S., 15 Ct. Cl. 217.

[8] Ct. Cl. Rule 95.

another judgment is a ground for granting a new trial.[9] It has been held that a delay of three years is a sufficient reason for denying a motion by the claimant for a new trial.[10] A motion for a new trial, after an interlocutory decree, may be made more than two years subsequently to the decree, when final judgment has not been entered.[11] The court may grant a new trial after an appeal, provided the record has been returned.[12]

A rehearing on a point presented and considered in the argument and disposition of the case, will not be granted unless desired by one of the judges who rendered judgment.[13] When a case has been dismissed for want of prosecution, it will not be reinstated unless the petition states a cause of action.[14] An error of law which may be corrected on appeal is not a ground for a new trial.[15]

§ 684. Judgments in Court of Claims. "Any person who corruptly practices or attempts to practice any fraud against the United States in the proof, statement, establishment, or allowance of any claim, or of any part of any claim against the United States, shall, *ipso facto* forfeit the same to the Government; and it shall be the duty of the Court of Claims, in such cases, to find specifically that such fraud was practiced or attempted to be practiced, and thereupon to give judgment that such claim is forfeited to the Government, and that the claimant be forever barred from prosecuting the same."[1] Such a finding may be made upon a new trial, although the original judgment has been paid, and the claimant fails to appear.[2]

"No interest shall be allowed on any claim up to the time of the rendition of judgment thereon by the Court of Claims, unless

[9] Belknap v. U. S., 150 U. S. 588, 37 L. ed. 1191.

[10] Figh v. U. S., 3 Ct. Cl. 97.

[11] Sampson's Case, 42 Ct. Cl. 378.

[12] Roberts v. U. S., 92 U. S. 41; 23 L. ed. 646; Belknap v. U. S., 150 U. S. 588, 37 L. ed. 1191.

[13] Fendall v. U. S., 12 Ct. Cl. 305.

[14] Whitney v. U. S., 18 Ct. Cl. 19; Flores v. U. S., 18 Ct. Cl. 352; Wade v. U. S., 21 Ct. Cl. 141.

[15] Earler v. U. S., 5 Ct. Cl. 708.

§ 684. [1] Jud. Code, § 172, 36 St. at L. 1087, re-enacting U. S. R. S., § 1086. For a form of a judgment in such a case, see Peychaud v. U. S., 16 Ct. Cl. 601, and U. S. v. Moore, 3 MacA. 226, 233.

[2] Peychaud v. U. S., 16 Ct. Cl. 601. It has been held that the amount of judgment cannot be corrected after its satisfaction, even though there was an arithmetical error in the court's opinion. Russell v. U. S., 15 Ct. Cl. 108.

upon a contract expressly stipulating for the payment of interest."[3] "Hereafter it shall be the duty of the Secretary of the Treasury to certify to Congress for appropriation only such judgments of the Court of Claims as are not to be appealed, or such appealed cases as shall have been decided by the Supreme Court to be due and payable. And on judgments in favor of claimants which have been appealed by the United States and affirmed by the Supreme Court, interest, at the rate of four per centum per annum, shall be allowed and paid from the date of filing the transcript of judgment in the Treasury Department up to and including the date of the mandate of affirmance by the Supreme Court: *Provided*, That in no case shall interest be allowed after the term of the Supreme Court at which said judgment was affirmed."[4] "Any final judgment against the claimant on any claim prosecuted as provided in this chapter shall forever bar any further claim or demand against the United States arising out of the matters involved in the controversy."[5]

[3] Jud. Code, § 177, 36 St. at L. 1087, re-enacting U. S. R. S., § 1091; Hobbs v. U. S., 19 Ct. Cl. 220; Tilson v. U. S., 100 U. S. 43, 25 L. ed. 543; Harvey v. U. S., 113 U. S. 243, 28 L. ed. 987. Sheckels v. District of Columbia, 246 U. S. 338. Where a claim was referred under a special act to the Court of Claims to be determined according to the rules and regulations heretofore adopted by the United States in settlement of like cases, in which interest had been allowed, it was held that interest might be allowed when previously allowed by Congress in the adjustment of like cases. U. S. v. McKee, 91 U. S. 442, 23 L. ed. 326; s. c., as McKee v. U. S., 10 Ct. Cl. 208 and 231. Where a factor had filed a claim against the proceeds of captured or abandoned property, which exceeded his original claim, it was held that he might be allowed interest up to the time of the rendition of the judgment. Villalonga v. U. S., 10 Ct. Cl. 428; s. c. as U. S. v. Villalonga, 23 Wall. 35, 23 L. ed. 64.

[4] U. S. R. S., § 1090, superseded as Act of Sept. 30, 1890, ch. 1126, § 1, 26 St. at L. 537, Comp. St. § 6406. Interest on a judgment begins to run when a certified copy is presented for payment, and ceases when the mandate of affirmance is issued or ordered to be issued. Hobbs v. U. S., 19 Ct. Cl. 220. Interest was allowed under the general terms of a special statute in U. S. v. Old Settlers, 148 U. S. 427, 478, 37 L. ed. 509, 510.

[5] Jud. Code, § 179, 36 St. at L. 1087, re-enacting U. S. R. S., § 1093. It has been held that this section relates only to judgments upon the merits, and does not change the rule of common law, nor does it do more than attach to final judgments the conclusiveness which the com-

"A final judgment is conclusive, although the Supreme Court subsequently reverses a similar judgment, and holds that the decision of the Court of Claims in the case in question was erroneous."[6] When a claimant has consented to a judgment against him on a general demurrer, he cannot subsequently sue on the same cause of action with substantially the same averments.[7]

"In all cases of final judgments by the Court of Claims, or, on appeal, by the Supreme Court, where the same are affirmed in favor of the claimant, the sum due thereby shall be paid out of any general appropriation made by law for the payment and satisfaction of private claims, on presentation to the Secretary of the Treasury of a copy of said judgment, certified by the clerk of the Court of Claims, and signed by the chief justice, or, in his absence, by the presiding judge of said court."[8]

"The payment of the amount due by any judgment of the Court of Claims, and of any interest thereon allowed by law, as

mon law ascribes to them. Spicer v. U. S., 5 Ct. Cl. 34. A judgment sustaining a demurrer to a petition which failed to allege the necessary facts does not bar an action founded upon a petition which alleges such fact. Ibid. A judgment of the Court of Claims from which an appeal is taken, is not a final judgment within the meaning of the statute. Green v. U. S., 18 Ct. Cl. 93. A judgment in favor of the United States on a suit for a breach of covenant to furnish specified freight for transportation does not bar an action for the consideration agreed to be paid for the freight actually transported. Shrewsbury v. U. S., 9 Ct. Cl. 263. An action for rent due in instalments may be brought as frequently as the respective sums become due, and a judgment in a suit for one instalment will not bar a suit to recover rent not due at the time when the first petition was filed. Cross v. U. S., 14 Wall. 479, 20 L. ed. 721; s. c., 8 Ct. Cl. 1; s. c., 5 Ct. Cl. 88.

[6] Osborn v. U. S., 9 Ct. Cl. 153.

[7] Porter v. U. S., 20 Ct. Cl. 307.

[8] U. S. R. S., § 1089. Appropriation acts usually provide that no judgment shall be paid until the right of appeal has expired. See for example, 21 St. at L. 252, ch. 234. An appeal from a judgment before the right to appeal has expired is not vacated by the appropriation by Congress of the amount to pay the judgment. U. S. v. Jones, 119 U. S. 477, 30 L. ed. 440. It has been held that an appropriation for the payment of "private claims" means claims which the Executive Departments have rejected, or over which they have no jurisdiction; and that the appropriation is for debts not to be paid out of the specific appropriations. Sweeney v. U. S., 5 Ct. Cl. 285, 290; s. c., 8 Ct. Cl. 134; s. c., 17 Wall. 75, 21 L. ed. 575.

provided by law, shall be a full discharge to the United States of all claim and demand touching any of the matters involved in the controversy."[9] The Court of Claims has jurisdiction to inquire whether one of its judgments has been properly executed.[10]

§ 685. Costs in the Court of Claims. If the United States puts in issue the plaintiff's right to recover, the court may in its discretion allow the prevailing party, whether plaintiff or defendant, costs from the time of joining such issue.[1] The costs include only disbursements for the fees of witnesses and clerks.[2]

§ 686. Appeals from Court of Claims. "An appeal to the Supreme Court shall be allowed, on behalf of the United States, from all judgments of the Court of Claims adverse to the United States, and on behalf of the plaintiff in any case where the amount in controversy exceeds three thousand dollars, or where his claim is forfeited to the United States by the judgment of said court, as provided in section one hundred and seventy-two."[1] The following rule regulates the practice in such appeals: "In all cases hereafter decided in the Court of Claims, in which, by the Act of Congress, such appeals are allowable, they shall be heard in the Supreme Court upon the following record, and none other: 1. A transcript of the pleadings in the case, of the final judgment or decree of the court, and of such interlocutory orders, rulings, judgments, and decrees as may be necessary to a proper review of the case. 2. A finding by the Court of Claims of the facts in the case established by the evidence in the nature of a special verdict, but not the evidence establishing them; and a separate statement of the conclusions of law upon said facts, upon which the court founds its judgment or decree. The find-

[9] U. S. R. S., § 1092. See Hobbs v. U. S., 19 Ct. Cl. 220; U. S. v. Frerichs, 124 U. S. 315, 320, 31 L. ed. 471, 472; s. c. as Freirichs v. U. S., 21 Ct. Cl. 16.

[10] Pam-To-Pee v. U. S., 187 U. S. 371, 47 L. ed. 221.

§ 685. [1] Jud. Code, § 152, re-enacting 24 St. at L. 505, § 15.

[2] Jud. Code, § 176, re-enacting 24 St. at L. 505, § 15.

§ 686. [1] Jud. Code, § 242, re-enacting U. S. R. S., § 707. See *infra*, § 690.

ing of facts and conclusions of law to be certified to this court as a part of the record."[2]

A finding of facts which is supported by any evidence is conclusive upon the Supreme Court.[3] "In all cases in which judgments or decrees have heretofore been rendered, where either party is by law entitled to an appeal, the party desiring it shall make application to the Court of Claims by petition for the allowance of such appeal. Said petition shall contain a distinct specification of the errors alleged to have been committed by said court in its rulings, judgment, or decree in the case. The court shall, if the specification of alleged error be correctly and accurately stated, certify the same, or may certify such alterations and modifications of the points decided and alleged for error as, in the judgment of said court, shall distinctly, fully and fairly present the points decided by the court. This, with the transcript mentioned in Rule 1 (except the statement of facts and law therein mentioned), shall constitute the record on which those cases shall be heard in the Supreme Court."[4] "In all cases an order of allowance of appeal by the Court of Claims,

[2] Appeals from Ct. Cl., Rule 1. The findings have the same effect as a verdict of the jury. Crocker v. U. S., 240 U. S. 74. The opinion is no part of the findings and cannot supplement them. Ibid. A reply of the Court of Claims to a request of the executive officer charged with the execution of its judgment for a further opinion, was regarded by the Supreme Court as part of the decision. U. S. ex rel. Lowe v. Fisher, 223 U. S. 95, 56 L. ed. 364. The evidence should not be certified, except under special statutes giving the Court of Claims jurisdiction in equity. U. S. v. Anciens Etablissements, 224 U. S. 309, 56 L. ed. 778. For cases remanded because the findings were insufficient, see Ripley v. U. S., 222 U. S. 144, 56 L. ed. 131; U. S. v. Archer, 241 U. S. 119. Where the findings fail to state what the contract was the Supreme Court cannot determine that there was a contract when the facts do not establish this as a matter of law. D. L. & W. R. R. Co. v. U. S., 249 U. S. 385. A finding of facts is not required for the review of a judgment of dismissal for want of jurisdiction upon the ground that it does not show a contract between the claimant and the United States. Cartas v. U. S., 250 U. S. 545. See *infra*, § 690.

[3] William Cramp and Sons Ship and Engine Building Co. v. U. S., 239 U. S. 221. A finding that delay in the approval of a contract was reasonable is a finding of fact. J. E. Hathaway & Co. v. U. S., 249 U. S. 460.

[4] Appeals from Ct. Cl. Rule 2, applicable only to decisions rendered before 1866.

or the Chief Justice thereof in vacation, is essential, and the limitation of time for *granting* such appeal shall cease to run from the time an application is made for the allowance of appeal."[5] "Application for appeal to the Supreme Court of the United States from any judgment or decree of this court must be in writing, and signed by the claimant or his attorney of record, if the appeal be on his behalf; or if taken by the United States, it must be signed by the Attorney General or the proper Assistant Attorney General." "Such application if made when the court is not in session, must be filed with the clerk, and the date of filing the same must be indorsed upon it and noted upon the general docket."[6] Upon an appeal from the Court of Claims only questions of law are involved[7] except under special statutes.[8]

"All appeals from the Court of Claims shall be taken within ninety days after the judgment is rendered."[9]

[5] Appeals from Ct. Cl. Rule 3.

[6] Ct. Cl. Rule 96.

[7] Talbert v. U. S., 155 U. S. 45, 39 L. ed. 64. This rule cannot be obviated by certifying the evidence to the Supreme Court. U. S. v. Anciens Etablissements, 224 U. S. 309, 56 L. ed. 778.

[8] U. S. v. Old Settlers, 148 U. S. 427, 463, 464, 37 L. ed. 509, 522, 523. See Harvey v. U. S., 105 U. S. 671, 691, 26 L. ed. 1206, 1213. Where Congress directs the Court of Claims to take jurisdiction in equity of a controversy, the Supreme Court on appeal may review the facts and the evidence must be certified with the transcript. Where both parties appeal, although the items of the disallowance of which the plaintiff complains amount to less than three thousand dollars, still he may avail himself of any thing in the case which properly shows that the judgment in his favor was not for too large a sum; and consequently if the appeal of the United States is sustained in part, the items which were improperly disallowed may be set off against those which were improperly allowed. U. S. v. Mosby, 133 U. S. 273, 281, 33 L. ed. 625, 628.

[9] Jud. Code, § 243, re-enacting U. S. R. S., § 708. But see U. S. v. Davis, 131 U. S. 36, 39, 33 L. ed. 93, 94. Where, after a decree of the Court of Claims in favor of the petitioner, an act of Congress was passed, whereupon the court made another decree granting the same relief; it was held that an appeal could be taken within ninety days from the time of the entry of the second decree. Cherokee Nation v. Whitmire, 223 U. S. 108, 56 L. ed. 370. When a motion for a new trial is duly made, the time to appeal does not begin to run until that has been decided. Ibid., 223 U. S. 108, 56 L. ed. 370.

CHAPTER XXXVI.

WRITS OF ERROR AND APPEALS.

§ 687. Writs of error and appeals. In general. A writ of error is the appropriate proceeding for the review of the judgment of a court of law.[1] An appeal is the appropriate proceed-

§ 687. [1] Ward v. Gregory, 7 Peters 633, 8 L. ed. 810; National Live Stock Bank of Chicago v. National Bank of Geneseo, 203 U. S. 296, 51 L. ed. 192; Behn, Meyer & Co. v. Campbell & Go Tauca, 205 U. S. 403, 51 L. ed. 857; Mulenberg Co. v. Dyer, C. C. A., 65 Fed. 634; U. S. ex rel. Schauffler v. Fidelity & Deposit Co. of Maryland, C. C. A., 147 Fed. 228; Kibler v. Gulf Land & Lumber Co., C. C. A., 166 Fed. 861. It has been held that the following orders, judgments and decrees, can be reviewed only by writ of error and not by appeal. Every judgment and order in an action at common law in a District Court, although a jury is waived. Campbell v. Porter, 162 U. S. 478, 40 L. ed. 1044; Porter v. F. M. Davies & Co., C. C. A., 223 Fed. 465. A judgment in an action upon a promissory note. Jones v. Lavallette, 5 Wall. 579, 18 L. ed. 550; Teeg v. Suffert, C. C. A., 167 Fed. 125. See Price v. U. S., C. C. A., 169 Fed. 791. In the last two cases, appeals from the United States Court for China were dismissed. An action in the United States Court of China upon the bond of a Consul General of the United States for misconduct in office. Cunningham v. Rodgers, C. C. A., 171 Fed. 835. A judgment of a Federal court upon a legal cause of action at common law to recover a sum of money. Courtney v. Pradt, C. C. A., 160 Fed. 561. A judgment in an action for the allotment of dower, although the ancient common-law procedure in such an action has been abrogated by the laws of the State. Parish v. Ellis, 16 Pet. 451, 10 L. ed. 1028. A judgment on a *scire facias* to enforce a forfeited recognizance. Kerr v. U. S., C. C. A., 159 Fed. 428; U. S. v. Northwestern Development Co., C. C. A., 203 Fed. 960. A judgment in an action for claim and delivery under the Code of North Carolina (N. C. Revisal 1905, §§ 790-802); Smith v. Currie, C. C. A., 230 Fed. 803. A judgment upon an intervention by third opposition under sections 395 to 400 of the Louisiana Code of Practice, by a person claiming that property seized on execution is exempt from seizure and sale; New Orleans v. Louisiana Construction Co., 129 U. S. 45, 32 L. ed. 607. A judgment or decree of condemnation and forfeiture, or dismissing a libel praying seizure and forfeiture, under the Pure Food &

Drugs Act. Four Hundred and Forty-three Cans of Frozen Egg Product v. U. S., 226 U. S. 172, 57 L. ed. —, U. S. v. Seven Hundred and Seventy-nine Cases of Molasses, C. C. A., 174 Fed. 325; U. S. v. Hudson Mfg. Co., C. C. A., 200 Fed. 956. A final order or judgment in a proceeding for seizure and forfeiture of land, Armstrong's Foundry v. U. S., 6 Wall. 766, 18 L. ed. 882; or of personal property. U. S. v. Emholt, 105 U. S. 414, 26 L. ed. 1077. A judgment in a criminal case; Bucklin v. U. S., 159 U. S. 680, 40 L. ed. 304; Sena v. U. S., C. C. A., 147 Fed. 485. An order punishing a person for contempt of an order in a case at law or in equity; Gould v. Sessions, C. C. A., 67 Fed. 163. But see Nassau El. R. Co. v. Sprague El. R. & M. Co., C. C. A., 95 Fed. 415; *supra*, §§ 434 436, 437. Upon an appeal from the final decree there may be a review of so much of the order as imposes a fine to indemnify a party injured by the contempt. Worden v. Searls, 121 U. S. 14, 26, 30 L. ed. 853, 857. A judgment after a trial by jury of the issues raised upon a petition of intervention founded upon a legal cause of action; Rouse v. Hornsby, C. C. A., 67 Fed. 219, 222; Texas & Pac. Ry. Co. v. Bloom's Adm'r, 164 U. S. 636, 643, 41 L. ed. 580, 583; Thompson v. Northern Pac. Ry. Co., C. C. A., 93 Fed. 384. A final order upon an application for a mandamus; Ward v. Gregory, 7 Pet. 633, 8 L. ed. 810; Muhlenberg County v. Dyer, C. C. A., 65 Fed. 634; Carter County v. Schmalstig, C. C. A., 127 Fed. 126. An order disbarring an attorney, Thatcher v. U. S., C. C. A., 212 Fed. 801. An order or judgment adjudicating a party a bankrupt, or refusing such an adjudication, which is founded upon a verdict of a jury; Elliott v. Toeppner, 187 U. S. 327, 47 L. ed. 200; Frederic L. Grant Shoe Co. v. W. M. Laird Co., 203 U. S. 502, 51 L. ed. 292; Duncan v. Landis, C. C. A., 106 Fed. 839. But see Lockman v. Lang, C. C. A., 128 Fed. 279. A judgment of the Court of Appeals of the District of Columbia, affirming a final order of the Supreme Court of that District which admitted to probate and record a certain writing as a last will and testament, after the verdict of a jury; Ormsby v. Webb, 134 U. S. 47, 33 L. ed. 805, or after a trial without a jury, Campbell v. Porter, 162 U. S. 478, 40 L. ed. 1044, or affirmed an order in a proceeding to condemn land; Metropolitan R. R. Co. v. District, 195 U. S. 322, 49 L. ed. 219. The judgment of the Supreme Court of the Territory of Oklahoma, affirming a judgment of replevin, although the case was tried without a jury. Nat. Live Stock Bank of First Nat. Bank, 203 U. S. 296, 51 L. ed. 192. A judgment of the Supreme Court of the Philippine Islands affirming a judgment of the court of land registration granting, Gauzon v. Compania General, 245 U. S. 86; or dismissing an application for registration of land. Carino v. Insular Government of the Philippine Islands, 212 U. S. 449, 53 L. ed. 594; Tiglao v. Insular Government of the Philippine Islands, 215 U. S. 410, 54 L. ed. 257. No appeal can be taken from the final order or decree of a State court, although the proceeding was equitable in its nature. *Cf.* §§ 666, 667, 669, *supra*. Final orders, judgments, and decrees of State courts can be reviewed

ing for the review of the decree of a court of equity[2] or admiralty.[3] A writ of error is the institution of a new suit in the court of review.[4] An appeal is a new trial of the suit in the appellate court.[5] The decisions of the District Courts in suits

only by writ of error. U. S. R. S., § 709; Verden v. Coleman, 22 How. 192, 16 L. ed. 336; *supra*, § 500.

[2] Marin v. Lalley, 17 Wall. 14, 21 L. ed. 596; Brewster v. Wakefield, 22 How. 118, 16 L. ed. 301. Any order in a suit in equity. Harry Bros. Co. v. Yaryan Naval Stores Co., C. C. A., 219 Fed. 884 (dismissing a plea of intervention); Swift Fertilizer Works v. Okolona Cotton Oil Co., C. C. A., 186 Fed. 158. It has been held that the following orders, judgments and decrees, can be reviewed only by appeal and not by writ of error: a final order or decree in a suit or proceeding, which in its essential nature is the foreclosure of a mortgage; Marin v. Lalley, 17 Wall. 14, 21 L. ed. 596; Brewster v. Wakefield, 22 How. 118, 16 L. ed. 301; Southern Pine Co. v. Ward, 208 U. S. 126, 136; Nashville Ry. & Light Co. v. Bunn, C. C. A., 168 Fed. 862. A judgment for damages for personal injuries, awarded by a special master to an intervenor in a foreclosure suit. A proceeding to enforce a mechanic's lien by a sale of the property subject thereto, and a personal judgment for the deficiency, under a statute providing that the practice shall be in like manner and with like effect as in actions for the foreclosure of mortgages, Idaho & O. L. I. Co. v. Bradbury, 132 U. S. 509, 33 L. ed. 433. A judgment of the Court of Appeals of the District of Columbia affirming a final settlement by the Orphans' Court of an account of an executrix. Kenaday v. Sinnott, 179 U. S. 606, 614, 45 L. ed. 339, 344. A judgment or decree of a court of the United States in the exercise of matters which are usually within the jurisdiction of probate courts. Laurel Oil & Gas Co. v. Galbreath Oil & Gas Co., C. C. A., 165 Fed. 162. An order denying a petition to set aside a sale by a receiver of a national bank, Files v. Brown, C. C. A., 124 Fed. 133. A judgment by a District Court upon an appeal from a commissioner's order of deportation, U. S. v. Hung Chang, C. C. A., 134 Fed. 19; Lee Lung On v. U. S., C. C. A., 159 Fed. 125. A judgment or decree in a suit by a judgment creditor to collect the amount of his claim from a company which has insured the judgment debtor from liability because of the same. Thomson v. Travelers' Ins. Co., C. C. A., 161 Fed. 867. An order in a habeas corpus proceeding in a District Court of the United States, *Re* Morrissey, 137 U. S. 157, 158, 34 L. ed. 644, 645; *Re* Neagle, 135 U. S. 1, 42, 34 L. ed. 55, 63; Rice v. Ames, 180 U. S. 371, 45 L. ed. 577; or in the Supreme Court of the Philippine Islands, Fisher on Behalf of Barcelon v. Baker, 203 U. S. 174, 51 L. ed. 142.

[3] *Supra*, § 592.

[4] Simpson v. First Nat. Bank, C. C. A., 129 Fed. 257, 259; Gould v. U. S., C. C. A., 205 Fed. 883.

[5] Irvine v. The Hesper, 122 U. S. 256, 30 L. ed. 1175; Sun Co. v. Vinton Petroleum Co., C. C. A., 248 Fed. 623, *supra* § 592.

upon claims against the United States are reviewed by appeal or writ of error according to the nature of each case.[6]

By the Act of September 6, 1916, "No court having power to review a judgment or decree rendered or passed by another shall dismiss a writ of error solely because an appeal should have been taken, or dismiss an appeal solely because a writ of error should have been sued out, but when such mistake or error occurs it shall disregard the same and take the action which would be appropriate if the proper appellate procedure had been followed."[7]

When the record is brought before it by a writ of error, the court looks into it to see if any error of law was committed by the inferior court. There can be no reversal by the Supreme Court[8] or a Circuit Court of Appeals upon a writ of error for any error of fact.[9] Where the evidence is contained in a bill of

[6] Chase v. U. S., 155 U. S. 489, 30 L. ed. 234, *supra* § 97.

[7] Ch. 448, § 4, 39 St. at L. 727. Comp. St., § 1649a. See Judicial Code, § 274b added by Act of March 3, 1915, ch. 90, 38 St. at L. 956; Maine Northwestern Development Co. v. Northwestern Commercial Co., C. C. A., 240 Fed. 583; Union Pac. R. Co. v. Syos, C. C. A., 246 Fed. 561; Toyo Kisen Kaisha v. Hartman, C. C. A., 253 Fed. 422, *infra*, § 705. "This section does not abolish the distinction between writs of error and appeals, but only requires that the party seeking review shall have it in the appropriate way, notwithstanding a mistake in choosing the mode of review." Gauzon v. Compania General, 245 U. S. 86, 89. It has been held by a divided court that it does not authorize the court of review upon an appeal not accompanied by a bill of exceptions to consider exceptions contained in a transcript of the evidence certified by the court below. See Buessel v. U. S., C. C. A., 2nd Ct., 258 Fed. 811. But see the dissenting opinion of Ward, J., *Cf.* Ana Maria Sugar Co. v. Quinones, C. C. A., 251 Fed. 499.

[8] U. S. R. S., § 1011; Wiscart v. Danchy, 3 Dall. 321, 327, 1 L. ed. 619; U. S. v. Goodwin, 7 Cranch, 108, 110, 3 L. ed. 284, 285; Cohens v. Virginia, 6 Wheat. 264, 5 L. ed. 257; Generes v. Campbell, 11 Wall. 193, 20 L. ed. 110; United States v. Dawson, 110 U. S. 569, 25 L. ed. 791; England v. Gebhardt, 112 U. S. 502, 28 L. ed. 811; Martinton v. Fairbanks, 112 U. S. 670, 28 L. ed. 862; Dower v. Richards, 151 U. S. 658, 38 L. ed. 305 (where the cases are reviewed by Mr. Justice Gray); Elliott v. Toeppner, 187 U. S. 327; Behn, Meyer & Co. v. Campbell & Go Tauco, 205 U. S. 403, 51 L. ed. 857; Cedar Rapids Gas Co. v. Cedar Rapids, 223 U. S. 655, 668, 56 L. ed. 604; Gsell v. Insular Customs Collector, 239 U. S. 93.

[9] Paul v. Delaware, L. & W. R. Co., 130 Fed. 951; Lillie v. Dennert, C. C. A., 232 Fed. 104.

exceptions, the court may determine whether there was any evidence at all to support the facts essential to the judgment.[10] Upon an appeal the appellate court regularly reviews the case upon the evidence taken in the inferior court, and certified to it.[11]

To these rules of the English practice the Federal statutes have made certain exceptions. Upon a writ of error there can be no reversal for error in ruling any plea in abatement, such as the plea of the pendency of another suit, other than a plea to the jurisdiction of the court.[12] A decision upon a motion to dismiss because by the death of a party the action has abated, affects the jurisdiction and can be reviewed upon a writ of error.[13] Upon an appeal from the Court of Claims, the evidence is not included in the findings; and the Supreme Court does not review the decision upon questions of fact.[14]

[10] Ling Su Fan v. U. S., 218 U. S. 302, 54 L. ed. 1049, 30 L. R. A. (N. S.) 1176; Ware v. Wunder Brewing Co. of San Francisco, C. C. A., 160 Fed. 79; Lew Moy v. U. S., C. C. A., 164 Fed. 322; Chin Man Can v. United States, C. C. A., 170 Fed. 187. Where it appears from the face of the patents that extrinsic evidence is not needed to explain the terms of art therein, or to apply the descriptions to the subject matter, and the court is able from mere comparison to comprehend what are the inventions described in each patent, and from such comparison whether one device infringes upon the other, the question of infringement or no infringement is one of law and susceptible of determination on a writ of error. Singer Manufacturing Co. v. Cramer, 192 U. S. 265, 48 L. ed. 437; Chicago & A. Ry. Co. v. Pressed Steel Car Co., C. C. A., 263 Fed. 883.

[11] *Re* Neagle, 135 U. S. 1, 42, 34 L. ed. 55, 63.

[12] U. S. R. S., § 1011, as amended 18 St. at L., ch. 80, p. 318; Piquignot v. Penn. R. Co., 16 How. 104, 14 L. ed. 863; Stephens v. Monongahela Bank, 111 U. S. 197, 28 L. ed. 399. See Cunningham v. Rodgers, C. C. A., 171 Fed. 835.

[13] Henderson v. Henshall, 54 Fed. 320, 330; Martin's Adm'r v. B. & O. R. Co., 151 U. S. 673, 703, 38 L. ed. 311, 322. "The proceeding is an action which is commenced by a writ, and the cause of the action is the damage sustained by the parties from the error in the previous judgment, and this damage equally attaches on the survivor in this as in any other action." Lord Ellenborough in Clark v. Rippon, 1 B. & Ald. 586, quoted in Moses v. Wooster, 115 U. S. 285, 29 L. ed. 391, and Martin's Adm'r v. B. & O. R. Co., 151 U. S. 673, 703, 38 L. ed. 311, 322.

[14] S. C. Rules on Appeals from Ct. Cl.; *supra*, §§ 457, 686, 690, *infra*, § 690; Talbert v. U. S., 155 U. S. 45, 39 L. ed. 64. This rule does not apply to suits in equity brought in the Court of Claims under special statutes. U. S. v. Old Settlers, 148 U. S. 427,

37 L. ed. 509; Harvey v. U. S., 105 U. S. 671, 691, 26 L. ed. 1206, 1213; La Abra S. Min. Co. v. U. S., 175 U. S. 423, 44 L. ed. 223. Formerly a writ of error could not issue from the Supreme Court of the United States to a judgment of a Territorial Court in a case not tried by a jury, and the review by the Supreme Court of the United States of a judgment of a Territorial Court in this continent in a case not tried by a jury could only be by an appeal. 18 St. at L. 27; Stringfellow v. Cain, 99 U. S. 610, 25 L. ed. 421; Cannon v. Pratt, 99 U. S. 619, 25 L. ed. 446; Gray v. Howe, 108 U. S. 12, 27 L. ed. 634; Thompson v. Ferry, 180 U. S. 484, 45 L. ed. 633; Armijo v. Armijo, 181 U. S. 558, 45 L. ed. 1000. The rule was otherwise as to the review of judgments of the Supreme Court of the former Territory of Oklahoma. Comstock v. Eagleton, 196 U. S. 99, 49 L. ed. 402; Oklahoma City v. McMaster, 196 U. S. 529, 49 L. ed. 587; National Live Stock Bank of Chicago v. National Bank of Geneseo, 203 U. S. 296, 51 L. ed. 192. In such a case, instead of the evidence at large, a statement of the facts of the case in the nature of a special verdict, with the rulings of the court on the admission or rejection of evidence when excepted to, was required to be made and certified by the court below. The Supreme Court of the United States could then only consider the exceptions to the rulings on evidence and also whether the decree could be sustained upon the findings, without reference to the weight of evidence or its sufficiency to support the findings. Ibid.; Stur v. Beck, 133 U. S. 541, 33 L. ed. 761; San Pedro & C. D. A. Co. v. U. S., 146 U. S. 120, 36 L. ed. 912; Young v. Amy, 171 U. S. 179, 43 L. ed. 127; Harrison v. Perea, 168 U. S. 311, 42 L. ed. 478; Mammoth Min. Co. v. Salt Lake F. & M. Co., 151 U. S. 447, 38 L. ed. 229; Black v. Jackson, 177 U. S. 349, 44 L. ed. 801; Caffrey v. Oklahoma Territory, 177 U. S. 346, 44 L. ed. 799; Rogers v. U. S., 141 U. S. 548, 35 L. ed. 853; Herrick v. Boquillas L. & C. Co., 200 U. S. 96, 50 L. ed. 388; Eagle Mining Co. v. Hamilton, 218 U. S. 513, 54 L. ed. 113; except in an extraordinary case. Halsell v. Renfrow, 202 U. S. 287, 292, 50 L. ed. 1032; Nielsen v. Steinfeld, 224 U. S. 534, 56 L. ed. 872. This rule did not apply to appeals from the Supreme Court of the Philippines, Dela Rama v. Dela Rama, 201 U. S. 303, 50 L. ed. 765; Philippine Sugar &c. Co. v. Phil. Islands, 247 U. S. 385. A judgment or decree of divorce, De La Rama v. De La Rama, 241 U. S. 154; or an order upon an application for the writ of habeas corpus, Fisher on Behalf of Barcelon v. Baker, 203 U. S. 174, 5 L. ed. 142; Gsell v. Insular Customs Collector, 239 U. S. 93; made by the Supreme Court of the Philippines is reviewable by appeal. Appeals from Porto Rico were formerly subject to the rules similar to those regulating appeals from the continental Territories, 31 Stat. 853; Comp. St., §§ 1215, 3791; Garzot v. De Rubio, 209 U. S. 283, 52 L. ed. 794; Rosaly v. Graham, 227 U. S. 584, 57 L. ed. —; Porto Rico v. Emmanuel, 235 U. S. 251; but they are now reviewed in the same manner as appeals from the District Courts of the United States in cases which are appealable. Jud. Code, § 244, 36 St.

§ 688. Direct review by the Supreme Court of decisions of the Federal courts of the United States. The Judicial Code provides: "Appeals and writs of error may be taken from the district courts, including the United States district court for Hawaii and the United States district court for Porto Rico, direct to the Supreme Court in the following cases: In any case in which the jurisdiction of the court is in issue,[1] in which

at L. 1157, Elizaburn v. Chaves, 239 U. S. 283, 36 Sup. Ct. 47, 60 L. ed. 290; Ana Maria Sugar Co. v. Quinones, C. C. A., 251 Fed. 499, 503. A judgment restraining the operation of a railroad and directing its removal is reviewable by appeal; Plazuela Sugar Co. v. Pastoriza, C. C. A., 245 Fed. 115. It has been held that judgments of the local courts of the Virgin Islands are reviewable only by appeal, Clen v. Jorgensen, C. C. A., 265 Fed. 120. Judgments and decrees of the Court of the Canal Zone are reviewable by appeal or writ of error in the same manner as those of the District Courts of the United States; Panama R. Co. v. Beckford, C. C. A., 231 Fed. 436.

§ 688. [1] 1 Jud. Code, § 238, 36 St. at L. 1087, re-enacting in substance 26 St. at L. 827. The words "in issue" are not confined to a formal issue raised by the findings, but include every case in which a question of jurisdiction is distinctly raised in any form. Shepard v. Adams, 168 U. S. 618, 42 L. ed. 602; Powers v. Chesapeake & O. Ry. Co., 169 U. S. 92, 42 L. ed. 673; Board of Trade v. Hammond El. Co., 198 U. S. 424, 49 L. ed. 1111; Kendall v. Am. Automatic Loom Co., 198 U. S. 477, 49 L. ed. 1133. They include a case where the court erroneously held that a question was jurisdictional. U. S. v. N. Y. Steam Fitting Co., 235 U. S. 327, 336. The jurisdiction intended by the statute is the jurisdiction of the court below in the suit wherein the decree appealed from is entered, not its jurisdiction to enter a former decree which the suit, Carey v. Houston & T. C. Ry. Co., 150 U. S. 170, 37 L. ed. 1041; or application, Stevirmac Oil & Gas Co. v. Dittmar, 245 U. S. 210; brought up for review sought to set aside. The question of jurisdiction must be one involving the District Court as a Federal court. Louisville Trust Co. v. Knott, 191 U. S. 225, 233, 48 L. ed. 159, 161; Bache v. Hunt, 193 U. S. 523, 48 L. ed. 774. It must be one of initial jurisdiction. U. S. v. Swan, C. C. A., 65 Fed. 647, 649, per Taft, J. It has been said that it must be either a case where the jurisdiction of the Federal court as a Federal court is put in issue, or, where an issue is raised, whether jurisdiction over the defendant was ever obtained by proper process. Alton Water Co. v. Brown, C. C. A., 166 Fed. 840, 842. The following questions have been held to be *jurisdictional* and reviewable immediately by the Supreme Court: Whether there exists the necessary citizenship, Mexican Central Ry. Co. v. Eckman, 187 U. S. 429, 47 L. ed. 245; Patch v. Wabash R. Co., 207 U. S. 277, 52 L. ed. 204; or a Federal question, Blackburn v. Portland

Gold Min. Co., 175 U. S. 571, 44 L. ed. 276; Giles v. Harris, 189 U. S. 475, 47 L. ed. 909; W. S. Tyler Co. v. Ludlow-Saylor Wire Co., C. C. A., 212 Fed. 156. The right to sue to restrain the infringement of a trade-mark or unlawful competition in a case originally brought in the Federal court, Ibid.; or removed there from a State court, Patch v. Wabash R. Co., 207 U. S. 277, 52 L. ed. 204. Whether suit can be brought in a District Court of the United States in a particular district, although the general Federal jurisdiction is not disputed. Davidson Bros. Marble Co. v. U. S., 213 U. S. 10, 53 L. ed. 675; U. S. v. Congress Const'n. Co., 222 U. S. 199, 56 L. ed. 163; Am. Electric Welding Co. v. Lalance & Grosjean Mfg. Co., C. C. A., 249 Fed. 968; provided that the cause of action arises under the Constitution or laws of the United States; Male v. Atchison, T. & S. F. Ry. Co., 240 U. S. 97, 101. When the Federal jurisdiction depends solely upon a difference of citizenship and the objection is founded upon the residence of a party, the right to an immediate review by the Supreme Court is doubtful. Ibid. But see Louisville & N. R. R. Co. v. W. U. Tel. Co., 234 U. S 369. Whether the value of the matter in dispute was sufficient to give the court of first instance jurisdiction even when that depends upon a question of fact, Wetmore v. Rymer, 169 U. S. 115, 42 L. ed. 682; Rogers v. Hennepin County, C. C. A., 220 Fed. 453. Whether a suit was brought by a stockholder by collusion between him and his corporation, for the fraudulent purpose of invoking the jurisdiction of the Federal court concerning a controversy, which really exists between that corporation and another defendant; Chicago v. Mills, 204 U. S. 321, 51 L. ed. 504. Whether a Federal court, Sheppard v. Adams, 168 U. S. 618, 42 L. ed. 602; U. S. v. N. Y. Steam Fitting Co., 235 U. S. 327; G. & C. Merriam Co. v. Saalfield and Ogilvie, 241 U. S. 22; Stewart v. Ramsay, 242 U. S. 128; or a State court, from which the case was removed, Remington v. Central Pac. R. Co., 198 U. S. 95, 49 L. ed. 959; St. Louis Cotton Compress Co. v. American Cotton Co., C. C. A., 125 Fed. 196; acquired jurisdiction over the defendant by valid service; see Davis v. C. C. & St. L. Ry. Co., 217 U. S. 157, 54 L. ed. 708; Am. Security Co. v. Dist. of Columbia, 224 U. S. 491, 56 L. ed. 856; Hays v. Richardson, C. C. A., 121 Fed. 536; or by an attachment, which was not irregular, Davis v. Cleveland, C. C. & St. L. Ry. Co., C. C. A., 156 Fed. 775, nor fraudulent, Hays v. Richardson, C. C. A., 121 Fed. 536; or by a general appearance, Davis v. Cleveland, C. C. & St. L. Ry Co., C. C. A., 156 Fed. 775; Olds v. Herman H. Hettler Lumber Co., C. C. A., 195 Fed. 9 (whether giving a forthcoming bond was a general appearance). Whether a petition for removal was filed in proper time, Powers v. Chesapeake & O. Ry. Co., 169 U. S. 92, 42 L. ed. 673. Whether the court of first instance, after a removal, has power to set aside an order of the State court, previously made; Remington v. Central Pac. R. Co., 198 U. S. 95, 49 L. ed. 959. Whether a court of admiralty has jurisdiction of a libel to compel contribution between two joint wrongdoers; The Ira M.

Hedges, 218 U. S. 264, 54 L. ed. 1039; or of a suit for salvage of a boat in a drydock, The Steamship Jefferson, 215 U. S. 130, 54 L. ed. 125; or, of a proceeding in admiralty for a limitation of the liability of a ship-owner, after final disposition of all points affecting the right of the petitioners to a limitation of their liability to enter a decree *in personam* against them for damages caused to some of the intervenors, The Annie Faxon, C. C. A., 87 Fed. 961; or it has been held the right to grant costs upon the dismissal of a libel for want of jurisdiction over the subject matter; The Ada, C. C. A., 255 Fed. 50, 51. Whether a Federal court has jurisdiction of a suit against an interstate carrier before action by the Interstate Commerce Commission upon the subject. Mitchell Coal & Coke Co. v. Pennsylvania R. Co., C. C. A., 192 Fed. 475. But see Morrisdale Coal Co. v. Pennsylvania R. Co., C. C. A., 183 Fed. 929. The following questions are *not* jurisdictional nor reviewable immediately by the Supreme Court. Whether a cause of action is barred by lapse of time, either because of a statutory limitation, or by a limitation contained in an order requiring claims to be presented within a specified period, Texas & Pac. Ry. Co. v. Saunders, 151 U. S. 105, 38 L. ed. 90; or by laches, Laidlaw v. Oregon & Nav. Co., C. C. A., 81 Fed. 876; in equity or admiralty irrespective of any statutory limitation. Whether a bill states a case of equitable cognizance, Smith v. McKay, 161 U. S. 355, 40 L. ed. 731; Bien v. Robinson, 208 U. S. 423, 426, 52 L. ed. 556, 557; Geneva Furniture Co. v. Karpen, 238 U. S. 254; Chapman v. Atlantic Trust Co., C. C. A., 119 Fed. 257; World's Columbian Exposition v. U. S., C. C. A., 56 Fed. 654; Smith v. McKay, 161 U. S. 355; U. S. v. Swan, C. C. A., 65 Fed. 647; Ferguson v. Omaha & S. W. R. Co., C. C. A., 227 Fed. 513, or any cause of action at law or in equity, *Re* Garrosi, C. C. A., 229 Fed. 363. Whether an indictment charges a crime against the United States, Lamar v. U. S., 240 U. S. 60. Whether the facts show a case of admiralty jurisdiction, Hazelwood Dock Co. v. Palmer, C. C. A., 228 Fed. 325; or a right to recover under a Federal statute such as the Employers' Liability Act, Farrugia v. Philadelphia & Reading Railway Company, 233 U. S. 352, when the initial pleading contains sufficient averments to support the jurisdiction in these respects. Whether a suit or proceeding was properly dismissed for reasons of comity or because it affected land not within the territorial jurisdiction of the District Court, Davis v. Anderson-Tully Co., C. C. A., 252 Fed. 681. Whether the right to deny allegations of the jurisdictional facts has been waived. Drake v. Tennessee, A. & T. R. Co., C. C. A., 268 Fed. 248. Whether a District Court has jurisdiction to enforce the decree of another sovereignty when the requisite diversity of citizenship exists. Fore River Shipbuilding Co. v. Hagg, 219 U. S. 175. Whether there is *res adjudicata*, Van Wagenen v. Sewall, 160 U. S. 369, 40 L. ed. 460; Blythe v. Hinckley, 173 U. S. 501, 43 L. ed. 783; or a subsequent decision between the same parties making the controversy moot, Male v. Atchison, T. & S. F. Ry. Co., 240 U. S. 97. Whether a stock-

holder's bill complies with the Equity Rules. Illinois Cent. R. R. Co. v. Adams, 180 U. S. 28, 34, 45 L. ed. 410, 412; Venner v. Great Northern Ry. Co., 209 U. S. 24, 52 L. ed. 666. Perhaps whether, although nominally against an individual, a suit is in reality against a State, Illinois Central R. Co. v. Adams, 180 U. S. 28, 38, 45 L. ed. 410. Whether an indispensable party has been omitted. Bogart v. So. Pac. Ry. Co., 228 U. S. 137, 57 L. ed. —. Whether a declaration in an action against carriers for reparation is sufficient without an averment of previous action by the Interstate Commerce Commission. R. J. Darnell v. Illinois Cent. R. R. Co., 225 U. S. 243, 56 L. ed. 1072; A. J. Phillips Co. v. Grand Trunk Western Ry. Co., C. C. A., 195 Fed. 12. Whether a foreign executor was subject to suit in a State court from which the suit has been removed; Courtney v. Pradt, 196 U. S. 89, 49 L. ed. 398. Whether the State court had jurisdiction of a controversy which has been properly removed, provided the defendant was duly served. Kansas City Northwestern R. R. Co. v. Zimmerman, 210 U. S. 336, 52 L. ed. 1084. In *habeas corpus* proceedings, whether the court whose commitment it is sought to review had jurisdiction. Childers v. McClaughry, 216 U. S. 139. Whether a party to a suit has been properly served with notice of an application at the foot of a decree. Bache v. Hunt, 193 U. S. 523, 48 L. ed. 774. Whether a court of equity, in proceedings not founded upon a Federal statute, has power to proceed by a summary application, instead of by a plenary suit; Schweer v. Brown, 195 U. S. 171, 49 L. ed. 144; Bien v. Robinson, 208 U. S. 423, 427, 52 L. ed. 556. Whether a court of equity has ancillary jurisdiction of an application in relation to matters in a suit that has been pending before it, Alton Water Co. v. Brown, C. C. A., 166 Fed. 840. Whether a Federal court, sitting in equity, can issue a writ to enforce a decree, without a new proceeding upon its common law side. U. S. v. Swan, C. C. A., 65 Fed. 647. Whether an appearance by a defendant corporation was lawfully made, when the right of an intervenor to raise the objection was denied by the court below. Keatley v. Furey, 226 U. S. 399, 57 L. ed. —. Whether the pendency of a previous suit in a State Court deprives a Federal court of power to interfere with the property or subject matter, Louisville Trust Co. v. Knott, 191 U. S. 225, 48 L. ed. 159; Bache v. Hunt, 193 U. S. 523, 48 L. ed. 774; Railroad Commission v. Louisville & Nashville R. R. Co., 225 U. S. 272, 56 L. ed. 1087. Attleborough Nat. Bank v. N. W. Mfg. Co., 28 Fed. 113; Central Dist. Printing & Telegraph Co. v. Farmers' & Producers' Nat. Bank, C. C. A., 255 Fed. 59. See Blythe v. Hinckley, 173 U. S. 501, 43 L. ed. 783; Huntington v. Laidley, 176 U. S. 668, 44 L. ed. 630; *supra*, § 52; *infra*, § 693; Shields v. Coleman, 157 U. S. 168, 39 L. ed. 660, has been overruled. Whether the decree or judgment of a State court could be reviewed collaterally because of its erroneous decision of certain constitutional questions. Blythe v. Hinckley, 173 U. S. 501, 43 L. ed. 783. Whether goods the subject of an action *in rem* were seized within the terri-

torial jurisdiction of a District Court; U. S. v. Larkin, 208 U. S. 333, 52 L. ed. 517. Whether a person belongs to the class who are not subject to involuntary bankruptcy; Denver First Nat. Bank v. Klug, 186 U. S. 202, 46 L. ed. 1127; *supra*, §§ 616, 617, 666, 669. Whether a petition sets forth an act of bankruptcy. Exploration Mercantilet Co. v. Pacific H. & S. Co., C. C. A., 177 Fed. 825. Whether a Court of Bankruptcy can proceed summarily against a party charged with holding property of the bankrupt; Schweer v. Brown, 195 U. S. 171, 49 L. ed. 144; *supra*, §§ 608, 635, 666, 669. Whether a Court of Bankruptcy has power to administer property which is claimed to be exempt; Lucius v. Cawthon-Coleman Co., 196 U. S. 149, 49 L. ed. 425.

The right to review by the Supreme Court in such cases depends upon the existence of a question of jurisdiction, and no other question in the case will be reviewed by that tribunal; Passavant v. U. S., 148 U. S. 214, 37 L. ed. 426; McLish v. Roff, 141 U. S. 661, 35 L. ed. 893; Schunk v. M. & S. Co., 147 U. S. 500, 37 L. ed. 255; Louisville & Nashville Railroad Co. v. Western Union Telegraph Co., 234 U. S. 369: except in a *habeas corpus* proceeding, when the Supreme Court will review all the merits of the application below. U. S. R. S., § 761; Storti v. Massachusetts, 183 U. S. 138, 143, 46 L. ed. 120, 124; *supra*, § 467. When the unsuccessful party wishes to have the judgment or decree reviewed upon jurisdictional grounds and other grounds as well, he cannot appeal to both the Supreme Court and the Circuit Court of Appeals. Columbus Const. Co. v. Crane Co., 174 U. S. 600, 43 L. ed. 1102; U. S. v. Jahn, 155 U. S. 109, 113, 39 L. ed. 87, 89. Where two such appeals or writs of error are taken by the same party, after the decision of the former on the merits the second will be dismissed; Columbus Const. Co. v. Crane Co., 174 U. S. 600, 43 L. ed. 1102; but see Robinson v. Caldwell, 165 U. S. 359, 362, 41 L. ed. 745, 746; Pullman P. C. Co. v. Central Tr. Co., 171 U. S. 138, 43 L. ed. 108; s. c., 39 U. S. App. 307; unless the proceedings in the Circuit Court of Appeals are absolutely void; U. S. v. Larkin, 208 U. S. 333, 52 L. ed. 517; but such an appeal by one defendant is not affected by an appeal to the Circuit Court of Appeals by another; Stillman v. Combe, 197 U. S. 436, 49 L. ed. 822. A prior writ of error, U. S. v. Larkin, 208 U. S. 333, 52 L. ed. 517; Davis v. C. C. C. & St. L. Ry. Co., 217 U. S. 157, 54 L. ed. 708; or appeal, Excelsior Wooden Pipe Co. v. Pacific Bridge Co., 185 U. S. 282, 46 L. ed. 910; seeking review by the Circuit Court of Appeals, which has been dismissed by such court, is no bar to a writ of error from the Supreme Court to review a question of jurisdiction which was duly raised. The decision of a District Court upon the mandate of a Circuit Court of Appeals may be reviewed by the Supreme Court upon the question of jurisdiction. Brown v. Alton Water Co., 222 U. S. 325, 56 L. ed. 221. The issue of a writ of error from the Supreme Court to review a judgment of the Circuit Court for want of jurisdiction does not prevent the Circuit Court of Appeals from issuing a writ of error to review an or-

case the question of jurisdiction alone shall be certified to the Supreme Court from the court below for decision;[2] from

der subsequent to the judgment denying a new trial claimed under a State statute. Shreve v. Cheesman, C. C. A., 69 Fed. 785. *Cf.* No. Pac. R. Co. v. Glaspell, C. C. A., 49 Fed. 482. Chief Justice Fuller said: "Giving the act a reasonable construction, taken as a whole, we conclude: (1) If the jurisdiction of the Circuit [now District] Court is in issue and decided in favor of the defendant, as that disposes of the case, the plaintiff should have the question certified and take his appeal or writ of error directly to this court (2) If the question of jurisdiction is in issue and the jurisdiction sustained, and then judgment or decree rendered in favor of the defendant on the merits, the plaintiff, who has maintained the jurisdiction, must appeal to the Circuit Court of Appeals, where, if the question of jurisdiction arises, the Circuit Court of Appeals may certify it. (3) If the question of jurisdiction is in issue and the jurisdiction sustained, and judgment on the merits is rendered in favor of the plaintiff, then the defendant can elect either to have the question certified and come directly to this court, or to carry the whole case to the Circuit Court of Appeals, and the question of jurisdiction can be certified by that court. (4) If in the case last supposed the plaintiff has ground of complaint in respect of the judgment he has recovered, he may also carry the case to the Circuit Court of Appeals on the merits, and this he may do by way of cross-appeal or writ of error if the defendant has taken the case there, or independently, if the defendant has carried the case to this court on the question of jurisdiction alone, and in this instance the Circuit Court of Appeals will suspend a decision upon the merits until the question of jurisdiction has been determined. (5) The same observations are applicable where a plaintiff objects to the jurisdiction and is, or both parties are, dissatisfied with the judgment on the merits." U. S. v. Jahn, 155 U. S. 109, 114, 115, 39 L. ed. 87, 90. Where the Supreme Court has jurisdiction upon other grounds, it may reverse the judgment because of a lack of jurisdiction in the court of first instance, although no such objection was raised below. Perez v. Fernandez, 202 U. S. 80, 100, 50 L. ed. 942, 949.

[2] It is the proper practice to procure a formal certificate from the court of first instance stating that a question of jurisdiction is in issue, Maynard v. Hecht, 151 U. S. 324, 38 L. ed. 179; Carey v. Houston & T. C. Ry. Co., 150 U. S. 170, 179, 37 L. ed. 1041, 1043; Moran v. Hagerman, 151 U. S. 329, 38 L. ed. 181; Colvin v. Jacksonville, 157 U. S. 368, 39 L. ed. 736; Chappell v. U. S., 160 U. S. 499, 40 L. ed. 510; Lutcher v. U. S., 157 U. S. 427, 39 L. ed. 759; The Bayonne, 159 U. S. 687, 40 L. ed. 306; Van Wagenen v. Sewell, 160 U. S. 369, 40 L. ed. 400; Davis v. Geissler, 162 U. S. 290, 40 L. ed. 972; Robinson v. Caldwell, 165 U. S. 359, 41 L. ed. 745; Apapas v. U. S., 238 U. S. 587. The District Judge may sign the

certificate, even in a case decided by the Circuit Judge. Huntington v. Laidley, 176 U. S. 668, 677, 44 L. ed. 630, 634. If the certificate was duly given, the appeal may be taken and perfected, like other appeals, within two years. Herndon-Carter Co. v. James N. Norris, Son & Co., 224 U. S. 496, 56 L. ed. 857. But such a formal certificate is not indispensable, where the record shows a plain declaration by the court that the single matter sent up for decision is a question of jurisdiction. Shields v. Coleman, 157 U. S. 168, 177, 39 L. ed. 660, 663; Interior C. & I. Co. v. Gibney, 160 U. S. 217, 40 L. ed. 401; Smith v. McKay, 161 U. S. 355, 40 L. ed. 731; *Re* Lehigh Min. & Mfg. Co., 156 U. S. 322, 39 L. ed. 438; Harkrader v. Wadley, 172 U. S. 148, 43 L. ed. 399; Excelsior Wooden Pipe Co. v. Pacific Bridge Co., 185 U. S. 282, 46 L. ed. 910; Petri v. F. E. Creelman Lumber Co., 199 U. S. 487, 50 L. ed. 281; U. S. v. Larkin, 208 U. S. 333, 52 L. ed. 517; The Steamship Jefferson, 215 U. S. 130, 54 L. ed. 125; Davis v. C. C. C. & St. L. Ry. Co., 217 U. S. 157, 54 L. ed. 708; Herndon-Carter Co. v. James N. Norris, Son & Co., 224 U. S. 496, 56 L. ed. 857; McAllister v. Chesapeake & Ohio Ry. Co., 243 U. S. 302. Thus, where the petition for the allowance of the writ of error or appeal asks for a review of the judgment or decree upon a single question of jurisdiction, which is clearly specified therein or in the order granting the application, the question of jurisdiction is certified with sufficient formality, Ibid. The certificate may be made in the bill of exceptions. *Re* Lehigh Min. & Mfg. Co., 156 U. S. 322, 39 L. ed. 438; but not when other errors are assigned and there is no certificate. Filhiol v. Torney, 194 U. S. 356, 48 L. ed. 1014. See The Bayonne, 159 U. S. 687, 40 L. ed. 306; Chappell v. U. S., 160 U. S. 499, 40 L. ed. 510. In case there is doubt as to whether the question is jurisdictional, the form of the decree must be taken to express the meaning of the judge. The Ira M. Hedges, 218 U. S. 264, 270, 54 L. ed. 1039. A statement of the nature of the question in the certificate is not indispensable, provided that it appears elsewhere in the record, Chicago v. Mills, 204 U. S. 321, 51 L. ed. 504; and it seems that the opinion may be examined for the purpose of ascertaining this. Chicago v. Mills, 204 U. S. 321, 51 L. ed. 504. Where the grounds assigned in a demurrer were want of jurisdiction in the court as a Federal court, and also want of jurisdiction as a court of equity; it was held that a decree sustaining the demurrer and dismissing the bill for want of jurisdiction must be construed to refer to the want of Federal jurisdiction. Crawford v. McCarthy, C. C. A., 148 Fed. 198. A certificate stating the whole case and propounding a question which requires an analysis of the facts, Graver v. Faurot, 162 U. S. 435, 40 L. ed. 1030; Cross v. Evans, 167 U. S. 60, 42 L. ed. 77; Del Monte M. Co. v. Last Chance M. Co., 171 U. S. 55, 92, 43 L. ed. 72, 87; Sioux City, O'N. & W. Ry. Co. v. Manhattan Tr. Co., 172 U. S. 642, 43 L. ed. 1187; U. S. v. Union Pac. Ry. Co., 168 U. S. 505, 513, 42 L. ed. 559, 561; but see *Re* Lehigh Min. & Mfg. Co., 156 U. S. 322, 39 L. ed. 438; and the allowance of a prayer

the final sentences and decrees in prize causes;[3] in any case that involves the construction or application of the Constitution of the United States;[4] in any case in which the constitutionality

for an appeal "upon the ground that this court was without jurisdiction to make the decree," without specifying the defect, The Bayonne, 159 U. S. 687, 40 L. ed. 306; Chappell v. U. S., 160 U. S. 499, 40 L. ed. 510; see also Van Wagenen v. Sewall, 160 U. S. 369, 40 L. ed. 460; Chappell v. U. S., 160 U. S. 499, 40 L. ed. 510; and a certificate of a jurisdictional question when it does not appear there or in the record that it was in issue or affected the decision, Arkansas v. Schlierholz, 179 U. S. 598, 45 L. ed. 335; are not sufficient. It is the safer practice to make the record show by a statement in the pleading, or by a bill of exceptions, or in some other appropriate manner, that a question of jurisdiction was raised and decided with the nature of such question. C. H. Nichols Lumber Co. v. Franson, 203 U. S. 278, 51 L. ed. 181.

The question of jurisdiction cannot be certified to the Supreme Court by a District Court until after the final judgment or decree; McLish v. Ruff, 141 U. S. 661, 35 L. ed. 893; Bardes v. Hawarden First Nat. Bank, 175 U. S. 526, 44 L. ed. 261. It seems that a decree upon a petition of intervention cannot be thus reviewed until the final decision in the original cause. Keatley v. Furey, 226 U. S. 399, 57 L. ed. —. But a Circuit Court of Appeals may certify such a question at any time before its decision of the case. 26 St. at L. 828, § 6; *infra*, § 689. A District Court cannot grant such a certificate after the term at which the judgment or decree was entered. Colvin v. City of Jacksonville, 158 U. S. 456, 39 L. ed. 1053; The Bayonne, 159 U. S. 687, 40 L. ed. 306. It cannot at a later term grant the certificate *nunc pro tunc;* The Bayonne, 159 U. S. 687, 40 L. ed. 306; nor, it seems, can it then be set aside, or a new certificate made, for the reason that it was signed through inadvertence and that the decision was based upon another ground. Patch v. Wabash R. Co., 207 U. S. 277, 52 L. ed. 204. A dismissal for want of jurisdiction pursuant to a mandate of the Circuit Court of Appeals cannot be thus reviewed, Brown v. Alton Water Co., 222 U. S. 325, 56 L. ed. 221. Nor can there be a review by the Supreme Court where the District Court, after a reversal by the Circuit Court of Appeals, without permission from the latter court introduces new questions into the litigation. St. Louis, Kansas City & Colorado R. R. Co. v. Wabash R. R. Co. and City of St. Louis, 217 U. S. 247. 54 L. ed. 752.

[3] Irrespective of the amount involved. The Paquete Habanan, 175 U. S. 677, 44 L. ed. 320.

[4] Lamar v. U. S., 240 U. S. 60; McCurdy v. U. S., 246 U. S. 263. See *infra*, § 692. The question whether a State tax on patent rights is constitutional is one that involves the construction or application of the Constitution of the United States and not one arising under the patent laws. Holt v. Indiana Mfg. Co., C. C. A., 80 Fed. 1. So are the ques-

of any law of the United States, or the validity or construction of any treaty [5] made under its authority is drawn in question;

tions whether the Constitution allows the rules and regulations of a Department to have the force of law. Boske v. Comingore, 177 U. S. 459, 44 L. ed. 846. Where the court had authority to make an order, irrespective of the constitutional questions raised by the applicant for the same, no question concerning the construction or application of the Constitution is involved in an appeal from a judgment committing for contempt the party against whom the order is directed, Wise v. Mills, 220 U. S. 549, 55 L. ed. 579. Nor upon his appeal from an order denying his application for a writ of *habeas corpus* to discharge him from such commitment, Wise v. Henkel, 220 U. S. 556, 55 L. ed. 581. Where the only substantial point is whether an officer of the United States misconstrued a statute, an appeal from a District Court will be dismissed. Am. Sugar Refining Co. v. U. S., 211 U. S. 155, 53 L. ed. 129. See B. Altman & Co. v. U. S., 224 U. S. 583, 56 L. ed. 894. Where diverse citizenship exists, if the real question is the controlling effect as *res judicata* of a decree rendered between the parties in another suit, and whether the court rendering it had jurisdiction so to do and those questions are decided upon principles of general law the case is not one involving the construction and application of the Constitution and laws of the United States, and a direct appeal does not lie to the Supreme Court under § 5. Nor can the decision appealed from be converted into one involving the construction and application of the Constitution by averring argumentatively that to give such effect to the former adjudication amounts to depriving a party of due process of law. Empire State-Idaho Mining and Developing Company v. Hanley, 205 U. S. 225, 51 L. ed. 799; Jones v. Buffalo Creek Coal & Coke Co., 245 U. S. 328. *Cf.* Cosmopolitan Min. Co. v. Walsh, 193 U. S. 460, 48 L. ed. 749. It was held otherwise where the objection was substantial and not merely colorable, Fayerweather v. Ritch, 195 U. S. 276, 49 L. ed. 193.

[5] Florida v. Furman, 180 U. S. 402, 45 L. ed. 596; Rice v. Ames, 180 U. S. 371, 45 L. ed. 577; Ornelas v. Ruiz, 161 U. S. 502, 507, 40 L. ed. 787, 789; Borgmeyer v. Idler, 159 U. S. 408, 40 L. ed. 199; Muse v. Arlington Hotel Co., 168 U. S. 430, 42 L. ed. 531; Robinson v. Caldwell, 165 U. S. 359, 41 L. ed. 745; Budzisz v. Illinois Steel Co., 170 U. S. 41, 42 L. ed. 941; Mitchell v. Furman, 180 U. S. 402, 45 L. ed. 596; Pettit v. Walshe, 194 U. S. 205, 48 L. ed. 938; Towne v. Eisner, 245 U. S. 418, 38 Sup. Ct. 158, 62 L. ed. 372; McCurdy v. U. S., 246 U. S. 263, 38 Sup. Ct. 289, 62 L. ed. 706; The Pilot, C. C. A., 53 Fed. 11; *Re* Newman, 79 Fed. 615. This is the case although the jurisdiction was invoked solely because of diverse citizenship, as for other reasons, Florida v. Furman, 180 U. S. 402, 45 L. ed. 596; B. Altman & Co. v. U. S., 224 U. S. 583, 56 L. ed. 894; Wilson Cypress Co. v. Del Pozo y Marcos, 236 U. S. 635; and the questions

and in any case in which the constitution or law of a State [6] is

arising under the treaties were not discussed upon the trial, McGovern v. Phila. & Reading Ry. Co., 235 U. S. 389 (where they had been discussed upon a previous motion when a new trial was directed). A suit by an Indian to determine his rights under a patent conveying lands to him in severalty, in accordance with the provisions of a treaty between his tribe and the United States, involves, it has been held, the construction of a treaty of the United States, is appealable directly to the Supreme Court and cannot be reviewed by the Circuit Court of Appeals. Terry v. Bird, C. C. A., 129 Fed. 592. So where the complainant's case depended upon the construction of treaties with Indians in regard to reservations and the contention that some of these had been repealed by the subsequent admission of the Territory into the Union as a State, Johnson v. Gearlds, 234 U. S. 422. Where it was contended that the rate fixed by a tariff law is a violation of a reciprocal agreement between the United States and a foreign nation, entered into by the President under authority of a previous statute. B. Altman & Co. v. U. S., 224 U. S. 583, 56 L. ed. 894. Where the controversy below concerned the consequence of a change in sovereignty, by reason of the cession of the Philippine Islands, the construction of the treaty made between the United States and Spain in 1898 was involved, and the Supreme Court took jurisdiction of the appeal. Vilas v. City of Manila, 220 U. S. 345, 55 L. ed. 491. But *not* a decision as to the right to the exclusive use of a trade mark or trade name in the Philippines, Compañia General v. Alhambra Cigar Co., 249 U. S. 73, 39 Sup. Ct. 224, 63 L. ed. 484. *Nor* a case involving the construction of the statutes regulating the immigration of Chinese; Chin Fong v. Backus, 241 U. S. 1. As to Mexican land grants, see Cordova v. Grant, Executor of Cotton, 248 U. S. 413.

[6] A municipal ordinance. Penn Mut. L. Ins. Co. v. Austin, 168 U. S. 685, 42 L. ed. 626; Owensboro v. Owensboro Water Works, C. C. A., 115 Fed. 318; or the order of a State commission, Arkadelphia Milling Co. v. St. Louis Southwestern Railway Co., 249 U. S. 134; Railroad Commission v. Morgan's L. & T. R. & S. S. Co., C. C. A., 195 Fed. 66, is a law of the State within the meaning of the statute; § 692, *infra;* § 25, *supra.* Where the bill attacked a State statute as unconstitutional and a general demurrer for want of equity was sustained, the court refused to dismiss the appeal, although the bill also asserted that complainant's product was not one of those specified in the statute, when it further alleged that the State officer therein named had construed the statute as applicable thereto. Savage v. Jones, 225 U. S. 501, 56 L. ed. 1182. The contention that a change in the decision of the State courts as to the construction of a state statute is an impairment of an obligation of a contract does not give the Supreme Court immediate jurisdiction. Moore-Mansfield Constr. Co. v. Electrical Installation Co., 234 U. S. 619. But see *infra,* § 692.

claimed to be in contravention of the Constitution of the United States."[7]

A criminal case, when it involves the construction or application of the Constitution of the United States, may be taken by

[7] Jud. Code, § 238, 36 St. at L. 1087; Illinois Cent. Ry. Co. v. Adams, 180 U. S. 28, 45 L. ed. 419. An order of a State board or commission acting under a State statute is considered to be a State law within the meaning of this statute, Arkadelphia Milling Co. v. St. Louis Southwestern Ry. Co., 249 U. S. 134, 39 Sup. Ct. 237, 63 L. ed. 517. It is not essential to the jurisdiction of the appeal that a right under the Constitution and laws of the United States should be claimed in the plaintiff's pleading, when it was duly claimed during the case. City of Memphis v. Cumberland Tel. & Tel. Co., 218 U. S. 624, 54 L. ed. 1185. It is too late to raise the question for the first time in the assignments of error. Cincinnati, H. & L. R. Co. v. Thiebaud, 177 U. S. 615, 44 L. ed. 911. Apapas v. U. S., 233 U. S. 587. After a former review of a case arising under the Constitution the Supreme Court may review a supplemental decision of the District Court therein in which no constitutional questions are considered; St. Louis, Iron Mountain & So. Ry. Co. v. J. F. Hasty & Sons, 255 U. S. 252. The fact that there are also allegations of diversity of citizenship in a bill praying relief founded upon the Federal Constitution does not prevent the immediate review of such a case by the Supreme Court. Field v. Barber Asphalt Paving Co., 194 U. S. 618, 48 L. ed. 1142. The Supreme Court has jurisdiction whether the right claimed under the Constitution was upheld or denied in the court below, Holder v. Aultman M. & Co., 169 U. S. 81, 42 L. ed. 669, provided that the appellant is aggrieved by such decision, Empire State-Idaho Min. & Developing Co. v. Hanley, 198 U. S. 292, 49 L. ed. 1056; McCandless v. Pratt, 211 U. S. 437, 53 L. ed. 271. But where the constitutional question and the question of jurisdiction are both decided by the District Court in favor of the plaintiff, he cannot appeal to the Supreme Court from a decree against him on the merits. Anglo-American Provision Co. v. Davis Provision Co., 191 U. S. 376, 48 L. ed. 228. By taking and arguing an appeal to the Circuit Court of Appeals, which has jurisdiction thereof upon other grounds, in a case involving constitutional questions, the right to an appeal to the Supreme Court is waived. Carter v. Roberts, 177 U. S. 496, 44 L. ed. 861; Am. Sugar Refining Co. v. New Orleans, 181 U. S. 277, 45 L. ed. 859; Cary Mfg. Co. v. Acme Flexible Clasp Co., 187 U. S. 427, 47 L. ed. 244; Ayres v. Polsdorfer, 187 U. S. 585, 47 L. ed. 314; McFadden v. U. S., 213 U. S. 288; Mackenzie v. Pease, C. C. A., 146 Fed. 743; *infra*, § 693. *Cf.* Union Tr. Co. of St. Louis v. Westhus, 228 U. S. 519, 57 L. ed. —, where a constitutional question was introduced in the court of first instance after a reversal by the Circuit Court of Appeals. Brown v. Alton Water Co., 222 U. S. 325, 56 L. ed. 221.

the defendant directly from a District Court to the Supreme Court of the United States, although there has been no conviction of a capital crime.[8] So may an order denying the writ of habeas corpus.[9]

Until a recent statute, the United States could not review by writ of error a judgment of acquittal in a criminal case, except possibly when a constitutional, jurisdictional or treaty question was involved.[10] It is now provided: "That a writ of error may be taken by and on behalf of the United States from the District [or Circuit] Courts direct to the Supreme Court of the United States in all criminal cases, in the following instances, to-wit: From a decision or judgment quashing, setting aside, or sustaining a demurrer to, any indictment, or any count thereof, where such decision or judgment is based upon the invalidity, or construction of the statute upon which the indictment is founded. From a decision arresting a judgment of conviction for insufficiency of the indictment, where such decision is based upon the invalidity or construction of the statute upon which the indictment is founded. From the decision or judgment sustaining a special plea in bar, when the defendant has not been put in jeopardy."[11]

[8] Motes v. U. S., 178 U. S. 458, 44 L. ed. 1150; Burton v. U. S., 196 U. S. 283, 49 L. ed. 482; Williamson v. U. S., 207 U. S. 425, 52 L. ed. 278. Prior to the Judicial Code, the Supreme Court had jurisdiction to review immediately the final judgment of any court of the United States in case of conviction of a capital crime. Act of Feb'y 6, 1889, 25 St. at L. 655, ch. 113, § 6; Evarts Act, 26 St. at L. 826, § 5. It was said: that the jurisdiction in such a case depended on the sentence which could be imposed, although the actual punishment was imprisonment. Fitzpatrick v. U. S., 178 U. S. 304, 44 L. ed. 1078. A conviction of murder in the second degree, for which the statutory penalty was imprisonment alone, cannot be thus reviewed. Rakes v. U. S., 212 U. S. 55, 53 L. ed. 401. Where the plaintiff in error was convicted of conspiracy under an indictment charging conspiracy and murder; it was held that the Circuit Court of Appeals should review the case. Davis v. U. S., C. C. A., 107 Fed. 753; approved in Rakes v. U. S., 212 U. S. 55, 57.

[9] Horner v. U. S., No. 2, 143 U. S. 570, 36 L. ed. 266; Rice v. Ames, 180 U. S. 371, 45 L. ed. 577; *supra*, § 467.

[10] U. S. v. Sanges, 144 U. S. 310, 36 L. ed. 445.

[11] 34 St. at L. 1246; quoted in full *supra*, § 536. This statute is constitutional. Taylor v. U. S., 207 U. S. 120, 52 L. ed. 130; U. S. v. Bitty, 208 U. S. 393, 52 L. ed. 543.

The Supreme Court of the United States has power to exercise jurisdiction in its nature appellate by means of the writs of prohibition, *certiorari*, mandamus, and *habeas corpus*, as hereinafter described.[12]

In suits brought by the United States under the Interstate Commerce law, or the act to protect trade and commerce against unlawful restraints and monopolies, an appeal from the final decree will lie only to the Supreme Court.[13]

The word "construction" in the act includes interpretation. U. S. v. Keitel, 211 U. S. 370, 53 L. ed. 230. The writ of error brings up for review only the decision of the lower court concerning the subjects embraced within the clauses of the statute, and not the whole case U. S. v. Keitel, 211 U. S. 370, 398, 53 L. ed. 230, 245. The construction of the indictment is not brought up for review. U. S. v. Herr *et al*, 211 U. S. 404, 53 L. ed. 251; U. S. v. Herr, 211 U. S. 406, 53 L. ed. 252; U. S. v. Keitel, 211 U. S. 370, 397, 53 L. ed. 230, 244. If the court of first instance erred in the construction of the statute, its decision will be reversed without passing upon the contention that the indictment, when correctly construed, stated no offense, U. S. v. Keitel, 211 U. S. 370, 398, 53 L. ed. 230, 244; U. S. v. Herr, 211 U. S. 406, 53 L. ed. 252; or that it was rightly quashed for other defects in the same. U. S. v. Keitel, 211 U. S. 370, 397, 53 L. ed. 230, 244. An action to recover a statutory penalty, U. S. v. Baltimore & O. S. W. R. Co., C. C. A., 159 Fed. 33; or to recover the penalty named in a recognizance, given by defendant in a criminal case, U. S. v. Zarafonitis, C. C. A., 150 Fed. 97, are, it has been held, criminal proceedings, and the United States may bring the same by writ of error to the Circuit Court of Appeals for review. A proceeding to punish a party for contempt is, in effect, a criminal case. O'Neal v. U. S., 190 U. S. 36, 47 L. ed. 945. Jud. Code, § 128, re-enacting 36 St. at L. 1087. When the trial court, besides holding the indictment defective for not following the language of the statute bases its decision also upon the ground that the statute does not apply to the facts alleged, the decision as to the latter ground is reviewable. U. S. v. Davis, 243 U. S. 570.

[12] *Supra*, §§ 456-460; *infra*, § 689.

[13] 32 St. at L. 823. The Evarts Act, 26 St. at L. 828, § 6, repealed U. S. R. S., §§ 651 and 697; U. S. v. Rider, 163 U. S. 132, 41 L. ed. 101; U. S. v. Hewecker, 164 U. S. 46, 41 L. ed. 345; U. S. R. S., § 763; Webb v. York, 74 Fed. 753. See *Ex parte* Lennon, 150 U. S. 393, 37 L. ed. 1120, 18 St. at L. 315, § 3; The Havilah, C. C. A., 48 Fed. 684. It also repealed so much of § 16 of the Interstate Commerce Law as allowed appeal direct to the Supreme Court from certain orders of the Circuit Court under the act. Interstate Com. Com's v. Atchison, T. & S. F. R. Co., 149 U. S. 264, 37 L. ed. 727. 30 Jud. Code § 241, 36 St. at L. 1087, re-enacting 26 St. at L. 828, § 6.

Appeals from orders granting or denying after notice and hearing interlocutory injunctions suspending or restraining the enforcement, operation, or execution of, or setting aside in whole or in part, orders of the Interstate Commerce Commission,[14] and orders of the United States Shipping Board,[15] and appeals from interlocutory injunctions suspending or restraining the operation or execution of a State statute by restraining the action of a State officer in the enforcement or execution of such statute or in the enforcement or execution of an order made by an administrative board or commission acting under and pursuant to the State statutes[16] are appealable directly to the Supreme Court of the United States.

In cases taken directly to the Supreme Court, where a constitutional question is raised, the Supreme Court reviews all the questions in the case, not merely the constitutional question.[17]

[14] Act of October 22, 1913, ch. 32, 38 St. at L. 220, Comp. St. § 998, *supra*, § 100b.

[15] Act of Sept. 7, 1916, ch. 451, § 31, 39 St. at L. 735, Comp. St. § 8146oo, *supra*, § 100c.

[16] Jud. Code, § 266, 36 St. at L. 1087, as amended by Act of March 4, 1913, Comp. St. § 1243, *supra*, § 105d. The facts as well as the law will be reviewed upon such an appeal, City of Cincinnati v. Cincinnati & Hamilton Traction Co., 245 U. S. 446, 38 Sup. Ct. 153, 62 L. ed. 389. No such appeal lies from a second injunction order issued in aid of an injunction previously granted. Looney v. Eastern Texas R. Co., 247 U. S. 214, 38 Sup. Ct. 460, 62 L. ed. 1084.

[17] Ekiu v. U. S., 142 U. S. 651, 35 L. ed. 1146; Horner v. U. S., No. 2, 143 U. S. 570, 36 L. ed. 266; Carey v. Houston & T. C. R. Co., 150 U. S. 170, 37 L. ed. 1041; Penn. Mutual Life Ins. Co. v. Austin, 168 U. S. 685, 42 L. ed. 626; B. Altman & Co. v. U. S., 224 U. S. 583, 56 L. ed. 894. Northwestern Laundry v. City of Des Moines, 239 U. S. 486. There is then no occasion to consider the constitutional question if the case may be disposed of on other grounds. McCurdy v. U. S., 246 U. S. 263. A cross-appeal, or cross writ of error taken by the respondent to review questions not involving the construction or application of the Constitution will also be then determined. Field v. Barber Asphalt Paving Co., 194 U. S. 618, 48 L. ed. 1142; Boise Artesian Hot and Cold Water Co. v. Boise City, 230 U. S. 84. Where a Circuit Court of Appeals has acted without jurisdiction because the sole question at issue arose under the Constitution of the United States, the Supreme Court will reverse its decree without passing upon the merits. Union & Planters' Bank v. Memphis, 189 U. S. 71, 74, 47 L. ed. 712, 714. See Mississippi R. R. Comm. v. L. & N. R. R. Co., 225 U. S. 272, 56 L. ed. 1087.

The Supreme Court will not take jurisdiction upon this ground unless there is a substantial controversy which is not merely colorable concerning the construction or application of the Constitution, or the validity or construction of a treaty.[18] No appeal or writ or error lies until final judgment or decree.[19] The Supreme Court has jurisdiction to review the judgments of the District Courts dismissing claims against the United States where the amount in controversy exceeds three thousand dollars or the claim is forfeited to the United States for fraud; but not otherwise; and also all judgments of such courts for the re-

[18] *Ex* Lennon, 150 U. S. 393, 37 L. ed. 1120; Carey v. Houston & T. Ry. Co., 150 U. S. 170, 37 L. ed. 1041; C. A. Treat Mfg. Co. v. Standard S. & I. Co., 157 U. S. 674, 39 L. ed. 823; Merritt v. Bowdoin College, 169 U. S. 551, 42 L. ed. 850; Muse v. Arlington Hotel Co., 168 U. S. 430; Central Tr. Co. v. Citizens' St. Ry. Co., 82 Fed. 1; City of Indianapolis v. Central Tr. Co., 83 Fed. 529; s. c., 27 C. C. A. 580; Cornell v. Green, 163 U. S. 75, 41 L. ed. 76; Consolidated Water Co. v. Babcock, 173 U. S. 702, 45 L. ed. 1257; Lampasas v. Bell, 180 U. S. 276, 45 L. ed. 527; Am. Sugar Refining Co. v. U. S., 211 U. S. 155, 53 L. ed. 129; Franklin v. U. S., 216 U. S. 559, 54 L. ed. 615; Brolan v. U. S., 236 U. S. 216; United Surety Co. v. Am. Fruit Product Co., 238 U. S. 140. When the constitutionality of the statute that is attacked has been sustained by a previous decision, the appeal will be dismissed, Chicago Junction Ry. Co. v. King, 222 U. S. 222, 56 L. ed. 173; but not when there has been a division of opinion in the court below, or there is a conflict of opinion in prior decisions as to the point involved, or an analysis of former decisions is necessary in order to ascertain whether they have passed upon the point in question, Louisville & Nashville R. R. Co. v. Melton, 218 U. S. 36, 54 L. ed. 921; nor where the bill attacks the constitutionality of a State statute, upon the validity of which the Supreme Court has not previously passed, and the application of prior decisions upon statutes which, it is contended, are similar, goes to the merits, Ontario Land Co. v. Wilfong, 223 U. S. 543, 56 L. ed. 544. When a constitutional question has been settled by a unanimous decision of the Supreme Court it cannot be subject of another appeal. Sloan v. U. S., 193 U. S. 614, 48 L. ed. 814; Farrell v. O'Brien, 199 U. S. 89, 50 L. ed. 101; Harris v. Rosenberger, C. C. A., 145 Fed. 449; *supra*, § 24. When a constitutional question existed in the case at the time the writ of error was sued out, the Supreme Court retains jurisdiction to decide the other questions therein, although the objection founded upon the Constitution has been obviated. Williamson v. U. S., 207 U. S. 425, 434, 52 L. ed. 278, 285.

[19] McLish v. Roff, 141 U. S. 661, 35 L. ed. 893; *infra*, § 695.

covery of claims against the United States,[20] except customs cases.[21] The Supreme Court can review directly the decree of the District Court entered upon its mandate.[22]

§ 688a. Review by the Supreme Court of the decisions of the Circuit Courts of Appeals. The Judicial Code further provides: that "the judgments and decrees of the Circuit Courts of Appeals shall be final in all cases in which the jurisdiction is dependent entirely upon the opposite parties to the suit or controversy, being aliens, and citizens of the United States, or citizens of different States;[1] also, in all cases arising under the

[20] Reid v. U. S., 211 U. S. 529, 53 L. ed. 313. See Arkansas v. Schlierholz, 179 U. S. 598, 45 L. ed. 335; Homer Fritch v. U. S., 248 U. S. 459; *infra*, § 711.

[21] See *infra*, § 689a.

[22] Arkadelphia Co. v. St. Louis S. W. Ry. Co., 249 U. S. 134; McCormick v. Oklahoma City, 236 U. S. 657.

§ 688a. [1] The Supreme Court can review by writ of error or appeal the final decision of a Circuit Court of Appeals provided the matter in controversy exceeds one thousand dollars besides costs, in a case where the plaintiff's pleading shows that jurisdiction exists both because of diverse citizenship and because the case arises under the Constitution or the laws of the United States, although the plaintiff himself invoked the jurisdiction because of the diversity of the citizenship alone, No. Pac. Ry. Co. v. Soderberg, 188 U. S. 526, 47 L. ed. 575; Benedict v. New York, 250 U. S. 321, 39 Sup. Ct. 476, 63 L. ed. 1005; but not where the complainant does not in his pleading invoke the protection of the Federal constitution; Omaha Electric Light and Power Co. v. City of Omaha, 230 U. S. 123. A recital that a judgment was rendered in another State is not equivalent to the assertion of the constitutional right that full faith and credit be given thereto. Bagley v. General Fire Extinguisher Co., 212 U. S. 477, 53 L. ed. 605. Nor where the alleged infractions of the Constitution are without color or merit, or are anticipatory of the defense. Denver v. N. Y. Trust Co., 229 U. S. 123; G. & C. Merriam Co. v. Syndicate Pub. Co., 237 U. S. 618; Norton v. Whiteside, 239 U. S. 144. Nor where the case has been removed from a State court solely because of diverse citizenship, Louisville and Nashville R. R. Co. v. W. U. Tel. Co., 237 U. S. 300; D. L. & W. R. R. Co. v. Yurkonis, 238 U. S. 439; Southern Pacific Co. v. Stewart, 245 U. S. 359, 38 Sup. Ct. 130, 62 L. ed. 345, where the plaintiff in its pleading had referred to an act of Congress. Nor where the constitutional question is not raised until the trial. Bagley v. General Fire Extinguisher Co., 212 U. S. 477, 53 L. ed. 605; Chicago Junction Ry. Co. v. King, 222 U. S. 222, 56 L. ed. 173. See City of Memphis v. Cumberland Tel. & Tel. Co., 218 U. S. 624, 54 L. ed. 1185; Boise Artesian Hot and Cold Water Co. v. Boise City (2), 230 U. S. 98. Nor where the original ground of

patent laws,[2] under the trade-mark laws,[3] under the copyright laws,[4] under the revenue laws,[5] and under the criminal

jurisdiction and the only one that appeared by the plaintiff's pleading was a difference of citizenship, although subsequently another ground for jurisdiction appeared, Colorado C. C. Min. Co. v. Turck, 150 U. S. 138, 37 L. ed. 1030; Borgmeyer v. Idler, 159 U. S. 408, 40 L. ed. 199; Third St. & Suburban Ry. Co. v. Lewis, 173 U. S. 457, 43 L. ed. 766; Am. Sugar Refining Co. v. New Orleans, 181 U. S. 277, 45 L. ed. 859. See also Benjamin v. New Orleans, 169 U. S. 161, 42 L. ed. 700; *Re* Jones, 164 U. S. 691, 41 L. ed. 601; Loeb v. Columbia Township, 179 U. S. 472, 45 L. ed. 280; Ayres v. Polsdorfer, 187 U. S. 585, 47 L. ed. 314. Nor in ancillary proceedings, Gregory v. Van Ee, 160 U. S. 643, 40 L. ed. 566; Carey v. Houston & T. C. R. Co., 161 U. S. 115, 40 L. ed. 638, including a suit for the collection of assets, brought by a receiver appointed by a Federal court; Pope v. Louisville, N. A. & C. R. Co., 173 U. S. 573, 43 L. ed. 814. Nor in proceedings upon petitions of intervention, Rouse v. Hornsby, 161 U. S. 588, 40 L. ed. 817; Gregory v. Van Ee, 160 U. S. 643, 40 L. ed. 566. Nor in suits brought by and against receivers of Federal courts when the sole ground of jurisdiction is that in the suits wherein they were appointed there was a diversity of citizenship, Pope v. Louisville, N. A. & C. Ry. Co., 173 U. S. 573, 43 L. ed. 814; Rouse v. Hornsby, 161 U. S. 588, 40 L. ed. 817; Carey v. Houston & T. C. Ry. Co., 161 U. S. 115, 40 L. ed. 638. But the Supreme Court may review a decree upon a petition by a receiver for relief against a violation of a right secured by the Constitution of the United States. Railroad Commission v. Worthington, 225 U. S. 101, 56 L. ed. 1004. Nor in suits to which national banking associations are parties and there is no other Federal question in the case; Continental Nat. Bank v. Buford, 191 U. S. 119, 48 L. ed. 119.

[2] See *supra*, § 29.

[3] Hutchinson, Pierce & Co. v. Loewy, 217 U. S. 457, 54 L. ed. 838; 33 St. at L. 724-731, ch. 592, §§ 1-30. This was not repealed by the Judicial Code. Street & Smith v. Atlas Mfg. Co., 231 U. S. 348; Hanover Star Milling Co. v. Metcalf, 240 U. S. 403; see *supra*, § 30.

[4] Webster v. Daly, 163 U. S. 155; Street v. Atlas Mfg. Co., 231 U. S. 348, 351, 34 Sup. Ct. 73, 58 L. ed. 262. So, in suits for damages on account of the infringement of a common-law copyright, Press Pub. Co. v. Monroe, 164 U. S. 105, 41 L. ed. 367. The Supreme Court took jurisdiction of a writ of error to review the judgment in a suit to recover penalties exceeding one thousand dollars for breach of copyright; Brady v. Daly, 175 U. S. 148, 44 L. ed. 1009. See *supra*, § 29.

[5] Suits to review the decisions of the board of general appraisers, arise under the revenue laws, Anglo-Californian Bank v. U. S., 175 U. S. 37, 44 L. ed. 64. The decision of a Circuit Court of Appeals is not final where the case arises under the internal revenue laws. Spreckles Sugar Ref. Co. v. McClain, 192 U. S. 397, 48 L. ed. 496, or tariff laws,

laws,[6] and in admiralty[7] cases."[8] By the Act of September 6, 1916, this finality was extended to "judgments and decrees of the Circuit Courts of Appeals in all proceedings and causes arising under 'An Act to establish a uniform system of bankruptcy throughout the United States,' approved July first, eighteen hundred and ninety-eight,[9] and in all controversies arising in such proceedings and causes; also, in all causes arising under 'An Act relating to the liability of common carriers by railroad to their employees in certain cases,' approved April twenty-second, nineteen hundred and eight;[10] also, in all causes arising under 'An Act to promote the safety of employees and travelers upon railroads by limiting the hours of service of employees thereon,' approved March fourth, nineteen hundred and seven;[11] also, in all causes arising under 'An Act to promote the safety of employees and travelers upon railroads by compelling common carriers engaged in interstate commerce to equip their cars with automatic couplers and continuous brakes and their locomotives with driving-wheel brakes, and for other purposes,' approved March second, eighteen hundred and ninety-three;[12] and also, in all causes arising under any amendment or supplement to any one of the aforementioned Acts which has been heretofore or may hereafter be enacted, shall be final."[13] "All cases not hereinbefore, in this section, made final[14] there shall be

B. Altman & Co. v. U. S., 224 U. S. 583, 56 L. ed. 894, and the plaintiff in his pleading questions the constitutionality of such a statute.

[6] Proceedings upon a writ of *scire facias* to enforce a forfeited recognizance or bail bond to secure the appearance of the defendant to a criminal charge arise "under the criminal laws," Hunt v. U. S., 166 U. S. 424, 41 L. ed. 1063.

[7] Proceedings to limit the liability of ship-owners are admiralty cases. Oregon R. & Nav. Co. v. Balfour, 179 U. S. 55, 45 L. ed. 82.

[8] Jud. Code, § 128, 36 St. at L. 1087; Ibid. § 241.

[9] *Supra*, § 669.

[10] See D. L. & W. R. R. Co. v. Yurkonis, 239 U. S. 652; Missouri, Kansas & Texas Ry. Co. v. Wulf, 226 U. S. 570, 57 L. ed. —.

[11] Chicago Junction Ry. Co. v. King, 222 U. S. 222, 56 L. ed. 173.

[12] Act of Jan'y 28, 1915, ch. 22, § 4, as amended Sept. 6, 1916, ch. 448, § 3, Comp. St. § 1120a.

[13] Jud. Code, § 128, 36 St. at L. 1087, Ibid. § 241, Comp. St. § 1120.

[14] Such decisions are *not final* where one of the parties is a foreign State. Columbia v. Cauca Co., 190 U. S. 524, 47 L. ed. 1150. Nor in cases under the Pure Food & Drugs Act. Four Hundred and Forty-three Cans of Frozen Egg Product v. U. S., 226 U. S. 172, 57 L. ed. —. See *supra*,

of right an appeal or writ of error or review of the case by

§ 607.. Under the Mining Laws. Butte & Superior Copper Co. v. Clark-Montana Realty Co., 249 U. S. 12; or land laws, Florida C. & P. R. Co. v. Bell, 176 U. S. 321, 44 L. ed. 486; of the United States, where the plaintiff's pleading claims relief thereunder and shows that there is a controversy between him and the defendant as to their construction. See *supra*, § 31. Suits to enforce a lien or title under a decree or judgment of a Federal court; Kansas City Ry. Co. v. Guardian Trust Co., 240 U. S. 166, 178. Suits brought against a marshal of the United States and a private person on account of an alleged wrongful execution of the process of a Federal court; Sonnentheil v. Christian Moerlein Br. Co., 172 U. S. 401, 43 L. ed. 492. See *supra*, § 39. A suit brought against a receiver of a national bank appointed by the Comptroller, Auten v. U. S. Nat. Bank, 174 U. S. 125, 43 L. ed. 920, or by a creditor of a national bank, to enforce the statutory liability of the stockholders therein, Wyman v. Wallace, 201 U. S. 230, 50 L. ed. 738. A suit brought by the United States to cancel a patent for an invention; U. S. v. Am. Bel. Tel. Co., 159 U. S. 548, 40 L. ed. 255; or to dissolve an association formed to monopolize interstate commerce; U. S. v. Trans-Missouri Freight Ass'n, 166 U. S. 290, 41 L. ed. 1007. A suit brought by the Interstate Commerce Commission to enforce one of its orders, Interstate Commerce Com'n v. Detroit, G. H. & M. Ry. Co., 167 U. S. 633, 42 L. ed. 306. Formerly the decisions of the Circuit Courts of Appeals were not final where the Federal jurisdiction depended solely upon the fact that the party is a corporation chartered by Congress. No. Pac. R. Co. v. Amato, 144 U. S. 465, 36 L. ed. 506 (in which the author was counsel); Union Pac. R. Co. v. Harris, 158 U. S. 326, 39 L. ed. 1003; Texas & Pac. Ry. Co. v. Gentry, 163 U. S. 353, 41 L. ed. 186; Texas & Pacific Railway Co. v. Hill, 237 U. S. 208; Texas & Pacific Railway Co. v. Marcus, 237 U. S. 215. It has been said that where there is jurisdiction, because the cause of action rests on a statute of the United States, and none of the contentions directly invoke the interpretation of the statute, but merely the question whether on the evidence there was a right of recovery; the case belongs to that class in which it was the purpose of Congress to make the judgment of the Circuit Court of Appeals final, and the Supreme Court will only examine the record to see if plain error has been committed, and if that is not apparent it will affirm the judgment. Chicago Junction Ry. Co. v. King, 222 U. S. 222, 56 L. ed. 173. But see No. Pac. R. Co. v. Amato, 144 U. S. 465, 36 L. ed. 506; Union Pac. R. Co. v. Harris, 158 U. S. 326, 39 L. ed. 1003; Texas & Pac. Ry. Co. v. Gentry, 163 U. S. 353, 41 L. ed. 186. Where the District Court would not have had jurisdiction had the allegations of diverse citizenship been stricken from the plaintiff's pleading, its decision is final. Bagley v. General Fire Extinguisher Co., 212 U. S. 477, 53 L. ed. 605; Weir v. Rountree, 216 U. S. 607, 54 L. ed. 635; Shine v. Fox Bros. Mfg. Co., 216 U. S. 609, 54 L. ed. 636.

the Supreme Court of the United States[15] where the matter in controversy shall exceed one thousand dollars besides costs."[16] No such appeal lies from a decree of such a court that is not final in its nature,[17] nor from an order affirming or reversing an interlocutory order for an injunction.[18] In all these cases the Supreme Court may review the decision by *certiorari*.[19]

§ 689. Review by the Supreme Court through certiorari of decisions of the Circuit Courts of Appeals. "In any case, civil or criminal, in which the judgment or decree of the circuit court of appeals is made final by the provisions of this title it shall be competent for the Supreme Court to require, by certiorari or otherwise, upon the petition of any party thereto, any such case to be certified to the Supreme Court for its review and determination, with the same power and authority in the case as if it had been carried by appeal or writ of error to the Supreme Court."[1]

A *certiorari* will issue from the Supreme Court under this section of the Judicial Code where questions of gravity or importance are involved[2] or in the interest of uniformity of de-

[15] San Pedro, Los Angeles & Salt Lake Railroad Co. v. U. S., 247 U. S. 307. A stipulation that the daily interstate shipments from the competitive points in question exceeded $1,000, when coupled with an allegation in the answer that free competition would cause great loss and possible financial ruin to the railroad company, were sufficient proof that the matter in controversy exceeded $1,000; U. S. v. Trans-Missouri Freight Ass'n, 166 U. S. 290, 41 L. ed. 1007. No appeal lies to the Supreme Court from a decree of a Circuit Court of Appeals upon an application for the writ of *habeas corpus*, since the matter in controversy cannot be measured in money. Lau Ow Bew v. U. S., 144 U. S. 47, 36 L. ed. 340. See *supra*, §§ 6-18, *infra*, § 693.

[16] Jud. Code § 128; San Pedro L. A. & S. L. R. Co. v. U. S., 247 U. S. 307, 38 Sup. Ct. 498, 62 L. ed. 1129. See *infra*, § 696.

[17] U. S. v. Krall, 174 U. S. 385, 43 L. ed. 1017; MacLeod v. Graven, C. C. A., 79 Fed. 84. *Infra*, § 695.

[18] Kirwan v. Murphy, 170 U. S. 205, 42 L. ed. 1009; Union Pac. R. Co. v. Board of Com'rs, 247 U. S. 282, 38 Sup. Ct. 510, 62 L. ed. 1110.

[19] See *infra*, § 689.

§ 689. [1] Jud. Code § 240, 36 St. at L. 1087.

[2] It will usually issue where questions of international importance are involved; *Re* Lau Ow Bew, 141 U. S. 583, 587, 588, 35 L. ed. 868, 869, 870; U. S. v. The Three Friends, 166 U. S. 1, 41 L. ed. 897, and where there is a question as to the disqualification of a judge of the Circuit Court of Appeals to sit in the case. American Constr. Co.

cision.[3] The writ is issued with great liberality in cases of admiralty[4] and in cases brought under section 16 of the Act to regulate commerce,[5] but rarely in patent cases where no fundamental principle is involved. The writ may issue in a case which the Circuit Court of Appeals has dismissed for an alleged want of jurisdiction.[6] The Supreme Court may,[7] but rarely will,[8] order the certification of the record on an appeal to the Circuit Court of Appeals from an interlocutory order.

v. Jacksonville, T. & K. W. Ry. Co., 148 U. S. 372, 37 L. ed. 486. For the issue of the writ to review a decree in a suit for the infringement of a patent and copyright and to restrain unfair competition, see Meccano v. Wanamaker, 253 U. S. 136. For its issue in a suit to restrain the infringement of a trademark, see United Drug Co. v. Theodore Vectanus Co., 248 U. S. 90, 39 Sup. Ct. 48, 63 L. ed. 141.

[3] *Re* Woods, 143 U. S. 202, 206, 36 L. ed. 125, 126, per Fuller, C. J. *Cf.* Chicago & N. W. Ry. Co. v. Osborne, 146 U. S. 354, 36 L. ed. 1002; where there is a difference of opinion between different Circuit Courts of Appeals; Columbus Watch Co. v. Robbins, 148 U. S. 266, 37 L. ed. 445; Hanover Star Milling Co. v. Metcalf, 240 U. S. 403. But see Meccano, Ltd. v. John Wanamaker, 253 U. S. 136; where there is an important conflict between the decisions of a Circuit Court of Appeals and a State Supreme Court in the same circuit; Forsyth v. Hammond, 166 U. S. 506, 41 L. ed. 1095; Anderson v. Moyer, 139 Fed. 499.

[4] See The Kensington, 183 U. S. 263, 22 Sup. Ct. 102, 46 L. ed. 190, in which the author was counsel.

[5] Southern Pac. Co. v. Darnell-Taenzer Lumber Co., 245 U. S. 531, 535.

[6] Kingman & Co. v. Western Mfg. Co., 170 U. S. 675, 42 L. ed. 1192; American S. R. Co. v. New Orleans, 181 U. S. 277, 45 L. ed. 859.

[7] American Constr. Co. v. Jacksonville, T. & K. W. Ry. Co., 148 U. S. 372, 386, 37 L. ed. 486, 492; Harriman v. Northern Securities Co., 197 U. S. 244, 49 L. ed. 739; Flannelly v. Delaware & Hudson Co., 225 U. S. 597, 56 L. ed. 1221, an order granting a new trial. Upon such an appeal the court may dismiss the bill, Denver v. N. Y. Trust Co., 229 U. S. 123.

[8] Denver v. N. Y. Trust Co., 229 U. S. 123. A refusal of the writ upon an interlocutory application is not equivalent to an affirmance. Ibid. Boise Commercial Club v. Oregon Short Line R. Co., C. C. A., 260 Fed. 769, 772, per Learned Hand, J. "We assume that ordinarily the denial of the writ of *certiorari* by the Supreme Court may not indicate the expression of an opinion in affirmance of the law of the case as applied by the Circuit Court of Appeals, but where there is a single question involved, and that question is entirely one of jurisdiction and there have been radically diverse decisions by the lower Federal courts, the denial of the writ would fairly imply that the court was satisfied that the jurisdictional point had been rightly decided."

The Supreme Court cannot issue a writ of *certiorari* under § 241 of the Judicial Code, which has been previously quoted, to bring before it a case which it has appellate jurisdiction to review by appeal or writ of error,[9] but it may do so under § 262, giving it power to issue original writs.[10] The Supreme Court may issue a *certiorari* directing the whole case before the Circuit Court of Appeals to be certified to it for its decision, whether its advice is requested or not.[11] It will then ordinarily decide the whole matter in controversy, as fully as if it had been brought up for review by writ of error or appeal.[12] The writ brings up the whole case, including questions affecting the merits and those concerning the jurisdiction of the District Court, if they have been properly saved,[13] and the decision of the Circuit Court of Appeals upon a former appeal in the same case.[14]

[9] Lau Ow Bew v. U. S., 144 U. S. 47, 36 L. ed. 340; U. S. v. Beatty, 232 U. S. 463; Spiller v. Atchison, T. & S. F. Ry. Co., 253 U. S. 117.

[10] Union Pac. R. R. Co. v. Weld County, 247 U. S. 282. See *supra*, § 460.

[11] Lau Ow Bew Co. v. U. S., 144 U. S. 47, 36 L. ed. 340. When two parties petition for writs of *certiorari* to review the same judgment and the entire matter can be disposed of on one petition the other will be denied; Gompers v. U. S., 233 U. S. 604. The court may allow a *certiorari* in lieu of a cross appeal which is dismissed; Central Trust Co. v. Chicago Auditorium, 240 U. S. 581.

[12] Loewe v. Lawlor, 208 U. S. 274, 52 L. ed. 488.

[13] Camp v. Gress, 250 U. S. 308. An error in interlocutory proceedings may then be reviewed although a previous writ of *certiorari* to review this has been denied. Hamilton Shoe Co. v. Wolf Brothers, 240 U. S. 251. A constitutional question may be considered although it was not raised in the court below. Itow & Fushimi v. U. S., 233 U. S. 581. The concurrent finding of the District Court and the Circuit Court of Appeals upon a question of fact will rarely be disturbed, Pacific Mail S. S. Co. v. Schmidt, 241 U. S. 245; Houston Oil Co. v. Goodrich, 245 U. S. 440. When the error of the Circuit Court of Appeals was upon a question of jurisdiction and the case was not there decided upon the merits, the case will ordinarily be remanded for a decision thereupon. Brown v. Fletcher, 237 U. S. 583. When the writ was erroneously or improvidently granted it may be dismissed without a decision upon any of the questions involved. Tyrrell, District of Columbia, 243 U. S. 1; Houston Oil Co. v. Goodrich, 245 U. S. 440.

[14] Panama R. Co. v. Napier Shipping Co., 166 U. S. 280, 41 L. ed. 1004. But see Smith v. Vulcan Iron Works, 165 U. S. 518, 41 L. ed. 810.

§ 689a. Review by the Supreme Court through certiorari of decisions of the Court of Customs Appeals. By the Judicial Code "in any case in which the judgment or decree of the Court of Customs Appeals is made final by the provisions of this title, it shall be competent for the Supreme Court, upon the petition of either part, filed within sixty days next after the issue by the Court of Customs Appeals of its mandate upon decision, in any case in which there is drawn in question the construction of the Constitution of the United States, or any part thereof, or of any treaty made pursuant thereof, or in any other case when the Attorney General of the United States shall, before the decision of the Court of Customs Appeals is rendered, file with the court a certificate to the effect that the case is of such importance as to render expedient its review and determination, with the same power and authority in the case as if it had been carried by appeal or writ of error to the Supreme Court; And provided further, That this Act shall not apply to any case involving only the construction of section one, or any portion thereof, of an Act entitled, 'An Act to provide revenue, equalize duties, and encourage the industries of the United States, and for other purposes,' approved August fifth, nineteen hundred and nine, nor to any case involving the construction of section two of an Act entitled 'An Act to promote reciprocal trade relations with the Dominion of Canada, and for other purposes,' approved July twenty-sixth, nineteen hundred and eleven."[1]

§ 689b. Review by the Supreme Court through certiorari of decisions of the Court of Appeals of the District of Columbia. The Judicial Code, after enumerating the cases in which the Supreme Court may review by appeal or writ of error final decisions of the Court of Appeals of the District of Columbia, provides: "In any case in which the judgment or decree of said Court of Appeals is made final by the section last preceding, it shall be competent for the Supreme Court of the United States to require, by *certiorari* or otherwise, any such case to be certified to it for its review and determination, with the same power and authority in the case as if it had been carried by writ of

§ 689a. [1] 36 St. at L. 91, 105, 38 St. at L. 703, Comp. St. § 1186, see *supra*, § 77.

error or appeal to said Supreme Court. It shall also be competent for said Court of Appeals, in any case in which its judgment or decree is made final under the section last preceding, at any time to certify to the Supreme Court of the United States any questions or propositions of law concerning which it desires the instruction of that court for their proper decision; and thereupon the Supreme Court may either give its instruction on the questions and propositions certified to it, which shall be binding upon said court of appeals in such case, or it may require that the whole record and cause be sent up to it for its consideration, and thereupon shall decide the whole matter in controversy in the same manner as if it had been brought there for review by writ of error or appeal."[1]

§ 689c. Review by the Supreme Court through certiorari of decisions of the Supreme Courts of Hawaii, Porto Rico and the Philippine Islands. By the Judicial Code in all civil or criminal cases wherein the final judgments and decrees of the Supreme Court of Hawaii and of the Supreme Court of Porto Rico are not reviewable directly by appeal or writ of error "it shall be competent for the Supreme Court of the United States to require by *certiorari*, upon the petition of any party thereto, that the case be certified to it, after final judgment or decree, for review and determination, with the same power and authority as if taken to that court by appeal or writ of error."[1]

By the Act of September 6, 1916, "No judgment or decree rendered or passed by the Supreme Court of the Philippine Islands more than sixty days after the approval of this Act shall be reviewed by the Supreme Court upon writ of error or appeal; but it shall be competent for the Supreme Court, by *certiorari* or otherwise, to require that there be certified to it for review and determination, with the same power, and author-

§ 689b. [1] Act of March 3, 1901, ch. 854, § 234, 31 St. at L. 1227; March 3, 1911, ch. 231, § 251, 36 St. at L. 1159. See *infra*, § 691; a contempt proceeding may be thus reviewed; Gompers v. U. S., 253 U. S. 604. A judgment which is not final, such as a judgment of reversal which orders a new trial, may be thus reviewed; George A. Fuller Co. v. Otis Elevator Co., 245 U. S. 489.

§ 689c. [1] Jud. Code § 246, as amended, 35 St. at L. 838, 36 St. at L. 1158. Act of Jan'y 28, 1915, 38 St. at L. 804, Comp. St. § 1223. See *infra*, § 691a and as to the practice see *supra*, § 689.

ity and with like effect as if brought up by writ of error or appeal, any case wherein after such sixty days, the Supreme Court of the Philippine Islands may render or pass a judgment or decree which could be subject to review under existing laws."[2]

§ 689d. Review by the Supreme Court through certiorari of decisions of the State courts. By the Act of September 6, 1916, "It shall be competent, for the Supreme Court by certiorari or otherwise,[1] to require that there be certified to it for review and determination with the same power and authority and with like effect as if brought up by writ of error, any cause wherein a final judgment or decree has been rendered or passed by the highest court of a State in which a decision could be had, where is drawn in question the validity of a treaty or statute of, or an authority exercised under the United States, and the decision is in favor of their validity; or where is drawn in question the validity of a statute of, or an authority exercised under any State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision is against their validity,[2] or where any title, right, privilege,

[2] Act of Sept. 6, 1916, ch. 448, § 5, 39 St. at L. 727, Comp. St. § 1225b. See *infra*, § 691a, and as to practice see *supra*, § 689. Gsell v. Insular Customs Collector, 239 U. S. 93; Tayabas Land Co. v. Manila R. R. Co., 250 U. S. 22. Upon an appeal from a decree of reversal the Supreme Court of the United States reviewed the evidence and finally disposed of the case. Philippines Sugar Estates Development Co. v. Government of Philippine Islands, 247 U. S. 385, 38 Sup. Ct. 513, 62 L. ed. 1177. It will usually defer to the decision of the court below upon the construction of local laws. Ibanez v. Hongkong & Shanghai Banking Corp., 246 U. S. 621, 38 Sup. Ct. 410, 62 L. ed. 903. *Cf.* Territory of Arizona v. Copper Queen Consol. Min. Co., 233 U. S. 87. But not when this is clearly erroneous. Philippine Sugar Estates Development Co. v. Government of the Philippine Islands, 247 U. S. 385, 38 Sup. Ct. 513, 62 L. ed. 1177.

§ 689d. [1] "The words, 'or otherwise' add nothing of substance to the thought expressed by the new act." Chicago Great Western R. R. Co. v. Basham, 249 U. S. 165, 39 Sup. Ct. 213, 63 L. ed. 534, per Pitney, J.

[2] Much can be said against the validity of this clause of the statute, although it is not improbable that it may be sustained. Where the decision of the State court was in favor of the title, right, privilege, or immunity claimed under the Federal authority, the Supreme Court

or immunity is claimed under the Constitution, or any treaty[3] or statute of,[4] or commission held, or authority exercised under

had before this act no jurisdiction to review it. Missouri v. Andriano, 138 U. S. 496, 34 L. ed. 1012.

[3] See *supra*, § 688.

[4] Straus v. Am. Publishers' Ass'n, 231 U. S. 222; Sage v. Hampe, 235 U. S. 99. Such is a case which involves the construction of an act of Congress under which a corporation is organized. Supreme Lodge, Knights of Pythias v. Mims, 241 U. S. 574; Supreme Lodge Knights of Pythias v. Smyth, 245 U. S. 594. A decision as to classification of merchandise imported into the Philippine Islands involves the construction of the Philippine Tariff Act. Gsell v. Insular Collector of Customs, 239 U. S. 93. Such is the right to a recovery, Seaboard Air Line Railway v. Padgett, Administratrix of Padgett, 236 U. S. 668; Chicago, Rock Island & Pacific Ry. Co. v. Devine, 239 U. S. 52; Great Northern Ry. Co. v. Alexander, 246 U. S. 276; or a defense, Nor. Car. R. R. Co. v. Zachary, 232 U. S. 248; Seaboard Air Line v. Horton, 233 U. S. 492; Toledo, St. L. & West. R. R. Co. v. Slavin, 236 U. S. 454; Chicago and Northwestern Ry. Co. v. Gray, 237 U. S. 399; Norfolk Southern Railroad Co. v. Ferebee, 238 U. S. 269; Kansas City Western Ry. Co. v. McAdow, 248 U. S. 51; Kansas City Southern Railway Co. v. Jones, 241 U. S. 181; Seaboard Air Line Railway v. Renn, 241 U. S. 290; which depends upon the construction of the Federal Employers' Liability Act, 35 St. at L. 65, — Comp. St. § 8657-8665; *supra*, § 454j. But see Louisville & N. R. Co. v. Holloway, 246 U. S. 525, 38 Sup. Ct. 379, 62 L. ed. 867 (holding that a ruling upon a question of local law should not be reviewed). Osborne v. Gray, 241 U. S. 16; *infra*, § 711. Or upon the construction of the Safety Appliance Act, 27 St. at L. 531, Comp. St. § 8605-8609. Minneapolis, St. Paul & Sault Ste. Marie Railway Co. v. Popplar, 237 U. S. 369; or upon the construction of the Anti-trust Law, Union Pac. R. Co. v. Huxoll, 245 U. S. 535, 38 Sup. Ct. 187, 62 L. ed. 455; Wilder Mfg. Co. v. Corn Products Co., 236 U. S. 165; or the Indian Laws, Wellsville Co. v. Miller, *née* Everett, 243 U. S. 6; Egan v. McDonald, 246 U. S. 220; Carney v. Chapman, 247 U. S. 102. Such is ordinarily the right to recover under a bill of lading issued in connection with an interstate shipment against the initial carrier. Southern Express Co. v. Byers, 240 U. S. 612; Southern Railway Company v. Prescott, 240 U. S. 632; Cincinnati & Pacific Ry. v. Rankin, 241 U. S. 319; Georgia, Fla. & Ala. Ry. v. Blish Co., 241 U. S. 190; Pennsylvania R. R. Co. v. Olivit Bros., 243 U. S. 574; St. Louis, Iron Mountain & Southern Ry. Co. v. Starbird, 243 U. S. 592; Northern Pacific Ry. Co. v. Solum, 247 U. S. 477; but not where the State court finds from conflicting evidence that the loss was occasioned by the negligence of the connecting carrier. New Orleans & Northeastern R. R. Co. v. National Rice Milling Co., 34 U. S. 80; and see Eastern Railway v. Littlefield, 237 U. S. 141. Or against a connecting or delivering carrier to whom the goods have been delivered for transport,

the United States,[5] and the decision is either in favor of or

Atchison, Topeka & Santa Fe Ry. Co. v. Robinson, 233 U. S. 173; Northern Pac. Ry. Co. v. Wall, 241 U. S. 87; Gulf, Colorado & Santa Fe Ry. Co. v. Texas Packing Co., 244 U. S. 31. See the Carmack Amendment of March 4, 1915, ch. 176, 38 St. at L. 119. Or the Federal land laws, when the validity of a treaty, or statute or authority of the United States is not questioned. See Gauthier v. Morrison, 232 U. S. 452; Logan v. Davis, 233 U. S. 613; State of California v. Deseret Water, Oil & Irrigation Co., 243 U. S. 415. For a decision that the construction of the National Bank Act was not in question, see Union National Bank v. McBoyle, 243 U. S. 26. In Ferry v. King County, 141 U. S. 668, 35 L. ed. 895, held: that the fact that a State statute and a mortgage made in pursuance thereof referred to certain acts of Congress as prescribing the rule and measure of the rights granted by the State thereunder, did not make the determination of such rights a Federal question. Miller's Ex'rs v. Swann, 150 U. S. 132, 137, 37 L. ed. 1028, per Brewer, J. In the absence of an act of Congress upon the subject no writ of error will review a judgment concerning an obstruction to a navigable stream. North Shore Boom & Driving Co. v. Nicomen Boom Co., 212 U. S. 406, 53 L. ed. 574.

[5] A judgment for the recovery of land against defendants, officers of the army, who claim to hold the land as the property of the United States, may be reviewed. Stanley v. Schwalby, 147 U. S. 508, 37 L. ed. 259. A defense grounded upon an order, judgment or decree of a Federal court is a claim of a right or immunity under an authority exercised under the United States. Texas & Pac. Ry. Co. v. Johnson, 151 U. S. 81, 99, 38 L. ed. 81, 87; Dowell v. Applegate, 152 U. S. 327, 38 L. ed. 463; Pittsburgh, C., C. & St. L. Ry. Co. v. Long Island L. & Tr. Co., 172 U. S. 493, 43 L. ed. 528; Virginia-Carolina Chemical Co. v. Kirven, 215 U. S. 252, 54 L. ed. 179; Radford v. Myers, 231 U. S. 725; Roller v. Murray, 234 U. S. 738; Parker v. McLain, 237 U. S. 469; Supreme Council of the Royal Arcanum v. Green, 237 U. S. 531; Hartford Life Insurance Company v. Ibs, 237 U. S. 662; Penna. Fire Ins. Co. v. Gold Issue Mining Co., 243 U. S. 93. *Cf.* Acme Harvester Co. v. Beekman Lumber Co., 222 U. S. 300. But see Avery v. Popper, 179 U. S. 305, 45 L. ed. 203. A refusal to give full faith and credit to a judgment of another State in the Union is reviewable. Roller v. Murray, 234 U. S. 738; Hartford Life Ins. Co. v. Barber, 245 U. S. 146, 38 Sup. Ct. 54, 62 L. ed. 208; Bates v. Bodie, 245 U. S. 520, 38 Sup. Ct. 182, 62 L. ed. 444. A State court does not deny full faith and credit to a provision of a statute or constitution of another State by giving an erroneous construction thereto. Smithsonian Institution v. St. John, 214 U. S. 19, 53 L. ed. 892; El Paso & Southwestern R. R. Co. v. Eichel, 226 U. S. 590, 57 L. ed. 43; Hartford Life Ins. Co. v. Johnson, 249 U. S. 490. There is no claim of a right or immunity under the Constitution of the United States by a suit or defense founded upon the judgment of a foreign State, unless the plaintiff in error rests upon

against the title, right, privilege, or immunity especially set up or claimed, by either party, under such Constitution, treaty, statute, commission, or authority."[6]

The issue of this writ of *certiorari* is within the discretion of the Supreme Court.[7] It cannot issue in a case of which the Supreme Court has jurisdiction by writ of error.[8] It can only issue to review a final judgment.[9]

§ 689e. Practice upon applications to the Supreme Court for certiorari. The Supreme Court Rules provide: "3. Where an application is submitted to this Court for a writ of certiorari to review a decision of a Circuit Court of Appeals or any other court, it shall be necessary for the petitioner to furnish as an exhibit to the petition a certified copy of the entire transcript of record of the case, including the proceedings in the court to which the writ of certiorari is asked to be directed.[1] The petition shall contain only a summary and short statement of the matter involved and the general reasons relied on for the allowance of the writ.[2] A failure to comply with this provision will

a clause in the treaty. Aetna Life Ins. Co. v. Tremblay, 223 U. S. 185, 56 L. ed. 398. Whether a State officer is subject to removal under the State Civil Service Laws does not present a Federal question; and upon an application for the writ of mandamus to compel restoration to such, the U. S. Supreme Court refused to consider the rights which the petitioner had in a fund, of which he may not be deprived without due process of law. Preston v. City of Chicago, 226 U. S. 447, 57 L. ed. —.

[6] Ch. 448, § 239 St. at L. 726, Comp. St. § 1214, amending Jud. Code § 237, See *infra*, §§ 692-692c.

[7] Ireland v. Woods, 246 U. S. 323, 38 Sup. Ct. 319, 62 L. ed. 745.

[8] New Orleans & N. E. R. Co. v. Scarlet, 249 U. S. 528, 39 Sup. Ct. 369, 63 L. ed. 752.

[9] Bruce v. Tobin, 245 U. S. 18, 38 Sup. Ct. 245, 62 L. ed. 123, holding that a judgment directing a new trial cannot thus be reviewed.

§ 689e—[1] In one or two instances a petition has been submitted and considered, although the petitioner has not furnished the Justices with copies of the record. If this is desired, the reason for the omission should be stated to the court at the time of the submission of the petition. Farrell v. O'Brien, 199 U. S. 89, 101, 56 L. ed. 101, 107, and other cases cited *infra*.

[2] The petition should be carefully prepared, contain appropriate references to the record and present with studied accuracy, brevity and clearness, whatever is essential to ready and adequate understanding of the points requiring the attention of the court, Furness, Withy & Co. v. Yang-Tsze Insurance Ass'n, 242 U. S. 430. It will rarely if ever after an affirmance below thus review a refusal to submit a question to the

be deemed a sufficient reason for denying the petition. Thirty printed copies of such petition and of any brief deemed necessary shall be filed. Notice of the date of submission of the petition, together with a copy of the petition and brief, if any, in support of the same shall be served on the counsel for the respondent at least two weeks before such date in all cases except where the counsel to be notified resides west of the Rocky Mountains, in which cases the time shall be at least three weeks. The brief for the respondent, if any, shall be filed at least three days before the date fixed for the submission of the petition.[3] Oral argument will not be permitted on such petitions, but they may be submitted in open court by counsel or by the clerk on request of counsel, and no petition will be received within three days next before the day fixed upon for the adjournment of the Court for the term."[4] "4. In any case where the time for presenting a petition for certiorari is expressly limited by statute, and where the court has adjourned for the term, the petition may be presented during such adjournment and within the period prescribed, by filing it, together with the printed record and briefs, in the office of the Clerk, and such filing shall have the same effect as a presentation in open court."[5]

jury, Houston Oil Co. v. Goodrich, 245 U. S. 440, 38 Sup. Ct. 140, 62 L. ed. 385; or reverse an order of the Circuit Court of Appeals which reverses an order of the District Court granting a preliminary injunction, Meccano, Ltd. v. John Wanamaker, 253 U. S. 136, 141; or pass upon the controverted questions of fact arising upon the application; Union Pac. R. R. Co. v. Weld County, 247 U. S. 288; Spiller v. Atchison, T. & S. F. Ry. Co., 253 U. S. 117, 121 (an order granting a new trial).

[3] Where the real situation is not therein set forth a duty rests upon the opposing counsel to reveal this in a reply. Ibid. It seems that, if a certified copy of the record is already on file, a new one need not then be presented to the court. Farrell v. O'Brien, 199 U. S. 89, 101, 56 L. ed. 101, 107.

[4] S. C. Rule 37, Sec. 3, as amended Nov. 4. 1918, 248 U. S. 529.

[5] S. C. Rule 37, Sec. 4, as amended in 241 U. S. 635. This gives the clerk authority to present the petitions at the request of counsel. Such request should be in writing. Liberty Oil Co. v. Gordon Nat. Bank, U. S. S. C., Nov. 7, 1921. The clerk of the Supreme Court has prepared the following:

"Instructions as to applications for writs of certiorari under Act of March 3, 1891 [210 U. S. 503].

"The following are the requirements on applications for writs of

Application for the writ must be made within three months after the entry of the judgment, decree or order of which complaint is made, except in the case of a judgment or decree of the Supreme Court of the Philippine Islands when application may be made within six months.[6]

"An application for a writ of *certiorari* will be deemed in time when the petition therefor, accompanied by the printed record and brief, is filed within the period prescribed by law: Provided this is followed by submitting the petition in open Court on some motion day not later than the first one which

certiorari under the act of March 3, 1891: Petitions are docketed in this court as ————, Petitioner, vs. ————, Respondent. Before the petition will be docketed there must be furnished this office: 1. An original petition with written signature of counsel. 2. A certified copy of the transcript of the record, including all proceedings in the Circuit Court of Appeals. 3. An appearance of counsel for petitioner, signed by a member of the bar of this court. 4. A deposit of twenty-five dollars ($25) on account of costs. Before submission of the petition there must be furnished: 1. Proof of service of notice of date fixed for submission and of copies of petition and brief upon counsel for the respondent. About two weeks' notice should be given. 2. Twenty-five (25) printed copies of the petition. 3. Twenty-five (25) printed copies of brief in support of petition, if any such brief is to be filed. 4. At least nine (9) uncertified copies of record, which must contain all the proceedings in the Circuit Court of Appeals. These copies may be made up by using copies of the record as printed for the Circuit Court of Appeals and adding thereto printed copies of the proceedings in that court. If a sufficient number of records thus made up can not be obtained, making it necessary to reprint the record for use on the hearing of the petition, fifty (50) copies must be printed under my supervision, in order that, should the petition be granted, there may be a sufficient number for use on the final hearing. Monday being motion day, some Monday must be fixed upon for the submission of the petition. No oral argument is permitted on such petitions, but they must be called up and submitted in open court by counsel for petitioner, or by some attorney in his behalf. If a respondent desires to oppose a petition, twenty-five (25) copies of a brief for such respondent must be filed. These briefs must bear the name of a member of the bar of this court, who should also enter an appearance for the respondent. It is not necessary, however, for such counsel to be present in court when the petition is submitted. *All papers in the case must be filed not later than the Saturday preceding the Monday fixed for the submission of the petition.*"

[6] Act of Sept. 6, 1916, 39 St. at L. 727, Comp. St. § 1228a; *infra*, § 698.

follows a period of four weeks after such filing. Notice of the date of submission and copies of the petition and brief must be served as required by Section 3 of this Rule."[7]

In a doubtful case it is the safer practice to ask for both a writ of error or appeal and a writ of *certiorari* in separate applications; whereupon the Supreme Court may grant the proper remedy whichever it may be.[8]

Ordinarily, no errors will be considered to which no reference was made in the petition for the writ.[9] The errors assigned by a party who took a cross-appeal to the Circuit Court of Appeals, but who filed no petition for the *certiorari*, will not be considered.[10] The effect of the writ is ordinarily to suspend all proceedings by the Circuit Court of Appeals and by the trial court in obedience to its mandate; and it has been said that it does not authorize the court of first instance, before a decision of the Supreme Court, to set aside orders previously made in obedience to the mandate before the *certiorari* was issued.[11] If a certified copy of the record is

[7] S. C. Rule 37, Sec. 4, amended March 26, 1916, 243 U. S. 623.

[8] Central Trust Co. v. Chicago Auditorium, 240 U. S. 581; Union Pac. R. Co. v. Board of Com'rs, 247 U. S. 282, 38 Sup. Ct. 510, 62 L. ed. 1110; United Drug Co. v. Theodore Rectanus Co., 248 U. S. 90, 39 Sup. Ct. 48, 63 L. ed. 141; Spiller v. Atchison, T. & S. F. Ry. Co., 253 U. S. 117.

[9] Alice State Bank v. Houston Pasture Co., 247 U. S. 240, 38 Sup. Ct. 496, 62 L. ed. 1096.

[10] Hubbard v. Tod, 171 U. S. 474, 43 L. ed. 246; Montana Min. Co. v. St. Louis Min. & Mill Co., 186 U. S. 24, 46 L. ed. 1039.

[11] Louisville N. A. & C. Ry. Co. v. Louisville Tr. Co., 78 Fed. 659. Pending the application of a *certiorari* execution on the judgment will usually be stayed by the court below when a supersedeas was granted in the proceedings for review by the Circuit Court of Appeals. Title Guaranty & Surety Co. v. U. S., 222 U. S. 401, 56 L. ed. 248; Boston & M. R. Co. v. Gokey, 150 Fed. 686; Orth v. Steger, 258 Fed. 625 (where the stays were granted by the District Court). In the latter case Mayer, J., quoted with approval the statement to this effect by the author now contained in § 427b. See also Title Guaranty & Surety Co. v. U. S., 222 U. S. 401, 56 L. ed. 248. Dancel v. Goodyear Shoe Machinery Co., S. D. N. Y., March 31, 1906 (in which the author was counsel). James H. McKenney, the former clerk of the Supreme Court, informed the author that the application for a stay should be made to the Circuit Court of Appeals. In the Second Circuit after the mandate had been issued it was held that the application should be addressed to the District Court.

already on file it may be treated as a return to the writ,[12] and may be supplemented by a certified copy of the subsequent proceedings in the court below.[13] Where, upon a petition for the writ of *certiorari*, a rule to show cause is entered, a return made to the rule and full argument had, the court, if there is no dispute as to the facts, may, and usually will, order the return to stand as the return to the writ and decide the case at once.[14] A transcript certified upon an appeal, which is dismissed, may be treated as a return to the writ.[15] Upon a *certiorari* to review an order vacating an injunction, the Supreme Court may dispose of the whole case.[16] The writ may issue after the mandate of the Circuit Court of Appeals has been sent to the court of first instance.[17] In this, and in other cases, the mandate of the Supreme Court is ordinarily addressed directly to the court of first instance, such as the District Court, or Supreme Court of the District of Columbia, as the case may be.[18]

§ 689f. Certification of questions for instruction. "In any case within its appellate jurisdiction as defined in section one hundred and twenty-eight, the circuit court of appeals at any time may certify to the Supreme Court of the United

Oceanic Steam Navigation Co. v. Watkins, C. C. A., 188 Fed. 909. C. C. A., 2nd Ct. Rule 22, as amended Dec., 1921. "If application for *certiorari* from the Supreme Court be made, application to stay the mandate pending such *certiorari* shall be made only to this court, except in vacation, when such application for stay of mandate may be made to any judge of this court. During recesses any judge of this court is authorized to grant an order to show cause (with stay) why the issuance of mandate should not be withheld, making, however, such order to show cause returnable at the next motion day of this court."

[12] Farrell v. O'Brien, 199 U. S. 89, 101, 50 L. ed. 101, 107; Union Pac. R. R. Co. v. Weld County, 247 U. S. 282; United Drug Co. v. Theodore Rectanus Co., 248 U. S. 90, 39 Sup. Ct. 48, 63 L. ed. 141; Spiller v. Atchison, T. & S. F. Ry. Co., 253 U. S. 117, 121.

[13] Guardian Assurance Co. v. Quintana, 227 U. S. 100.

[14] Am. Sugar Ref. Co. v. New Orleans, 181 U. S. 277, 283, 45 L. ed. 859, 862.

[15] Farrell v. O'Brien, 199 U. S. 89, 101, 50 L. ed. 101, 107; United Drug Co. v. Theodore Rectanus Co., 248 U. S. 90, 39 Sup. Ct. 48, 63 L. ed. 141.

[16] Harriman v. Northern Securities Co., 197 U. S. 244, 49 L. ed. 739.

[17] The Conqueror, 166 U. S. 110, 41 L. ed. 937.

[18] The Conqueror, 166 U. S. 110, 41 L. ed. 937, *infra*, § 712.

States any questions or propositions of law concerning which it desires the instruction of that court for its proper decision; and thereupon the Supreme Court may either give its instruction on the questions and propositions certified to it, which shall be binding upon the Circuit Court of Appeals in such case, or it may require that the whole record and cause be sent up to it for its consideration,—and thereupon shall decide the whole matter in controversy in the same manner as if it had been brought there for review by writ of error or appeal."[1] Another section of the Judicial Code gives similar power of certification to the Court of Appeals of the District of Columbia.[2]

The following rule regulates the practice under this act: "Where under section 239 of the act entitled 'An act to codify, revise, and amend the laws relating to the judiciary,' approved March 3, 1911, chapter 231, a Circuit Court of Appeals shall certify to this court a question or proposition of law, concerning which it desires the instruction of this court for its proper decision, the certificate shall contain a proper statement of the facts on which such question or proposition of law arises. If application is thereupon made to this court that the whole record and cause may be sent up to it for its consideration, the party making such application shall, as a part thereof,[3] furnish this court with a certified copy of the whole of said record."

It has been held: that a Circuit Court of Appeals will only certify a question to the Supreme Court for instruction upon its own motion;[4] that it will not permit a party to move for such a certificate before the argument,[5] nor grant such a motion after its decision;[6] that the certificate cannot be made unless

§ 689f. [1] Jud. Code. § 239, 36 St. at L. 1087. This applies to cases originally arising in the District Court of Alaska. Ibid, § 134.

[2] *Ibid*, § 234.

[3] S. C. Rule 37; 248 U. S. 528.

[4] *Ibid;* Louisville, N. A. & C. Ry. Co. v. Pope, C. C. A., 74 Fed. 1; Cella v. Brown, C. C. A., 144 Fed. 742.

[5] Louisville, N. A. & C. Ry. Co. v. Pope, C. C. A., 74 Fed. 1.

[6] Andrews v. Nat. Foundry & P. Works, C. C. A., 36 L.R.A. 153, 77 Fed. 774; Lehigh Valley Coal Co. v. Yensavage, C. C. A., 2nd Ct., 218 Fed. 547, 559. In Exporters of Manufacturers' Products v. Butterworth-Judson Co., in which the author was counsel, such a certificate was granted by the Circuit Court of Appeals for the Second Circuit, A. D. 1921, after an opinion deciding the case had been filed and after the denial by the Supreme Court of a motion made against the

a quorum of the court is present;[7] nor, in a case where the decision of the District[8] or Circuit Court of Appeals[9] is not final. The certificate should not be made unless the Circuit Court of Appeals has grave doubt upon the question.[10]

The questions certified must each consist of a single question of law,[11] which can be answered without a reference to the

author's advice for leave to file a petition for the writ of mandamus to compel the Circuit Court of Appeals to overrule its decision.

7 Cincinnati, H. & D. R. Co. v. McKean, 149 U. S. 259, 37 L. ed. 725.

8 U. S. ex. rel. Arant v. Lane, 245 U. S. 166. This was criticized by Charles V. Moore, esq., in Law Notes, March, 1918, p. 225.

9 Texas & Pac. Ry. Co. v. Gentry, C. C. A., 57 Fed. 422.

10 German Ins. Co. v. Hearne, C. C. A., 118 Fed. 134; Cella v. Brown, C. C. A., 144 Fed. 742. A conflict of decisions between other Circuit Courts of Appeal is a sufficient reason for making the certificate. U. S. v. Woo Jan, C. C. A., 250 Fed. 595. The fact that one or more of the judges of the Circuit Court of Appeals was disqualified was held to be a sufficient reason. Farmers' & M. State Bank v. Armstrong, C. C. A., 49 Fed. 600.

11 McHenry v. Alford, 168 U. S. 651, 42 L. ed. 614; Grover v. Faurot, 162 U. S. 435, 40 L. ed. 1030; Del Monte Min. & M. Co. v. Last Chance M. & M. Co., 171 U. S. 55, 43 L. ed. 72; U. S. v. Union Pac. Ry. Co., 168 U. S. 505, 42 L. ed. 559; Warner v. New Orleans, 167 U. S. 467, 42 L. ed. 239; Cross v. Evans, 167 U. S. 60, 42 L. ed. 77; Chicago, B. & Q. R. Co. v. Williams, 205 U. S. 444, 51 L. ed. 875. In each of the foregoing cases the certificate was held to be insufficient. So where the certificate stated that as the judgment of the Circuit Court of Appeals "differs from that of a co-ordinate court, the instruction of the Supreme Court is requested." Columbus Watch Co. v. Robbins, 148 U. S. 266, 37 L. ed. 445. In Quinlan v. Green County, 205 U. S. 410, 51 L. ed. 860, the court refused to answer the following question, which was certified to it: "1st. Do the facts found by the Circuit Court conclude or estop the county from denying liability to the plaintiff upon the bonds and coupons in suit, by reason of non-compliances with the terms and conditions imposed by the favorable vote of the county authorizing a subscription to the stock of the Cumberland and Ohio Railroad Company and the issuance of bonds in payment therefor?" but answered in the affirmative to a second question, which was as follows: "2d. Assuming the facts to be as found was a *bona fide* purchaser, before maturity of these bonds and coupons for value, entitled to assume in his purchase that Green County had before their issuance been 'fully and completely exonerated from the payment of the capital stock subscribed for by the County Court of said county for and in behalf of said county to the Elizabethtown and Tennessee Railroad Company?'" Cleveland-Cliffs Iron Co.

v. Arctic Iron Co., 248 U. S. 178. Eleven questions certified by the Circuit Court of Appeals of the Sixth Circuit as reported in full in 261 Fed. 15, 25, were not answered because improper. For questions in a criminal case which were recently answered see Gouled v. U. S., 255 U. S. 298, s. c., in C. C. A., 264 Fed. 839, quoted in full in § 487b, note 14, *supra*. See also U. S. v. Mayer, 235 U. S. 55. Where an answer to one or more of the questions will dispose of the case the Supreme Court ordinarily will not answer the others, U. S. v. Ginsberg, 243 U. S. 472. Where none of the questions apply to the facts set forth in the certificate they will not be answered, Seim v. Hurd, 232 U. S. 420. It is insufficient to state what is alleged and denied by the parties in their pleading and that there was evidence pending to establish the facts as claimed, Ricaud v. Am. Metal Co., 246 U. S. 34; or to describe the facts as "assumed." Ibid. The rules which were formerly in force as to certificates of a division of opinion between the judges holding a Circuit Court under U. S. R. S., §§ 650, 659, 693, govern in most respects the certificates by the Circuit Courts of Appeals. Graver v. Faurot, 162 U. S. 435, 40 L. ed. 1030; U. S. v. Rider, 163 U. S. 132, 139, 41 L. ed. 101, 104; U. S. v. Union Pac. Ry. Co., 168 U. S. 505, 42 L. ed. 559. Under these statutes the certificates were held to be sufficient in the following cases: Skillern's Ex'rs v. May's Ex'rs, 6 Cranch, 267, 3 L. ed. 220; U. S. v. Tyler, 7 Cranch, 285, 3 L. ed. 344; Wayman v. Southard, 10 Wheat. 1, 6 L. ed. 253; U. S. v. Chicago, 7 How. 185, 12 L. ed. 660; Shelby v. Bacon, 10 How. 56, 13 L. ed. 326; Havemeyer v. Board of Supervisors, 3 Wall. 294, 18 L. ed. 38; Veazie v. Wadleigh, 11 Pet. 55, 9 L. ed. 630; Pelham v. Rose, 9 Wall 103, 19 L. ed. 602; *Ex parte* Milligan, 4 Wall. 2, 18 L. ed. 281; Ward v. Chamberlain, 2 Black, 430, 17 L. ed. 319; Somerville's Ex'rs v. Hamilton, 4 Wheat. 230, 4 L. ed. 558; U. S. v. Hall, 98 U. S. 343, 25 L. ed. 180; U. S. v. Irvine, 98 U. S. 450, 25 L. ed. 193; U. S. v. Germaine, 99 U. S. 508, 25 L. ed. 482; U. S. v. Hirsch, 100 U. S. 33, 25 L. ed. 539; U. S. v. Steffens, 100 U. S. 82, 25 L. ed. 550; Tennessee v. Davis, 100 U. S. 257, 25 L. ed. 648; U. S. v. Carll, 105 U. S. 611, 26 L. ed. 1135; U. S. v. Britton, 107 U. S. 655, 27 L. ed. 520; U. S. v. Curtis, 107 U. S. 671, 27 L. ed. 534; Bartholow v. Trustees, 105 U. S. 6, 26 L. ed. 937; U. S. v. Ambrose, 108 U. S. 336, 27 L. ed. 746; U. S. v. Gale, 109 U. S. 65, 27 L. ed. 857; U. S. v. Waddell, 112 U. S. 76, 28 L. ed. 673; U. S. v. Spiegel, 116 U. S. 270, 29 L. ed. 664; California Paving Co. v. Molitor, 113 U. S. 609, 28 L. ed. 1106; Mackin v. U. S., 117 U. S. 348. 29 L. ed. 909; U. S. v. Kagamer, 118 U. S. 375, 30 L. ed. 228; U. S. v. Rauscher, 119 U. S. 407, 30 L. ed. 425; U. S. v. Northway, 120 U. S. 327, 30 L. ed. 664; Enfield v. Jordan, 119 U. S. 680, 30 L. ed. 523; U. S. v. Argona, 120 U. S. 479; 30 L. ed. 728; U. S. v. Le Bris, 121 U. S. 278, 30 L. ed. 946; U. S. v. Hess, 124 U. S. 483, 31 L. ed. 516; Hosford v. Germania Fire I. Co., 127 U. S. 399, 32 L. ed. 196; Fire Ins. Ass'n v. Wickham, 128 U. S. 426, 32 L. ed. 503; U. S. v. Lacher, 134 U. S. 624, 33 L. ed. 1080; U.

pleadings or evidence.[12] They must not be questions of mixed law or fact.[13] Nor can the whole case be thus sent up for review.[14] A Circuit Court of Appeals should not accompany its certificate by a transcript of the record until ordered by the Supreme Court to transmit the same.[15] The statement of facts in the certificate must contain only the fundamental facts and not the evidential facts from which the fundamental facts are found.[16] A jurisdictional question,[17] and a question involving the construction or application of the Constitution of the United

S. v. Chase, 135 U. S. 255, 34 L. ed. 117; U. S. v. Brewer, 139 U. S. 278, 35 L. ed. 190; Scott v. Armstrong, 146 U. S. 499, 502, 36 L. ed. 1059, 1060; Grant v. Raymond, 6 Pet. 218, 220, 8 L. ed. 376, 377; U. S. v. Wilson, 7 Pet. 150, 8 L. ed. 640; U. S. v. Thomas, 151 U. S. 577, 581, 38 L. ed. 276, 277. A complete list of the questions which the Supreme Court answered and of those which it declined to answer before March 3, 1901, prepared by Mr. Justice James C. Van Siclen of the N. Y. Supreme Court when a student in the writer's office is contained in a note to § 476 of the second edition of this book. For cases where the certificates were held to be sufficient, see Hertz v. Woodman, 218 U. S. 205, 54 L. ed. —. Helwig v. U. S., 188 U. S. 605, 47 L. ed. 614; U. S. v. Pridgeon, 153 U. S. 48, 38 L. ed. 631; U. S. v. Ju Toy, 198 U. S. 253, 49 L. ed. 1040.

[12] Dillon v. Strathearn Steamship Co., 248 U. S. 182. Facts supplied by judicial notice may cure an omission in this respect, Ricaud v. Am. Metal Co., 246 U. S. 304. In a case where the facts were not in dispute, the Supreme Court answered the question certified although this was not sufficiently precise or specific. Boston Store v. Am. Graphophone Co., 246 U. S. 8, 38 Sup. Ct. 257, 62 L. ed. 551.

[13] McHenry v. Alford, 168 U. S. 651, 42 L. ed. 614; U. S. v. Mayer, 235 U. S. 55; Cleveland-Cliffs Iron Co. v. Arctic Iron Co., 248 U. S. 178.

[14] Cross v. Evans, 167 U. S. 60, 42 L. ed. 77; Warner v. New Orleans, 167 U. S. 467, 42 L. ed. 239; Graver v. Faurot, 162 U. S. 435, 40 L. ed. 1030; Delmonte Min. & M. Co. v. Last Chance Min. & M. Co., 171 U. S. 55, 43 L. ed. 72; Graver v. Faurot, 162 U. S. 435, 40 L. ed. 1030; Warner v. New Orleans, 167 U. S. 467, 42 L. ed. 239; Emsheimer v. New Orleans, 186 U. S. 33, 46 L. ed. 1042; Felsenheld v. U. S., 186 U. S. 126, 46 L. ed. 1085; Chicago, B. & Q. R. Co. v. Williams, 205 U. S. 444, 51 L. ed. 875; German Ins. Co. v. Hearne, C. C. A., 118 Fed. 134.

[15] Cincinnati H. & D. R. Co. v. McKeen, 149 U. S. 259, 37 L. ed. 725; Farmers' & M. State Bank v. Armstrong, C. C. A., 49 Fed. 600.

[16] Cleveland-Cliffs Iron Co. v. Arctic Iron Co., 248 U. S. 178; Sigafus v. Porter, C. C. A., 85 Fed. 689.

[17] U. S. v. Jahn, 155 U. S. 109, 39 L. ed. 87; McLish v. Roff, 141 U. S. 661, 668, 35 L. ed. 893, 895.

States,[18] may thus be certified in a case of which the Circuit Court of Appeals has jurisdiction.[19]

The act of February 11, 1903, provides: that where the judges of the Circuit Court sitting in a suit in equity, brought under the monopoly law or the interstate commerce laws, are divided in opinion, "the case shall be certified to the Supreme Court for review in like manner as if taken there by appeal as hereinafter provided."[20] It has been held that the whole case cannot thus be certified, at least before final judgment.[21]

§ 690. Review of decisions of Court of Claims. The Supreme Court has jurisdiction to review by appeal, on behalf of the United States, all final judgments of the Court of Claims adverse to the United States; by appeal, on behalf of the plaintiff, all judgments of the Court of Claims in any case where the amount in controversy exceeds three thousand dollars, or his claim has been forfeited to the United States for fraud.[1] Where the United States has taken an appeal from a decision of the Court of Claims against them, the claimant may take a cross-appeal from so much of the judgment as disallowed part of his claim, although the sum of the items disallowed does not exceed $3,000.[2] No appeal lies to the Supreme Court from the findings

[18] Am. Sugar Refining Co. v. New Orleans, 181 U. S. 277, 45 L. ed. 859.

[19] The Circuit Court of Appeals has no power to ask instructions upon an issue which it has no right to decide; but where the case was already pending in the Supreme Court upon a writ of error therefrom to the District Court the Supreme Court treated the whole controversy between the parties as in substance pending there on a cross writ to the District Court obtained by the defendant in error, which had taken out the writ from the Circuit Court of Appeals. Billings v. U. S., 232 U. S. 261, 277.

[20] Act of Feb'y 11, 1903, 32 St. at L. 823, 10 Fed. St. Ann. 199, Comp. St. Supp. 622, Pierce Fed. Code, § 7696. This cannot be done until the final decree or judgment has been entered below. Baltimore & Ohio R. R. Co. v. Interstate Commerce Commission, 215 U. S. 216, 54 L. ed. 164. It has been held that when there is a division of opinion concerning an order upon a motion for a preliminary injunction, the court below is not required to make such a certificate. Southern Pac. T. Co. v. Interstate Commerce Commission, 166 Fed. 134.

[21] Baltimore & Ohio P. R. Co. v. Interstate Commerce Commission, 215 U. S. 216, 54 L. ed. 164.

§ 690. [1] Jud. Code, § 242, 36 St. at L. 1087; U. S. R. S., § 707; *supra*, § 686.

[2] U. S. v. Mosby, 133 U. S. 273, 289, 33 L. ed. 625, 631.

and decisions of the Court of Claims upon a claim sent thereto by the head of a department for investigation, in pursuance of an act of Congress, which does not make the decisions of the court binding upon the department.[3] The practice upon such appeals has been explained in the previous chapter on the Court of Claims.[4]

On appeals from the Court of Claims, in the absence of a special statute, nothing can be reviewed but questions of law.[5] On appeals from the Court of Claims the findings of fact import absolute verity and conclude both parties.[6] Where the Court of Claims sends up as a part of its findings of facts all the evidence on which an essential fact was found, and there is no legal evidence to establish such fact, the Supreme Court must reverse the judgment, if the fact so found is essential to the judgment.[7] The judgment of the Court of Claims as to the legal effect of the ultimate circumstantial facts in a case may be reviewed on appeal.[8] The conclusions of law drawn from the findings of fact may be reviewed.[9] Questions of law arising in the course of a trial before the Court of Claims may also be reviewed upon appeal.[10] Upon a question of fraud or mistake, the Supreme Court will not go behind the findings of fact of the Court of Claims.[11]

§ 691. Review by Supreme Court of decisions of the courts

[3] *Re* Sanborn, 148 U. S. 222, 37 L. ed. 429. *Cf.* Talbert v. U. S., 155 U. S. 45, 39 L. ed. 64. But see U. S. v. Jones, 119 U. S. 477, 30 L. ed. 440. For cases where the Supreme Court refused to look into the facts, see McClure v. U. S., 116 U. S. 145, 29 L. ed. 572; Union Pac. Ry. Co. v. U. S., 116 U. S. 154, 29 L. ed. 584.

[4] *Supra*, § 686.

[5] Mahan v. U. S., 14 Wall. 109, 20 L. ed. 764; U. S. v. Smith, 94 U. S. 214, 24 L. ed. 115.

[6] Desmare v. U. S., 93 U. S. 605, 23 L. ed. 959; Talbert v. U. S., 155 U. S. 45, 39 L. ed. 64.

[7] U. S. v. Clark, 96 U. S. 37, 24 L. ed. 696.

[8] U. S. v. Pough, 99 U. S. 265, 25 L. ed. 322.

[9] Union Pac. R. Co. v. U. S., 116 U. S. 154, 29 L. ed. 584. See also The Adriatic, 107 U. S. 512, 27 L. ed. 497.

[10] McClure v. U. S., 116 U. S. 145, 29 L. ed. 572.

[11] U. S. v. Adams, 6 Wall. 101, 18 L. ed. 792. As to decisions upon appeals from Territorial Courts, see Mammoth Min. Co. v. Salt Lake F. & M. Co., 151 U. S. 447, 38 L. ed. 229; *supra*, §§ 687, 688, 691.

of the District of Columbia. "Any final[1] judgment or decree of the Court of Appeals of the District of Columbia may be reexamined and affirmed, reversed, or modified by the Supreme Court of the United States, upon writ of error or appeal, in the following cases: First. In cases in which the jurisdiction of the trial court is in issue; but when any such case is not otherwise reviewable in said Supreme Court, then the question of jurisdiction alone shall be certified to said Supreme Court for decision.[2] Second. In prize cases. Third. In cases involving the construction or application of the Constitution of the United States, or the constitutionality of any law of the United States, or the validity or construction of any treaty made under its authority.[3] Fourth. In cases in which the constitution, or any law of a State, is claimed to be in contravention of the Constitution of the United States.[4] Fifth. In cases in which the validity of any authority exercised under the United States, or the existence or scope of any power or duty of an officer of the United States is drawn in question.[5] Sixth. In cases in which

§ 691. [1] An order quashing a writ of *certiorari* intended to stop a criminal prosecution is not final. Hartranft v. Mullowny, 247 U. S. 295, 38 Sup. Ct. 518, 72 L. ed. 1123. *Infra*, § 695.

[2] *Supra*, § 688. Where the jurisdiction "is invoked on a substantial ground, other than that of jurisdiction, it extends to the determination of all questions presented by the record, irrespective of the disposition that may be made of the particular question on which the appeal rests." McGowan v. Parish, 237 U. S. 285.

[3] Ibid. It seems that in such a case the Supreme Court may review a question as to the constitutionality of a law which is merely local. United Surety Co. v. Am. Fruit Produce Co., 238 U. S. 140.

[4] See *supra*, § 688.

[5] "It will be observed that this section," now subdivision fifth, "of the statute, while it is based upon the general principle which is found in the act of Congress allowing writs of error from this court to the highest courts of a State, namely, to protect parties against the exercise of an unlawful power on the part of the State authorities, does not use the language which is found in that act, that to give this court jurisdiction the decision of the State court must be *against* the right or power set up by the party under the laws of the United States." Clayton v. Utah, 132 U. S. 632, 637, 33 L. ed. 455. See Idaho & O. Land Imp. Co. v. Bradbury, 132 U. S. 509, 33 L. ed. 433; *supra*, § 688; *infra*, § 692. The phrase "validity of a statute," when used in the Acts of Congress which confer jurisdiction to review the decisions of the courts of the District and Territories, refers to

the construction of any law of the United States is drawn in question by the defendant.[6] Except as provided in the next succeeding section, the judgments and decrees of said Court of Appeals shall be final in all cases arising under the patent laws, the copyright laws, the revenue laws, the criminal laws,[7] and in admiralty cases;[8] and, except as provided in the next succeeding section, the judgments and decrees of said Court of Appeals shall be final in all cases not reviewable as hereinbefore provided. Writs of error and appeals shall be taken within the same time, in the same manner, and under the same regulations as writs of error and appeals are taken from the circuit courts of appeals to the Supreme Court of the United States."[9]

the power of Congress to pass the particular statute at all, and not to mere judicial construction. Baltimore & P. R. Co. v. Hopkins, 130 U. S. 210, 226, 32 L. ed. 908, 914, per Fuller, C. J.; District of Columbia v. Gannon, 130 U. S. 227, 32 L. ed. 922; Telluride Power Transmission Co. v. Rio Grande W. Ry. Co., 175 U. S. 639, 44 L. ed. 305. The Supreme Court took jurisdiction to review a decree affirming the dismissal of a libel under the Pure Food and Drugs Act, when the District Court of Appeals had held to be invalid a regulation of the Secretaries of the Treasury, of Agriculture, and of Commerce and Labor under 34 St. at L. 768, § 3, concerning labels. U. S. v. Antikamnia Chem. Co., 231 U. S. 654.

[6] This does not extend to cases where the act of Congress construed by the Court of Appeals is a purely local law relating to the district and has no general application throughout the United States. Am. Security Co. v. Dist. of Columbia, 224 U. S. 491, 56 L. ed. 856; Washington, Alexandria and Mt. Vernon Ry. Co. v. Downey, 236 U. S. 190; United Surety Co. v. Am. Fruit Product Co., 238 U. S. 140; U. S. ex rel. Arant v. Lane, 245 U. S. 166. The decision upon the question whether the tenure of an office is within the provision of the Civil Service Law (Act of Aug. 24, 1912, ch. 389, 37 St. at L. 555), is not local. U. S. ex rel. Arant v. Lane, 245 U. S. 166.

[7] Chapman v. U. S., 164 U. S. 436, 41 L. ed. 504; Sinclair v. District of Columbia, 192 U. S. 16, 48 L. ed. 322; not even where the result of the judgment is the forfeiture of a right to a sum of money in excess of the jurisdictional amount. Fields v. U. S., 205 U. S. 292, 51 L. ed. 322; nor in a capital case; *Re* Heath, 144 U. S. 92, 36 L. ed. 358; Cross v. U. S., 145 U. S. 571, 36 L. ed. 821; Hartranft v. Mullowny, 247 U. S. 295, 38 Sup. Ct. 518, 62 L. ed. 1123.

[8] *Supra*, § 688.

[9] Jud. Code, § 250, 36 St. at L. 187, re-enacting in substance 27 St. at L. 436; 23 St. at L. 443; Baltimore & P. R. Co. v. Hopkins, 130

"In any case in which the judgment or decree of said Court of Appeals is made final by the section last preceding, it shall be competent for the Supreme Court of the United States to require, by *certiorari* or otherwise, any such case to be certified to it for its review and determination, with the same power

U. S. 210, 32 L. ed. 908; District of Columbia v. Gannon, 130 U. S. 227, 32 L. ed. 922; *Re* Heath, 144 U. S. 92, 36 L. ed. 358; Parsons v. District of Columbia, 170 U. S. 45, 42 L. ed. 943; 29 St. at L. 692; Code D. C. § 234; 31 St. at L. 1189; Winston v. U. S., 172 U. S. 303, 43 L. ed. 456; Sinclair v. District of Columbia, 192 U. S. 16, 48 L. ed. 322. This section should be strictly construed, as the intent of Congress was to lighten the labor of the Supreme Court. Am. Security Co. v. Dist. of Columbia, 224 U. S. 491, 56 L. ed. 856. The Supreme Court may thus review a judgment in a case arising under the Federal Employers' Liability Act of April 22, 1908, 35 St. at L. 65, as amended April 5, 1910, 36 St. at L. 291; Washington Railway & Electric Co. v. Scala, 244 U. S. 630. Ordinarily the Supreme Court cannot review a judgment of the District Court of Appeals in a contempt proceeding. Gompers v. U. S., 233 U. S. 604. Now the affirmance of an order quashing a writ of *certiorari*. Hartranft v. Mullowny, 247 U. S. 295, 38 Sup. Ct. 518, 62 L. ed. 1123. Formerly the Supreme Court of the United States might directly review a judgment by the Supreme Court of the District which convicted the plaintiff of a capital crime. 25 St. at L. 655, § 6; Cross v. U. S., 145 U. S. 571, 576, 36 L. ed. 821, 823. But see Sinclair v. District of Columbia, 192 U. S. 16, 19, 48 L. ed. 322, 324; New v. Oklahoma, 195 U. S. 252, 49 L. ed. 182. *Cf.* § 688, *supra*. Where the validity of a patent or copyright was previously not involved, and the validity of a treaty, statute or authority exercised under the United States is not in question, the Supreme Court had no jurisdiction of appeals from orders, decrees or judgments of the Court of Appeals of the District of Columbia upon applications for writs of *habeas corpus*, Cross v. Burke, 146 U. S. 82, 36 L. ed. 896; not even where the right to the custody of a child is involved. Perrine v. Slack, 164 U. S. 452, 41 L. ed. 510. Except where the question of jurisdiction only is certified the jurisdiction of the Supreme Court in cases coming from the District Court of Appeals is general. McGowan v. Parish, 237 U. S. 285. Objections not raised in the latter court will ordinarily not be considered even though they were raised in the court of original jurisdiction. Magruder v. Drury and Maddox, 235 U. S. 106; *infra*, § 711. An allowance of commissions made by an auditor and affirmed by both the courts in the district was not disturbed. Magruder v. Drury, 235 U. S. 106.

and authority in the case as if it had been carried by writ of error or appeal to said Supreme Court."[10]

The decisions of the Court of Appeals of the District of Columbia upon appeals from the Commissioner of Patents, in connection with applications for patents[11] and trademarks,[12] are not reviewable by the Supreme Court of the United States.

§ 691a. Review by Supreme Court of decisions of the District Court of Alaska. "Appeals and writs of error may be taken and prosecuted from final judgments and decrees of the district court for the district of Alaska or for any division thereof, direct to the Supreme Court of the United States, in the following cases: In prize cases; and in all cases which involve the construction or application of the Constitution of the United States, or in which the constitutionality of any law of the United States or the validity or construction of any treaty made under its authority is drawn in question, or in which the constitution or law of a State is claimed to be in contravention of the Constitution of the United States. Such writs of error and appeal shall be taken within the same time, in the same manner, and under the same regulations as writs of error and appeals are taken from the district courts to the Supreme Court."[1]

[10] Act of March 3, 1901, ch. 854, § 234, 31 St. at L. 1227, March 3, 1911, ch. 231, § 251, 36 St. at L. 1159.

[11] Frasch v. Moore, 211 U. S. 1, 53 L. ed. 65. Nor upon an application for a mandamus to compel the issue of a patent, since this arises under the patent laws. U. S. ex rel. Chott v. Ewing, 237 U. S. 197. But the Supreme Court took jurisdiction of a writ of error to review the denial of a writ of mandamus to require an examiner in the Patent Office to forward an appeal to the board of examiners in chief. U. S. ex rel. Steinmetz v. Allen, 192 U. S. 543.

[12] E. C. Atkins & Co. v. Moore, 212 U. S. 285, 53 L. ed. 515; Baldwin v. R. S. Howard Co., 256 U. S. 35.

§ 691a. [1] Jud. Code, § 247, 36 St. at L. 1087. See 31 St. at L. 414, Alaska Code of Civ. Proc., § 504. Under the Evarts Act, the District Court of Alaska was considered the Supreme Court of a Territory, and not as a District Court of the United States. Coquitlam v. U. S., 163 U. S. 346, 16 Sup. Ct. 117, 41 L. ed. 184. This power of review is practically the same as that to review the final decision of the District Courts of the United States. Itow & Fushimi v. U. S., 233 U. S. 581. See *supra*, § 688. It no longer includes the review of capital cases.

§ 691b. Review by the Supreme Court of decisions of the Courts of the Island Territories. The Supreme Court of the United States reviews the decisions of the United States District Court of Hawaii,[1] and the United States District Court for Porto Rico [2] in the same classes of cases in which it can review

Ibid. When a case involving constitutional questions as well as others is taken from the District Court of Alaska to the Circuit Court of Appeals for the Ninth Circuit, the Supreme Court can not review the decision of the latter court by appeal or writ of error; but only by *certiorari*. Alaska Pacific Fisheries v. Territory of Alaska, 249 U. S. 53. See *supra*, § 689. For decisions upon appeals and writs of error brought to review the judgments of courts of Territories which have subsequently become States, see Williams v. First Nat. Bank of Pauls Valley, 216 U. S. 582, 54 L. ed. 625; Eagle Mining Co. v. Hamilton, 218 U. S. 513, 54 L. ed. 1131; Young v. U. S., 176 Fed. 612.

§ 691b. [1] Act of March 3, 1891, ch. 517, § 5, 26 St. at L. 827. Act of Jan'y 20, 1897, ch. 68, 29 St. at L. 492. Act of April 12, 1900, ch. 191, § 35, 31 St. at L. 85. Act of April 30, 1900, ch. 339, § 86, 31 St. at L. 158. Act of March 3, 1909, ch. 269, § 1, 35 St. at L. 838. Act of March 3, 1911, ch. 231, §§ 238, 244, 36 St. at L. 1157. Act of Jan'y 28, 1915, ch. 22, § 2, 38 St. at L. 804. Comp. St. § 1215.

[2] Ibid. See *supra*, § 688. For decisions under the former statutes, *Cf.* Royal Ins. Co. v. Martin, 192 U. S. 149, 11, 49 L. ed. 385, 389; Amado v. U. S., 195 U. S. 172, 49 L. ed. 145; Garrozi v. Dastas, 204 U. S. 64, 51 L. ed. 369. Hijo v. U. S., 194 U. S. 315, 48 L. ed. 994; People of Porto Rico v. Emmanuel, 235 U. S. 251; Cerecedo v. U. S., 239 U. S. 1, 3. It was said that not every mere question of irregularity in the application of a law of the United States justifies a review by the Supreme Court, and held that the generality of the statement thereof and the absence of specifications would justify a dismissal of the writ. Arran v. Zurrinach, 222 U. S. 395, 56 L. ed. 246. A claim that the District Court of the United States of Porto Rico should follow the local statute in the selection of grand jurors, Crowley v. U. S., 194 U. S. 461, 48 L. ed. 1075; and that grand jurors were not selected or drawn as required by the Federal statutes, Rodriguez v. U. S., 198 U. S. 156, 49 L. ed. 994; are, when made by a man who has been indicted, claims of rights under statutes of the United States. So is the contention that a local law of Porto Rico is void because it is in conflict with a specified act of Congress; Kent v. Porto Rico, 207 U. S. 113, 52 L. ed. 127 (where the writ of error was dismissed because the claim was frivolous); but not a general claim that an indictment does not charge "an offense under the statutes of the United States." Amado v. U. S., 195 U. S. 172, 49 L. ed. 145. The contention that a jury trial cannot be had at a special term held at Mayaguez is too

the decisions of the District Courts of the United States.[3] "Writs of error and appeals from the final judgments and decrees of the Supreme Court of the Territory of Hawaii and of the Supreme Court of Porto Rico may be taken and prosecuted to the Supreme Court of the United States within the same time, in the same manner, under the same regulations, and in the same classes of cases, in which writs of error and appeals from the final judgments and decrees of the highest court of a State in which a decision in the suit could be had, may be taken and prosecuted to the Supreme Court of the United States under the provisions of section two hundred and thirty-seven;[4] and in all other cases, civil or criminal, in the Supreme Court of the Territory of Hawaii[5] or the Supreme Court of Porto Rico,[6] it shall be competent for the Supreme Court of the United States to require by *certiorari*, upon the petition of any party thereto, that the case be certified to it, after final judgment or decree, for review and determination, with the same

clearly frivolous to sustain a writ of error to the Supreme Court of the United States. American R. Co. v. Castro, 204 U. S. 453, 51 L. ed. 564. Upon a writ of error, the court can review such legal questions as arose upon the face of the record and appeared by a bill of exceptions, including the sufficiency of findings to sustain the decree, and, when there is a bill of exceptions, rulings on the objection and admission of testimony to which exceptions were duly taken. Garzot v. de Rubio, 209 U. S. 283, 52 L. ed. 794.

[3] Jud. Code, § 128, as amended Act of Jan'y 28, 1915, ch. 22, § 2, 38 St. at L. 803, Comp. St. § 1120, Jud. Code, § 238, as amended Act of Jan'y 28, 1915, ch. 22, § 2, 38 St. at L. 804, Comp. St. § 1215; *supra*, § 688.

[4] *Infra*, § 692.

[5] Under the statute now in force the pecuniary amount is immaterial. Inter-Island Steam Navigation Co. v. Ward, 242 U. S. 1. *Cf.* Hapal v. Brown, 239 U. S. 502. Only final decisions can be reviewed. Cotton v. Hawaii, 211 U. S. 162, 53 L. ed. 131. The refusal of an order granting a new trial case can not be reviewed. Ibid.

[6] See Serralles' Succession v. Esbri, 200 U. S. 103, 0 L. ed. 391; Monagas v. Albertucci, 225 U. S. 81; Elzaburu v. Chaves, 239 U. S. 283; Cardona v. Quinoñes, 240 U. S. 83; El Banco Popular de Economias y Prestamos de San Juan, P. R. v. Wilcox, 255 U. S. 72. Prior to the Judicial Code, the Supreme Court, upon appeals, was bound by the findings of fact in the court below. Gonzales v. Buist, 224 U. S. 126, 56 L. ed. 693.

power and authority as if taken to that court by appeal or writ of error."[7]

"No judgment or decree rendered or passed by the Supreme Court of the Philippine Islands more than sixty days after the approval of this Act shall be reviewed by the Supreme Court upon writ of error or appeal; but it shall be competent for the Supreme Court, by *certiorari* or otherwise, to require that there be certified to it for review and determination, with the same power, and authority and with like effect as if brought up by writ of error or appeal, any cause wherein after such sixty days, the Supreme Court of the Philippine Islands may render or pass a judgment or decree which would be subject to review under existing laws."[8]

It seems that decisions of the courts of the Virgin Islands are not reviewable by the Supreme Court of the United States except by writ of *certiorari* to the Circuit Court of Appeals of the Third Circuit when the latter court has reviewed such decisions, or upon certification by the latter court to the Supreme Court of questions on propositions upon which instruction is desired.[9]

§ 691c. Review by the Supreme Court of decisions of the District Court of the Canal Zone. The Supreme Court of the United States seems to have no jurisdiction to review the decisions of the District Court of the Canal Zone, except when reviewing the decisions of the Circuit Court of Appeals of the Fifth Circuit in cases originally instituted in such District Court, when the decisions of such Circuit Court of Appeals are not final.[1]

§ 692. Writs of error from the Supreme Court to State Courts. By the Act of September 6, 1916, "A final judgment or decree in any suit in the highest court of a State in which a decision in the suit could be had, where is drawn in question

[7] Jud. Code, § 246, as amended, 35 St. at L. 838, 36 St. at L. 1158, Act of Jan'y 28, 1915, 38 St. at L. 804, Comp. St. § 1223.

[8] Act of Sept. 6, 1916, ch. 448, § 5, 39 St. at L. 727, Comp. St. § 1225b. See *supra*, § 689c.

[9] Ch. 171, § 2, 39 St. at L. 1132, Comp. St. § 3924½b. See *supra*, §§ 689d, 689f.

§ 691c. [1] Act of August 24, 1912, ch. 390, § 9, 37 St. at L. 565, Comp. St. § 10045. See *supra*, § 70a, *infra*, § 693.

the validity of a treaty,[1] or statute of,[2] or an authority[3] exer-

§ 692. [1] The validity of a treaty is not drawn in question by a decision denying a right claimed thereunder by a consul or other person because it is not within the terms thereof. Erie R. R. Co. v. Hamilton, 248 U. S. 369, 39 Sup. Ct. 95, 63 L. ed. 307; Rust Land & Lumber Co. v. Jackson, 250 U. S. 71, 39 Sup. Ct. 424, 63 L. ed. 850.

[2] The phrase, "validity of a statute," refers to the power of Congress to pass the statute and not to mere judicial construction, Baltimore & P. R. Co. v. Hopkins, 130 U. S. 210, 226, 32 L. ed. 908, 914, *per* Fuller, C. J.; District of Columbia v. Gannon, 130 U. S. 227, 32 L. ed. 922; Telluride Power Transmission Co. v. Rio Grande W. Ry. Co., 175 U. S. 639, 44 L. ed. 305; Coon v. Kennedy, 248 U. S. 457, 39 Sup. Co. 146, 63 L. ed. 358; Dana v. Dana, 250 U. S. 220, 39 Sup. Ct. 449, 63 L. ed. 947; Jett Bros. Co. v. City of Carrollton, 252 U. S. 1, 6; *supra*, § 691. The validity of an authority exercised under the United States drawn in question when a court refuses to enforce a regulation established by an Executive Department. U. S. ex rel. Steinmetz v. Allen, 192 U. S. 543, 48 L. ed. 555 (a rule of practice established by the Commissioner of Patents); U. S. v. Antikamnia Co., 231 U. S. 654. Or when the right to hold an office is disputed. Clough v. Curtis, 134 U. S. 361, 370, 33 L. ed. 945; U. S. ex rel. Arant v. Lane, 245 U. S. 166. The validity of a statute is not drawn in question every time that a right claimed under such statute is controverted. Cook County v. Calumet & C. C. & D. Co., 138 U. S. 635, 653, 654, 34 L. ed. 1110, 1116, 1117; *supra*, § 497b; Rogers v. Clark Iron Co., 217 U. S. 589, 54 L. ed. 895; Reinman v. City of Little Rock, 237 U. S. 171. See Union Pac. R. Co. v. Laughlin, 247 U. S. 204, 38 Sup. Ct. 436, 62 L. ed. 1073. The validity of an authority exercised under the United States is not drawn in question by defending a suit brought by the government for the abatement of a fence upon public land. Cameron v. U. S., 146 U. S. 533, 36 L. ed. 1077; U. S. ex rel. Taylor v. Taft, 203 U. S. 461, 51 L. ed. 269. Nor by an application for a *mandamus* to compel an officer to allow a credit which he rejected when auditing an account where a government employe. U. S. v. Lynch, 137 U. S. 280, 34 L. ed. 700. Nor by the denial of a claim or defense based upon a construction of the statute which the State court refused to adopt. Coon v. Kennedy, 248 U. S. 457; Citizens Bank v. Opperman, 249 U. S. 448. Nor by an application for a mandamus to compel restoration to a place in the public service when the relator does not deny the authority of the President or of his other superior to dismiss him but contends that the dismissal is illegal because of a failure to comply with certain rules and regulations of the civil service. U. S. ex rel. Taylor v. Taft, 203 U. S. 461, 51 L. ed. 269. See also, Board of Public Utility Com'rs v. Manila El. R. R. Lt. Co., 249 U. S. 262; *supra*, § 691.

[3] Petrie v. Nampa and Meridian Irrigation District, 248 U. S. 154. The validity of an authority is not drawn in question every time an act done by such authority is disputed.

cised under the United States, and the decision is against their validity; or where is drawn in question the validity of a statute of,[4] or an authority[5] exercised under any State, on the ground

Cook County v. Calumet & C. C. & D. Co., 138 U. S. 635, 653, 34 L. ed. 1110, 1116, per Fuller, C. J. Nor unless such validity is primarily denied, and the denial made the subject of direct inquiry. Ibid. The authority exercised in the case appealed, by the court from which the appeal is taken, is not the authority intended. Snow v. U. S., 118 U. S. 346, 347, 30 L. ed. 207, 208. Nor by a failure to comply with the decision of the Supreme Court of the United States in an analogous case. Rust Land & Lumber Co. v. Jackson, 250 U. S. 71. Nor by the denial of an adjournment or a continuance until the decision of the Supreme Court in another case which will determine the respective rights of the parties to the suit. Ibid.

[4] Fox v. Washington, 236 U. S. 272; New Orleans & N. E. R. Co. v. Scarlet, 249 U. S. 528, 39 Sup. Ct. 369, 63 L. ed. 752; Darling v. City of Newport News, 249 U. S. 540, 39 Sup. Ct. 371, 63 L. ed. 759. See *supra*, § 688. So when the court denied the contention of the plaintiff in error that a State statute affecting interstate transportation was void as a regulation of interstate commerce. Adams Express Co. v. Commonwealth of Kentucky, 214 U. S. 218, 53 L. ed. 972. The validity of the action of a State board or commission acting under the authority of a State statute may be thus reviewed. Lake Erie & Western R. R. Co. v. State Public Utilities Commission, 249 U. S. 422; Corn Products Refining Co. v. Eddy, 249 U. S. 427, 39 Sup. Ct. 325, 63 L. ed. 689; Standard Computing Scale Co. v. Farrell, 249 U. S. 571. The contention that a lease was made in interstate commerce and was therefore not subject to the State statutes does not challenge the validity thereof. Mergenthaler Linotype Co. v. Davis, 251 U. S. 256. A writ of error was dismissed when it sought to review the validity of service of process upon a foreign corporation in accordance with a State statute. Philadelphia & Reading Coal & Iron Co. v. Gilbert, 245 U. S. 162. See Dana v. Dana, 250 U. S. 220, 39 Sup. Ct. 449, 63 L. ed. 947.

[5] The validity of an order of a State commission, charged to have been made in violation of the Federal Constitution, may be thus reviewed. The right to due process of law, or to the equal protection of the law may be infringed by the action of a State court, although no State statute is attacked as unconstitutional. Miedreich v. Lauenstein, 232 U. S. 236; McDonald v. Oregon Railroad and Navigation Co., 233 U. S. 665; Willoughby v. Chicago, 235 U. S. 45; Myles Salt Co. v. Iberia Drainage Dist., 239 U. S. 478; O'Neil v. Northern Colorado Irrigation Co., 242 U. S. 20; In the Matter of the Petition of Selling v. Radford, 243 U. S. 46; Saunders v. Shaw, 244 U. S. 317. People of N. Y. ex rel. N. Y. & Queens Gas Co. v. McCall, 245 U. S. 345, 38 Sup. Ct. 122, 62 L. ed. 337. The denial of a writ of *habeas corpus* to discharge from arrest for interstate

of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision is in favor of their validity, may be re-examined and reversed or affirmed in the Supreme Court upon a writ of error. The writ shall have the same effect as if the judgment or decree complained of had been rendered or passed in a court of the United States. The Supreme Court may reverse, modify, or affirm the judgment or decree of any such State court, and may, in its discretion, award execution or remand the same to the court from which it was removed by the writ. In any suit involving the validity of a contract wherein it is claimed that a change in the rule of law or construction of statutes by the highest court of a State applicable to such contract would be repugnant to the Constitution of the United States,[5a] the Supreme Court shall, upon writ of error, re-

extradition under the warrant of a State governor, where the petitioner claims that he is imprisoned in violation of the Federal Constitution is not reviewable by writ of error. Ireland v. Woods, 246 U. S. 323, 38 Sup. Ct. 319, 62 L. ed. 745. A judgment of a State court may be reversed because it takes the property of a person without due process of law, although there is no valid objection to the statute under which the court has acted, when there has not been due notice of the proceedings. Scott v. McNeal, 154 U. S. 34, 38 L. ed. 896. But see Stadelman v. Miner, 246 U. S. 544, 38 Sup. Ct. 359, 62 L. ed. 875; or when the rulings of the court upon the admission or exclusion of evidence or in the charge to the jury or otherwise enforce a rule of law repugnant to the Federal Constitution. Chicago, B. & Q. R. Co. v. Chicago, 166 U. S. 226, 41 L. ed. 979; Petrie v. Nampa & Meridian Irr. Dist., 248 U. S. 154, 39 Sup. Ct. 25, 63 L. ed. 178; but a question of fact decided by a jury in a State court cannot be re-examined by the Supreme Court of the United States upon a writ of error. Chicago, B. & Q. R. Co. v. Chicago, 166 U. S. 226, 242, 41 L. ed. 979, 986.

[5a] It has been said that, when the highest court of a State has interpreted a contract affecting property in land, such interpretation becomes a part of such contract, upon which any purchaser of the land may rely, and a subsequent change thereof to his injury impairs the obligation of the contract and may be set aside, although there has been no State legislation upon the subject. Muhlker v. New York & Harlem R. Co., 197 U. S. 544, 49 L. ed. 872; Sauer v. New York, 206 U. S. 536, 549, 51 L. ed. 1176, 1182. But see Moore-Mansfield Constr. Co. v. Electrical Installation Co., 234 U. S. 619; Cleveland & Pittsburgh R. R. v. Cleveland, 235 U. S. 550; Fidelity & Columbia Tr. Co. v. City of Louisville, Ky., 245 U. S. 54, 38 Sup. Ct. 40, 62 L. ed. 145; Mohl v. Lamar Canal Co., 128 Fed. 776. In the following cases amongst others

examine, reverse, or affirm the final judgment of the highest court of a State in which a decision in the suit could be had, if said claim is made in said court at any time before said final judgment is entered and if the decision is against the claim so made."[6]

it was held that there was due process of law. Porter v. Wilson, 239 U. S. 170; St. Louis and Kansas City Land Co. v. Kansas City, 241 U. S. 419; Stadelman v. Miner, 246 U. S. 544; McCoy v. Union Elevated R. Co., 247 U. S. 354, 38 Sup. Ct. 504, 62 L. ed. 1156. It is no ground for review that a State court upon an application for the appointment of a receiver admitted testimony taken between the same parties in another suit. Waters-Pierce Oil Co. v. Texas, 212 U. S. 112, 53 L. ed. 432. No ground for review was found in the contention that an assessment for taxation was excessive, exorbitant, unjust, and disproportionate to the assessment of similar property, when the validity of the statute was not drawn in question. First Nat. Bank v. City Council of Estherville, 215 U. S. 341, 54 L. ed. 223. The Supreme Court will not take jurisdiction because the highest court of the State, in construing a statute so as to bring it into harmony with the Federal and State constitutions so far neglected its obvious meaning as to make the judgment an exercise of legislative power. Londoner v. Denver, 210 U. S. 373, 379, 52 L. ed. 1103, 1109.

[6] Ch. 448, § 2, 39 St. at L. 726, Comp. St. § 1214, amending Jud. Code, § 237; as amended February 17, 1922. The Revised Statutes, which were re-enacted in this section of the Judicial Code as originally adopted previously provided that "a final judgment or decree in any suit in the highest court of a State in which a decision in the suit could be had, where is drawn in question the validity of a statute of, or an authority exercised under, the United States, and the decision is against their validity, or where is drawn in question the validity of a statute of, or authority exercised under, any State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision is in favor of their validity; or where any title, right, privilege, or immunity, is claimed under the Constitution, or any treaty, or statute of, or commission held or authority exercised under the United States, and the decision is against the title, right, privilege, or immunity specially set up or claimed by either party, under such Constitution, treaty, statute, commission, or authority,—may be re-examined, and reversed or affirmed, in the Supreme Court upon a writ of error. The writ shall have the same effect as if the judgment or decree complained of had been rendered or passed in a court of the United States; and the proceedings upon the reversal shall be the same, except that the Supreme Court may, at their discretion, proceed to a final decision of the case, and award execution, or remand the same to the court from which it was so removed.

"When a writ of error is issued for the revision of the judgment of a State court, in any criminal proceeding where is drawn in question the validity of a statute of, or an authority exercised under, the United States, or where any title, right, privilege, or immunity is claimed under the Constitution, or any statute of, or commission held or authority exercised under, the United States, the defendant, if charged with an offense that is bailable by the laws of such State, shall not be released from custody until a final judgment upon such writ, or until a bond, with sufficient sureties, in a reasonable sum, as ordered and approved by the State court, is given; and if the offense is not so bailable, until a final judgment upon the writ of error."[7] "Cases on writ of error to revise the judgment of a State court in any criminal case, shall have precedence, on the docket of the Supreme Court, of all cases to which the Government of the United States is not a party, excepting only such cases as the court, in its discretion, may decide to be of public importance."[8] The jurisdiction of the Supreme Court to review judgments and decrees of State courts, although at first bitterly contested,[9] has

The Supreme Court may re-affirm, reverse, modify, or affirm the judgment or decree of such State court, and may, at their discretion, award execution, or remand the same to the court from which it was removed by the writ." U. S. R. S., § 709. The cases therein included not covered by the statute quoted in the text can now only be reviewed by *certiorari* which issues not as a matter of right but in the discretion of the Supreme Court. See *supra*, § 689d.

[7] U. S. R. S., § 1017.

[8] U. S. R. S., § 710.

[9] Tyranny Unmasked, by John Taylor of Virginia, pp. 305, 306: "Thus, the preservation of good manners is taken from the States, and intrusted to combinations whose own manners want improvement. And thus Congress has invented by the judicial law a process, by the name of a writ of error, equivalent to the odious writ of *quo warranto*, once used in England by the king and his judges, to destroy the rights of corporations. By our substitute the end is effected, as if Congress had empowered the judges to issue a writ of *quo warranto* directly against the State governments. The only difference between the cases is, that the English *quo warranto* destroyed all the rights of corporations at a blow, and that ours destroys the rights of State governments by degrees. But the end of both proceedings is the same; in England it was to make corporations subservient to royal pleasure; here, it is to make State governments subservient to Federal pleasure. A dependence of corporations upon the will of the king was evi-

been held to be constitutional.[10] The title or right claimed under

dently a subversion of the principles of the English government. If a dependence of State rights upon the will of Congress is also a subversion of the principles of our form of government, may not our *quo warranto* process under a new name, be a tendency towards tyrannical government, if the true principles of our form of government are as good as those of the English form for the preservation of liberty? The security of the State rights may be as essential to our liberty as the security of corporate rights was supposed to be in England; and a consolidation of States subservient to Congress, as dangerous to it as a consolidation of corporations into a subserviency to royal sovereignty; especially if a consolidated republic over our vast territories should turn out to be impracticable. These writs of error are as good instruments for establishing the property transferring policy as the *quo warranto* was in England. For this purpose they have been used in the bank and lottery cases to come at the money or property of the people." See also Construction Construed and Constitution Vindicated, by the same author.

In a letter to James Monroe, Thomas Jefferson said: "It is of immense consequence that the States retain as complete authority as possible over their own citizens. The withdrawing themselves under the shelter of a foreign jurisdiction is so subversive of order and so pregnant of abuse, that it may not be amiss to consider how far a law of *præmunire* should be revived and modified, against all citizens who attempt to carry their causes before any other than the State courts in cases where those courts have no right to their cognizance. A plea to the jurisdiction of the courts of their State, or a reclamation of a foreign jurisdiction if adjudged valid, would be followed by the punishment of *præmunire* for the attempt." Jefferson's Works, IV, 200. See the message of the Governor of Texas, January 21, 1891, quoted in Mercantile Trust Co. v. Texas & P. Ry. Co., 51 Fed. 529, 533, 534.

[10] Martin v. Hunter's Lessee, 1 Wheat. 304, 4 L. ed. 97; Cohens v. Virginia, 6 Wheat. 264, 5 L. ed. 257. For the contrary view see Hunter v. Martin, 4 Mun. (Va.) 1; Padelford v. Mayor, 14 Ga. 438; Piqua Bank v. Treasurer of Miami County, 6 Ohio St. 342; Johnson v. Gordon, 4 Cal. 768 (1854); overruled by Ferris v. Carver, 11 Cal. 175; Hart v. Burnett, 26 Cal. 169; Cal. Statutes of 1855, p. 80. See Greely v. Townsend, 25 Cal. 604, 613. Where a Federal question was properly raised and decided adversely to the party raising it, the Supreme Court will take jurisdiction of a writ of error to review a judgment in an action of *quo warranto* affecting the office of Governor of a State. Boyd v. Nebraska ex rel. Thayer, 143 U. S. 135, 36 L. ed. 103; but see Taylor v. Beckham, 178 U. S. 548, 44 L. ed. 1187; and of a writ of error to review an order denying a mandamus sought to compel a State Secretary of State to issue notices of an election of Presidential electors under a statute claimed to be still in force because

the Federal law must be one claimed by the plaintiff in error, and not the right of a third person only.[11] An injury directly resulting from the denial of a claim of a constitutional right must appear.[12] The fact that the statute may be unconstitutional as against a class, to which the party complaining does not belong, does not authorize the reversal of a judgment enforcing the statute against him.[13] Formerly a trustee in bank-

of the alleged unconstitutionality of a repealing act which provided for a new method of election to such offices. McPherson v. Blacker, 146 U. S. 1, 36 L. ed. 869.

[11] Giles v. Little, 134 U. S. 645, 650, 33 L. ed. 1062; Owings v. Norwood, 5 Cranch, 344, 3 L. ed. 120; Conde v. York, 168 U. S. 642, 42 L. ed. 611; Lampasas v. Bell, 180 U. S. 276, 45 L. ed. 527; Tyler v. Judges, 179 U. S. 405, 45 L. ed. 252; Nutt v. Knut, 200 U. S. 12, 19, 50 L. ed. 348, 352, *per* Harlan, J.: "A party who insists that a judgment cannot be rendered against him consistently with the statutes of the United States may be fairly held, within the meaning of section 709, to assert a right and immunity under such statutes, although the statutes may not give the party himself a personal or affirmative right that could be enforced by direct suit against his adversary." See Illinois Central Railroad v. McKendree, 203 U. S. 514, 525, 51 L. ed. 298, 303; Bowe v. Scott, 233 U. S. 658.

[12] Chadwick v. Kelly, 187 U. S. 540, 47 L. ed. 293; Plymouth Coal Co. v. Commonwealth of Pennsylvania, 232 U. S. 531; Missouri, Kansas & Texas Ry. Co. v. Cade, 233 U. S. 642; Hendrick v. State of Maryland, 235 U. S. 610; Stearns v. Wood, 236 U. S. 75; Chicago, Terre Haute & Southeastern Ry. Co. v. Anderson, 242 U. S. 283; Wall v. Parrot Silver & Copper Co., 244 U. S. 407; Arkadelphia Co. v. St. Louis S. W. Ry. Co., 249 U. S. 134. A county officer cannot object to a judgment directing him to apply public money in accordance with a State statute upon the ground that the law is unconstitutional as depriving him as an individual or as a taxpayer of his property without due process of law or denying him in such capacity of the equal protection of the law. Stewart v. City of Kansas City, 239 U. S. 14.

[13] Lee v. New Jersey, 207 U. S. 67, 52 L. ed. 106; Southern Ry. Co. v. King, 217 U. S. 524, 54 L. ed. 868; Engel v. O'Malley, 219 U. S. 128, 55 L. ed. 128; Missouri Rate Cases, 230 U. S. 474; Straus v. Foxworth, 231 U. S. 163; Amoskeag Savings Bank v. Purdy, 231 U. S. 373; Hendrick v. State of Maryland, 235 U. S. 610; Rail Coal Co. v. Ohio Industrial Comm., 236 U. S. 349; Mallinckrodt Works v. St. Louis, 238 U. S. 41; Aikens v. Kingsbury, 247 U. S. 484; People v. Margaret H. Sanger, 222 N. Y. 192. See Larabee v. Dolley, 175 Fed. 365. Where a State statute applies to both intrastate and interstate shipments, but the shipment involved is wholly intrastate, this court will not consider the validity of the statute when applied to interstate shipments. Seaboard Air Line Rail-

ruptcy could obtain a writ of error to review a judgment of a State court in an action brought by him to recover assets.[14] The term "suit" as used in this statute applies to any proceeding in a court of justice in which a person pursues the remedy which the law affords him;[15] and includes an application for a writ of mandamus,[16] prohibition,[17] or *habeas corpus*.[18] The amount of the matter in dispute in the State court is immaterial to the right of review by the Supreme Court of the United States.[19]

§ 692a. Determination whether Federal question was decided. The opinion of the State court, if properly authenticated, may be examined to see what questions were decided,[1] but it is not conclusive.[2] When it appears that the decision below was adverse to the plaintiff in error upon two independent grounds, one of which is not a Federal question, the Supreme Court will dismiss the writ of error.[3] Where there is a Federal question,

way v. Seegers, 207 U. S. 73, 52 L. ed. 108.

[14] Rector v. City Deposit Bank Co., 200 U. S. 405, 50 L. ed. 527; *supra*, § 669.

[15] Weston v. Charleston, 2 Pet. 449, 7 L. ed. 481; Aldrich v. Aetna Co., 8 Wall. 491, 19 L. ed. 473.

[16] Hartman v. Greenhow, 102 U. S. 672, 26 L. ed. 271; McPherson v. Blacker, 146 U. S. 1, 36 L. ed. 868; Chicago, B. & Q. R. Co. v. Nebraska, 170 U. S. 57, 42 L. ed. 948; Am. Express Co. v. Michigan, 155 U. S. 404, 44 L. ed. 823.

[17] Weston v. Charleston, 2 Pet. 449, 7 L. ed. 481.

[18] Kurtz v. Moffitt, 115 U. S. 487, 29 L. ed. 458. But see the opinion of Thompson, J., in Holmes v. Jennison, 14 Pet. 540, 586, 10 L. ed. 578, 601. The writ was dismissed when brought to review the order of a judge in such a case. McKnight v. James, 155 U. S. 685, 39 L. ed. 310; Clarke v. McDade, 165 U. S. 168, 41 L. ed. 673.

[19] Buel v. Van Ness, 8 Wheat. 312, 5 L. ed. 624.

§ 692a. [1] Murdock v. Memphis, 20 Wall. 590, 22 L. ed. 429; Gross v. U. S. Mortgage Co., 108 U. S. 477, 27 L. ed. 795; Adams County v. B. & Mo. R. Co., 112 U. S. 123, 129, 28 L. ed. 678, 680; Philadelphia F. Ass'n v. New York, 119 U. S. 110, 116, 30 L. ed. 342, 345; Walter A. Wood Co. v. Skinner, 139 U. S. 293, 295, 25 L. ed. 193, 194. Even where the State practice requires that the syllabus be prepared by the Judge who writes the opinion. Ohio Tax Cases, 232 U. S. 576.

[2] Corn Products Refg. Co. v. Eddy, 249 U. S. 427.

[3] Eustis v. Bolles, 150 U. S. 361, 370, 37 L. ed. 1111, 1113; Mo. Pac. Ry. Co. v. Fitzgerald, 160 U. S. 556, 40 L. ed. 536; Murdock v. Memphis, 20 Wall. 590, 22 L. ed. 429; Adams County v. B. & M. R. R. Co., 112 U. S. 123, 28 L. ed. 678; De Saussure v. Gaillard, 127 U. S. 216, 32 L. ed. 126; Hopkins v.

but the decision may have been on another independent ground, and on which ground the judgment was based does not appear, then, if the independent ground was clearly invalid and insuffi-

McLure, 133 U. S. 380, 33 L. ed. 660; Hale v. Akers, 132 U. S. 554, 3 L. ed. 442; Blount v. Walker, 134 U. S. 607, 33 L. ed. 1036; Johnson v. Risk, 137 U. S. 300, 34 L. ed. 83; Beaupré v. Noyes, 138 U. S. 397, 34 L. ed. 991; Hammond v. Johnston, 142 U. S. 73, 35 L. ed. 941; Yesler v. Washington Harbor Line Com'rs, 146 U. S. 646, 36 L. ed. 1119; Seeberger v. McCormick, 175 U. S. 274, 44 L. ed. 161; Giles v. Teasley, 193 U. S. 146, 48 L. ed. 655; Allen v. Arguimbau, 198 U. S. 149, 49 L. ed. 990; Leathe v. Thomas, 207 U. S. 93, 52 L. ed. 118; Adams v. Russell, 229 U. S. 353; Holden Land and Live Stock Co. v. Inter-State Trading Co., 233 U. S. 536; New Orleans & N. E. R. R. Co. v. National Rice Milling Co., 234 U. S. 80; Mellon Co. v. McCafferty, 239 U. S. 134; Municipal Securities Corp. v. Kansas City, 246 U. S. 63, 38 Sup. Ct. 224, 62 L. ed. 579; Bilby v. Stewart, 246 U. S. 255; Farson, Son & Co. v. Bird, 248 U. S. 268; Withnell v. Ruecking Const. Co., 249 U. S. 63, 39 Sup. Ct. 200, 63 L. ed. 479. Where the State court held that the plaintiff in error was estopped from raising the constitutional question, the writ of error was dismissed. Eustis v. Bolles, 150 U. S. 361, 37 L. ed. 1111; Pierce v. Somerset Ry. Co., 171 U. S. 641, 43 L. ed. 316; Rutland R. Co. v. Central Vt. R. Co., 159 U. S. 630, 40 L. ed. 284; Moran v. Horsky, 178 U. S. 205, 44 L. ed. 1038; Pittsburgh & L. A. I. Co. v. Cleveland Min. Co., 178 U. S. 270, 279, 44 L. ed. 1065, 1068; Beals v. Cone, 188 U. S. 184, 47 L. ed. 435; Schaefer v. Werling, 188 U. S. 516, 47 L. ed. 570; *contra*. Union Pacific R. R. Co. v. Public Service Commission, 248 U. S. 67. It was so held as to rulings that the payment of a tax was voluntary and not under duress. Gaar, Scott & Co. v. Shannon, 223 U. S. 468, 56 L. ed. 510. That the appeal to the highest State court was taken too late. Chesapeake & Ohio Ry. Co. v. McDonald, 214 U. S. 191, 53 L. ed. 963. Where the application was denied for laches. Preston v. City of Chicago, 226 U. S. 447, 57 L. ed. —; and because it was prematurely made. Petrie v. Nampa & Meridian Irrigation District, 248 U. S. 155, 39 Sup. Ct. 25, 63 L. ed. 178.

The Supreme Court refused to review a decision of a State court which denied a motion to punish a party for a contempt. Newport Light Co. v. Newport, 151 U. S. 527, 38 L. ed. 259. A decision that the complainant has no right to sue because the act of which complaint is made, is a public and not a private wrong was considered to be the denial of a Federal right. Bowe v. Scott, 233 U. S. 658. Where it is claimed that the obligation of a contract has been impaired by a State law, the Supreme Court of the United States may pass upon the question whether any contract was made. Mobile & O. R. Co. v. Tennessee, 153 U. S. 486, 38 L. ed. 793; and upon the construction of the contract, and will then exercise its independent

cient to sustain the judgment, the Supreme Court will take jurisdiction of the case, because when put to inference as to what points the State court decided, it ought not to assume that

judgment. Butz v. Muscatine, 8 Wall. 575; Columbia Water Power Co. v. Columbia El. Ry., L. & P. Co., 172 U. S. 475, 43 L. ed. 521; Citizen's Savings Bank v. Owensboro, 173 U. S. 636; Louisiana Ry. & Nav. Co. v. Behrman, 235 U. S. 146; Long Sault Dev. Co. v. Call, 242 U. S. 272. But if the question is doubtful it will incline to agree with the construction given by the State court. Board of Liquidation v. Louisiana, 179 U. S. 622. It will conform to the settled construction which the highest courts of the State gave to the State statutes at the time when the alleged obligation was incurred. Taylor v. Ypsilanti, 105 U. S. 60; Ennis Water Works v. City of Ennis, 233 U. S. 652; U. S. Fidelity & Guaranty Co. v. State of Oklahoma, 250 U. S. 111; New Orleans Water Co. v. Louisiana Sugar Co., 125 U. S. 18, 38, 31 L. ed. 607, 614, *per* Gray, J.: "When the State court decides against a right claimed under a contract, and there was no law subsequent to the contract this court clearly has no jurisdiction. When the existence and construction of a contract are undisputed, and the State court upholds a subsequent law on the ground that it did not impair the obligation of the admitted contract, it is equally clear that this court has jurisdiction." See Detroit United Ry. v. Michigan, 242 U. S. 239. "When the State court holds that there was a contract conferring certain rights, and that a subsequent law did not impair those rights, this court has jurisdiction to consider the true construction of the supposed contract, and, if it is of opinion that it did not confer the right affirmed by the State court, and therefore its obligation was not impaired by the subsequent law, may, on that ground, affirm the judgment. When the State court upholds the subsequent law on the ground that the contract did not confer the right claimed, this court may inquire whether the supposed contract did give the right, because, if it did, the subsequent law cannot be upheld." But see Missouri & Kansas Interurban Ry. Co. v. City of Olathe, 222 U. S. 187, 56 L. ed. 156.

In McCullough v. Virginia, 172 U. S. 102, 43 L. ed. 382, the plaintiff in error claimed that certain legislation subsequent to his contract impaired the obligation of the same. The State Court of Appeals, without expressly passing upon the validity of such legislation, gave substantial effect thereto by holding that the original contract was void and could not be enforced. The Supreme Court of the United States took jurisdiction and reversed the judgment. But see the dissenting opinion of Peckham, J., and Powell v. Brunswick County, 150 U. S. 433, 37 L. ed. 1134; Bacon v. Texas, 163 U. S. 207, 41 L. ed. 132; St. Paul & M. M. Ry. Co. v. Todd County, 142 U. S. 282, 35 L. ed. 1014. The omission of the State court to refer to a statute which the plaintiff in error asserts has impaired his rights does not prevent the Supreme Court from con-

the judgment was based upon grounds clearly untenable;[4] but where a defense resting on local statutes is distinctly made, the Supreme Court will not, in order to reach a Federal question, resort to critical conjecture as to the action of the State court in the disposition of such defense.[5] When the Supreme Court is of the opinion that the Federal question was erroneously decided, it will still affirm the judgment, if it appears that on another ground, even if such ground were not considered by the State court, the decision was correct.[6] A decision of a question of fact by a jury will not be thus reviewed.[7] In a case tried before a judge without a jury the findings of fact are usually followed;[8] but not where it appears to be without sup-

sidering such statute, if it was an essential, although an unmentioned, element of the decision. Carondelet Canal Co. v. Louisiana, 233 U. S. 362; Louisiana Ry. & Nav. Co. v. Behrman, 235 U. S. 164. It has been said that there is a distinction between a statute which has the effect of violating or repudiating a contract and one that impairs the obligation thereof. Hays v. Port of Seattle, 251 U. S. 233.

[4] Klinger v. Missouri, 13 Wall. 257, 20 L. ed. 635; Johnson v. Risk, 137 U. S. 300, 307, 34 L. ed. 683, 686; St. Louis Iron Mountain & Southern Ry. Co. v. McWhirter, 229 U. S. 265; Missouri, Kansas & Texas Ry. Co. v. Cade, 233 U. S. 642: Northwestern Laundry v. Des Moines, 239 U. S. 486; Crew Levick Co. v. Commonwealth of Pa., 245 U. S. 292; Am. Fire Ins. Co. v. King Lumber & Mfg. Co., 250 U. S. 2, 39 Sup. Ct. 431, 63 L. ed. 810.

[5] Johnson v. Risk, 137 U. S. 300, 307, 34 L. ed. 683, 686; Cuyahoga Power Co. v. North'n Realty Co., 244 U. S. 300.

[6] Murdock v. Memphis, 20 Wall. 590, 636, 22 L. ed. 429, 444. See Walter A. Wood Co. v. Skinner, 139 U. S. 293, 295, 35 L. ed. 193, 194; Heim v. McCall, 239 U. S. 175; Bi-Metallic Investment Co. v. State Board of Equalization of Colorado, 239 U. S. 441.

[7] Dower v. Richards, 151 U. S. 658, 38 L. ed. 305; Chicago, B. & Q. R. R. Co. v. Chicago, 166 U. S. 226, 242, 41 L. ed. 979, 986. Missouri, Kansas & Texas Railway Company v. West, 232 U. S. 682; Cornell Steamboat Co. v. Phœnix Construction Co., 233 U. S. 593; Great Northern Ry. Co. v. Donaldson, 246 U. S. 121, 38 Sup. Ct. 230, 62 L. ed. 616.

[8] Willoughby v. Chicago, 235 U. S. 45; Jones National Bank v. Yates, 240 U. S. 541; Donohue v. Vosper, 243 U. S. 59 (Adverse possession); King v. Putnam Investment Co., 248 U. S. 23; Pure Oil Co. v. State of Minnesota, 248 U. S. 158, 39 Sup. Ct. 35, 63 L. ed. 180; Gillis v. N. Y., N. H. & H. R. Co., 249 U. S. 515, 39 Sup. Ct. 355, 63 L. ed. 738. In a suit against a railroad company to recover an undercharge, where the tariffs filed are not included in the record, the findings of the State

port from the evidence,[9] and the court may examine the evidence in order to determine whether what purports to be a finding of fact is in reality a decision upon a question of Federal law.[10] It may review a ruling upon the admission [11] or exclusion [12] of evidence.

§ 692b. Raising Federal question in State court. Except possibly under extraordinary circumstances, a writ of error will not issue to review the judgment of a State court unless the Federal question was raised in the State tribunals.[1] When it is desired to secure the right to review the decision of a State court in the Supreme Court of the United States, it is the safer practice to make it appear distinctly on the record, by a statement either in the pleadings,[2] or as the ground for an objection to the admission of evidence, or in support of an offer of evidence,

court are usually conclusive. Louis. & Nash. R. R. Co. v. Maxwell, 237 U. S. 95. Whether a shipment was at a given time interstate is a question of fact. Southern Pac. Co. v. State of Arizona, 249 U. S. 472.

[9] Northern Pac. Ry. Co. v. State of North Dakota, 236 U. S. 585; Interstate Amusement Co. v. Albert, 239 U. S. 560. The State court cannot, by omitting to pass upon basic questions of fact, deprive a litigant of the benefit of a Federal right properly asserted. Southern Pacific Co. v. Schuyler, 227 U. S. 601; Carlson v. Curtiss, 234 U. S. 103; Postal Telegraph Cable Co. v. City of Newport, 247 U. S. 464, 38 Sup. Ct. 566, 62 L. ed. 1215.

[10] Cedar Rapids Gas Light Co. v. City of Cedar Rapids, 223 U. S. 655, 668, 56 L. ed. 594, 604; Kansas City So. Ry. Co. v. Albers Comm. Co., 223 U. S. 573, 56 L. ed. 556; Northern Pac. R. Co. v. State of North Dakota, 236 U. S. 585; Norfolk and Western Railway Company v. Conley, Attorney General of the State of West Virginia, 236 U. S. 605; Stewart Mining Company v. Ontario Mining Company, 237 U. S. 350.

[11] Apapas v. U. S., 233 U. S. 587; Graham v. Gill, 233 U. S. 643.

[12] Atlantic Coast Line Railroad Company v. Glenn, 239 U. S. 388; McGinis v. California, 247 U. S. 91.

§ 692b. [1] Citizens' Bank of Michigan City v. Opperman, 249 U. S. 448, 39 Sup. Ct. 330, 63 L. ed. 701; Southern Pac. Co. v. State of Arizona, 249 U. S. 472; Jett Bros. Co. v. City of Carrollton, 252 U. S. 1. It will not consider an independent constitutional question which appears upon the facts, but was not raised below. Dewey v. Des Moines, 173 U. S. 193, 43 L. ed. 665; Chapin v. Fye, 179 U. S. 127, 45 L. ed. 119. But see Hedrick v. Atchison T. & S. F. Ry. Co., 167 U. S. 673, 677, 42 L. ed. 320, 321; Bement v. National Harrow Co., 186 U. S. 70, 46 L. ed. 1058; Jenkins v. Neff, 186 U. S. 230, 235, 46 L. ed. 1140, 1142. See *infra*, § 711g.

[2] See Hays v. Port of Seattle, 251 U. S. 233, 237. An averment that by reason of a contract with the

or a request to charge, that a Federal question is involved.[3] This is not, however, indispensable, if the Supreme Court

city plaintiff had a vested right of property therein, and in the performance thereof and that a refusal to perform amounts to a deprivation of such property is insufficient since it amounts to no more than an allegation of a breach of contract. McCormick v. Oklahoma City, 236 U. S. 657.

[3] Zadiz v. Baldwin, 166 U. S. 485, 41 L. ed. 1087; Oxley Stave Co. v. Butler County, 166 U. S. 648, 41 L. ed. 1149; Carney v. Chapman, 247 U. S. 102, 38 Sup. Ct. 449, 62 L. ed. 1005. It is not necessary to state specifically the particular provision of the Constitution of the United States upon which the party relies. Bridge Proprietors v. Hoboken L. & I. Co., 1 Wall. 116, 17 L. ed. 571; Furman v. Nichol, 8 Wall. 44, 19 L. ed. 370; Columbia Water Power Co. v. Columbia El. St. Ry., Lt. & P. Co., 172 U. S. 475, 485, 43 L. ed. 521, 524. But see New York C. & H. R. R. Co. v. New York, 186 U. S. 269, 46 L. ed. 1158. For a case where the pleading raised the question, see Am. Express Co. v. Michigan, 177 U. S. 404, 409, 44 L. ed. 823, 825. When an immunity was claimed under a specified statute, it was said that it would be an excessive requirement to hold the plaintiff in error bound, in the first instance, to anticipate the specific and qualified form in which the immunity finally was denied. Merchants' Nat. Bank v. Wehrmann, 202 U. S. 295, 299, 50 L. ed. 1036, 1039. But a general claim below that a statute is unconstitutional is insufficient, since it may have called the attention of the court to the State Constitution only. Endowment & Ben. Ass'n v. Kansas, 120 U. S. 103, 30 L. ed. 593; Miller v. Cornwall R. Co., 168 U. S. 131, 42 L. ed. 409; Layton v. Missouri, 187 U. S. 356, 47 L. ed. 214. It seems that a claim that a statutory proceeding is not due process of law is insufficient unless reference is specifically made to the Fourteenth amendment. Bollen v. Nebraska, 176 U. S. 83, 44 L. ed. 382. See Hulbert v. Chicago, 202 U. S. 275, 50 L. ed. 1026. An exception because the judgment deprives plaintiff in error of his property without due process of law, in violation of the Constitution of the United States, only brings up the question whether the proceedings themselves show a want of such due process. Appleby v. City of Buffalo, 221 U. S. 524, 55 L. ed. 838. When the plaintiff in error had claimed protection below under the Fifth and Seventh amendments to the Federal Constitution, which do not apply to the States, he was not allowed in the Supreme Court of the United States to claim that the statute in question was obnoxious to the Fourteenth amendment. Chapin v. Fye, 179 U. S. 127, 45 L. ed. 119. A general claim in the answer, that "this proceeding is in violation of the Constitution of the United States," was held to be insufficient to raise a Federal question that did not appear to have been argued below. Capital City Dairy Co. v. Ohio, 183 U. S. 238, 248, 46 L. ed. 171, 176. In an action founded upon the Employers' Liability Act, an exception to a

can see by an examination of the record that the Federal question was raised and decided adversely to the plaintiff in error.[4]

part of a charge concerning contributory negligence does not raise a Federal question, unless it specifically refers to some provision of that statute. Seaboard Air Line Ry. v. Duvall, 225 U. S. 477, 56 L. ed. 1171. The mention in a pleading of a defense based upon the Constitution of the United States seems to be insufficient when the same is not called to the attention of the State court of first instance or of that of review. Hulbert v. Chicago, 202 U. S. 275, 50 L. ed. 1026; Olympia Mining & Milling Co. v. Kerns, 236 U. S. 211.

The safer practice is to raise the question clearly by a request to the court of first instance for a ruling thereupon and an exception. Seaboard Air Line Ry. v. Duvall, 225 U. S. 477, 56 L. ed. 1171. In a trial by jury, this should be done by a request for instructions. *Ibid.;* St. Louis, Iron Mountain & Southern Ry. Co. v. Taylor, 210 U. S. 281, 293, 52 L. ed. 1061, 1067. In a case tried by a judge, by a request for a finding of fact or conclusion of law upon the subject. St. Louis, Iron Mountain & Southern Ry. Co. v. Taylor, 210 U. S. 281, 293, 52 L. ed. 1061, 1067.

[4] Furman v. Nichol, 8 Wall. 44, 19 L. ed. 370; Crowell v. Randell, 10 Pet. 368, 9 L. ed. 458; Armstrong v. Treas. of Athens County, 16 Pet. 281, 10 L. ed. 965; Beer Co. v. Massachusetts, 97 U. S. 25, 24 L. ed. 989. See Roby v. Colehour, 146 U. S. 153, 36 L. ed. 922; Green Bay & M. Canal Co. v. Patten P. Co., 172 U. S. 58, 43 L. ed. 364; Bilby v. Stewart, 246 U. S. 255, 38 Sup. Ct. 264, 62 L. ed. 701; Dickinson v. Stiles, 246 U. S. 631.

The certification by the clerk of briefs not a part of the record is insufficient. Zadig v. Baldwin, 166 U. S. 485, 41 L. ed. 1087; Harding v. Illinois, 196 U. S. 78, 49 L. ed. 394. A certificate of the presiding justice of the State court or a certificate of that court may be examined for that purpose. Cited with approval by Dayton, J., in *Re* Charleston Light & Power Co., 199 Fed. 846, 857; Murdock v. Memphis, 20 Wall. 590, 593, 22 L. ed. 429; Johnson v. Risk, 137 U. S. 300, 307, 34 L. ed. 683, 686; Roby v. Colehour, 146 U. S. 153, 36 L. ed. 922; Gulf & S. I'd R. Co. v. Hewes, 183 U. S. 66, 46 L. ed. 86. "Such certificate is insufficient to give us jurisdiction where it does not appear in the record, and that its office is to make more certain and specific what is too vague and general in the record." Brown, J., in Yazoo & Miss. R. Co. v. Adams, 180 U. S. 41, 48, 45 L. ed. 415, 418. Where a judge of the highest court of a State, in allowing a writ of error, adds to his signature "P. J. etc., in the absence of the chief judge from the State," such recital is *prima facie* evidence that the chief judge is absent and that the judge signing is presiding. Missouri Valley Land Co. v. Wiese, 208 U. S. 234, 5 L. ed. 466. But not when made after the case has passed beyond the control of such court. Home for Incurables v. New York, 187 U. S. 155, 47 L. ed. 117, 63 L. R. A. 329. Neither of these, however, is conclusive. Adams

A discussion of the point in the opinion below is sufficient.[5]

If the question was not raised until a motion for a rehearing in the highest court of the State, no writ of error will lie,[6] unless the rehearing was granted,[7] or the court entertains the motion and expressly passes upon the point.[8] The constitutional question may be raised for the first time upon a motion for a

County v. B. & Mo. R. R. Co., 112 U. S. 123, 129, 28 L. ed. 678, 680; Gross v. U. S. Mortgage Co., 108 U. S. 477, 27 L. ed. 795; Roby v. Colehour, 146 U. S. 153, 36 L. ed. 922; Powell v. Brunswick County, 150 U. S. 433, 37 L. ed. 1134; Dibble v. Bellingham Bay Land Co., 163 U. S. 63, 41 L. ed. 72; Yazoo & Miss. R. Co. v. Adams, 180 U. S. 41, 48, 45 L. ed. 415, 418. "It is elementary that the certificate of a court of last resort may not import a Federal question into a record where otherwise such a question does not arise." Citing Seaboard Air Line Ry. v. Duvall, 225 U. S. 477, 56 L. ed. 1171; Fullerton v. Texas, 196 U. S. 192, 49 L. ed. 443; Louisville & N. R. Co. v. Smith, H. & Co., 204 U. S. 551, 51 L. ed. 612. See also Erie R. R. Co. v. Solomon, 237 U. S. 427. "It is equally elementary that such a certificate may serve to elucidate the determination whether a Federal question exists." Rector v. City Deposit Bank Co., 200 U. S. 405, 412, 50 L. ed. 527, 529; Illinois C. R. Co. v. McKendree, 203 U. S. 514, 525, 51 L. ed. 298, 303; Sperry & Hutchinson Co. v. City of Tacoma, Wash., 199 Fed. 853.

[5] When the opinion of the State court considers a Federal question without any criticism of the manner in which it was raised, the Supreme Court will hold that the point was duly made although the record contains no mention thereof. St. Louis, Iron Mountain & Southern Ry. Co. v. Hesterly, 228 U. S. 702; Miedreich v. Lauenstein, 232 U. S. 236; Carlson v. Washington, 234 U. S. 103; Mallinckrodt Chemical Works v. Missouri, 238 U. S. 41; Cincinnati, New Orleans & Texas Pac. Ry. Co. v. Rankin, 241 U. S. 319; Cissna v. Tennessee, 246 U. S. 289, 38 Sup. Ct. 306, 62 L. ed. 720; Northern Pac. Ry. Co. v. Solum, 247 U. S. 477, 38 Sup. Ct. 550, 62 L. ed. 1221; Dickinson v. Stiles, 246 U. S. 631, 38 Sup. Ct. 415, 62 L. ed. 908.

[6] Texas & P. Ry. Co. v. So. Pac. Ry. Co., 137 U. S. 48; Turner v. Richardson, 180 U. S. 87; McCorquodale v. State of Texas, 211 U. S. 432, 53 L. ed. 269; Waters-Pierce Oil Co. v. Texas, 212 U. S. 112, 53 L. ed. 431; Forbes v. State Council of Virginia, Junior Order United Am. Mechanics of the State of Virginia, 216 U. S. 396, 54 L. ed. 534; Bowe v. Scott, 233 U. S. 658; St. Louis and San Francisco R. R. Co. v. Shepherd, 240 U. S. 240; Bilby v. Stewart, 246 U. S. 255; Godchaux Co. v. Estopinal, 51 U. S. 179.

[7] Mallett v. North Carolina, 181 U. S. 589, 592, 45 L. ed. 1015, 1017.

[8] Disconto Gesellschaft v. Umbreit, 208 U. S. 570, 52 L. ed. 625; Smithsonian Institution v. St. John, 214 U. S. 19, 53 L. ed. 892; Gran-

new trial,[9] even where it arose upon rebuttal,[10] even if it has not been subsequently considered in the highest court of the State.[11] The assertion of a Federal right in an unsuccessful application to the highest State court for a writ of error to a lower court, is insufficient.[12]

Where the State practice requires that the objection be raised before the trial,[13] or at a later stage of the case,[14] and for that reason the highest court of the State refused to consider one subsequently raised, the Supreme Court of the United States cannot take jurisdiction,[15] unless there has been an unwarranted resort by the State court to rules of practice in order to evade a decision upon the Federal question,[16] or where it is claimed that a change in the rule of law or construction of statutes applicable

nis v. Ordean, 234 U. S. 385; Atchison, Topeka & Santa Fe R. Co. v. Harold, 241 U. S. 371. A denial "after mature consideration" does not show that the Federal question was considered; Forbes v. State Council, 216 U. S. 396, 54 L. ed. 534; Consol. Turnpike Co. v. Norfolk & O. V. Co., 228 U. S. 326, 57 L. ed. —.

[9] Chicago, B. & Q. R. Co. v. Chicago, 166 U. S. 226, 231, 41 L. ed. 979, 982; San Jose Land & Water Co. v. San Jose Ranch Co., 189 U. S. 117, 47 L. ed. 765.

[10] San Jose Land & Water Co. v. San Jose Ranch Co., 189 U. S. 177, 47 L. ed. 765.

[11] Chicago, B. & Q. R. Co. v. Chicago, 166 U. S. 226, 47 L. ed. 979.

[12] El Paso & Southwestern R. R. Co. v. Eichel, 226 U. S. 590.

[13] Atlantic Coast Line R. R. Co. v. Mims, 242 U. S. 532; Nevada-California-Oregon Railway v. Burrus, 244 U. S. 103.

[14] Bonner v. Gorman, 213 U. S. 86, 91, when raised upon a second appeal; Louisville & Nashville R. R. Co. v. Woodford, 234 U. S. 46, 51 (upon the argument of a motion for a new trial but not specified in the written notice or motion); Louisville & Nashville R. R. Co. v. Higdon, 234 U. S. 592; Missouri, Kansas & Texas Ry. Co. v. Sealy, 248 U. S. 363, 39 Sup. Ct. 97, 63 L. ed. 296; Barbour v. State of Georgia, 249 U. S. 454. The silence of the State court upon the question cannot be construed as a ruling that it was not properly brought to its attention. International Harvester Co. v. State of Missouri, 234 U. S. 200; Reinman v. Little Rock, 237 U. S. 171.

[15] Erie R. Co. v. Purdy, 185 U. S. 148, 46 L. ed. 847; Mutual Life Ins. Co. v. McGrew, 188 U. S. 291, 47 L. ed. 480, 63 L. R. A. 33; Cleveland & Pittsburgh R. R. v. Cleveland, 235 U. S. 50; Missouri Pacific Ry. Co. v. Taber, 244 U. S. 200; Barbour v. Georgia, 249 U. S. 454, 39 Sup. Ct. 316, 63 L. ed. 704; Hartford Life Ins. Co. v. Johnson, 249 U. S. 490, 39 Sup. Ct. 336, 63 L. ed. 722.

[16] Louisville & Nashville Railroad Co. v. Woodford, 24 U. S. 46; Atlantic Coast Line R. R. Co. v. Mims, 242 U. S. 535.

to a contract would be repugnant to the Constitution.[17] A mention of a Federal question in a petition for a writ of error, or in an assignment of errors,[18] after judgment by the State court, is insufficient to give the Supreme Court jurisdiction.[19]

§ 692c. Practice upon writs of error to State courts. A writ of error to a State court is not allowed as a matter of right.[1] The usual practice is to submit a certified copy of the record of the State court to a Justice of the Supreme Court, whose duty it then is to ascertain upon examination whether the case upon the face of the record will justify the allowance of the writ.[2] He may refer the application to the whole court for decision as to the propriety of the issue of the writ.[3] The application may also be made to the presiding judge of the State court to which the writ of error is addressed.[4] The writ will be denied if there is no Federal question involved, or if the decision complained of was, as regards the Federal question, so plainly right as not to require argument.[5] The writ does not

17 Act of February 17, 1922, quoted *supra*, § 692.

18 Leeper v. Texas, 139 U. S. 462, 35 L. ed. 225; Manhattan Life Ins. Co. v. Cohen, 234 U. S. 123; Cleveland and Pittsburgh R. R. Co. v. Cleveland, 235 U. S. 50; Jett Bros. Co. v. Carrollton, 252 U. S. 1.

19 Chapin v. Fye, 179 U. S. 127, 45 L. ed. 119.

§ 692c. 1 Twitchell v. Commonwealth, 7 Wall. 321, 19 L. ed. 223; Spies v. Illinois, 123 U. S. 131, 143, 31 L. ed. 80.

2 Ibid. A justice of the Supreme Court may grant the writ after its refusal by the judges of the State court. *Ex parte* Chadwick, 159 Fed. 576.

3 Twitchell v. Commonwealth, 7 Wall. 321, 19 L. ed. 223; Spies v. Illinois, 123 U. S. 131, 143, 31 L. ed. 80; *Re* Kemmler, 136 U. S. 436, 437, 34 L. ed. 519. The Supreme Court will consider no application for a writ of error, unless a Justice of the court has indorsed on the record a request that the application be made to the full bench. *Re* Ingalls, 139 U. S. 548, 35 L. ed. 266. The application for a writ of error, if made to a single Justice, is usually *ex parte*. When made to the full court, usually both sides are heard. Spies v. Illinois, 123 U. S. 131, 31 L. ed. 80; *Re* Kemmler, 136 U. S. 436, 437, 34 L. ed. 519.

4 Sheppard v. Wilson, 5 How. 210, 12 L. ed. 120; Bartemeyer v. Iowa, 14 Wall. 26, 20 L. ed. 792. Where the order allowing the writ of error states that the chief justice is absent, and is signed by a judge as presiding judge of the State court, it will be presumed that the writ was properly allowed. Butler v. Gage, 138 U. S. 52, 56, 34 L. ed. 869, 371.

5 Spies v. Illinois, 123 U. S. 131, 166, 31 L. ed. 80, 86; Brooks v. Missouri, 124 U. S. 394, 31 L. ed. 454; New Orleans Waterworks Co.

issue to review a judgment which is not final,[6] and, on the question of finality, the form of the judgment is controlling.[7] A writ of error may be issued by the Supreme Court of the United States to a judgment of an inferior State court which, by the laws of the State, cannot be reviewed in the highest State court.[8]

v. Louisiana, 185 U. S. 336, 46 L. ed. 936; Swafford v. Templeton, 185 U. S. 487, 493, 46 L. ed. 1005; Wabash R. Co. v. Flannigan, 192 U. S. 29, 38, 48 L. ed. 328, 331.

[6] Louisiana Nav. Co. v. Oyster Commission, 226 U. S. 99, 57 L. ed. —. See § 695, *infra*. The writ may issue to review final judgment overruling a plea of abatement. Buck Stove & Range Co. v. Wickers, 226 U. S. 205, 57 L. ed. —. It seems that an order denying a motion for a new trial may be thus reviewed in a proper case. Chicago, B. & O. R. R. Co. v. Chicago, 166 U. S. 226, 41 L. ed. 979. What constitutes a final judgment, decree, or order is explained in another section. *Infra*, § 695. A judgment, which orders a new trial, Houston v. Moore, 3 Wheat. 433, 4 L. ed. 428; Parcels v. Johnson, 20 Wall. 653, 22 L. ed. 410; Rankin v. State, 11 Wall. 380, 20 L. ed. 175; or any further proceedings, McComb v. Com'rs of Knox County, 91 U. S. 1, 23 L. ed. 185; Bostwick v. Brinkerhoff, 106 U. S. 3, 27 L. ed. 73; Gibbons v. Ogden, 6 Wheat. 448, 5 L. ed. 302; Meagher v. Minn. Thr. Mfg. Co., 145 U. S. 608, 36 L. ed. 834; Cincinnati St. Ry. Co. v. Snell, 179 U. S. 395, 45 L. ed. 248; cannot be immediately reviewed; even if no further proceedings have actually taken place. Haseltine v. Central Nat. Bank, 183 U. S. 130, 46 L. ed. 117. A judgment unconditionally dismissing a complaint, when nothing more is requisite to complete the dismissal, may thus be reviewed. Com'rs of Tippecanoe County v. Lucas, 93 U. S. 108, 23 L. ed. 822. An error in an interlocutory judgment or order may be reviewed by writ of error to that which is final. Coe v. Armour Fertilizer Works, 237 U. S. 413. Even though by the State practice it settled the law of the case and must be followed in subsequent proceedings therein. Grays Harbor Co. v. Coats Fordney Co., 243 U. S. 251. See *infra*, § 711f. Unless the former was in its nature final and immediately reviewable. Rio Grande Ry. Co. v. Stringham, 239 U. S. 44.

[7] Louisiana Nav. Co. v. Oyster Commission, 226 U. S. 99, 57 L. ed. —, where the State Supreme Court, when reviewing a judgment of dismissal, said that an opportunity to amend the petition should be afforded, and in its judgment set aside the judgment appealed from and remanded the case for procedure in accordance with the views expressed in the opinion, plaintiff in error contending that the opinion finally disposed of his claim to the greater portion of the land.

[8] Downham v. Alexandria, 9 Wall. 659, 19 L. ed. 807; Gregory v. McVeigh, 23 Wall. 294, 23 L. ed. 156; Miller v. Joseph, 17 Wall. 655, 21 L. ed. 741; Kentucky v. Powers, 201 U. S. 1, 37, 50 L. ed. 633, 649; Kanawha & Michigan Ry. Co. v. Kerse, 239 U. S. 576; San Antonio & Aransas Pass Ry. Co. v. Wagner, 241 U. S. 476; Second National

When, however, the plaintiff in error has a right to a review of the judgment in another court of the State, no writ of error can be obtained till after such review has been had;[9] even though the judgment of the inferior State court is in accordance with what was decided by the highest State court in a former appeal.[10] Where leave to appeal to a higher court of the State is discretionary, the record must show an applicant for its allowance and a refusal thereof.[11] The writ should be directed to the court in which the final judgment was rendered, by whose process it is to be executed, and where the record remains, although a higher court has considered the case upon appeal or writ of error, and sent down a *remittitur* or rescript accordingly.[12] In the latter case, the writ may be addressed to the highest court, and seek through its instrumentality to obtain the record from the inferior court having it in keeping;[13] but it is the safer practice to address the writ to the court which has the record.[14]

Bank of Cincinnati, Ohio v. First National Bank of Okeana, Ohio, 242 U. S. 600; Cuyahoga River Power Co. v. Northern Realty Co., 244 U. S. 300; Pennsylvania R. R. Co. v. Public Service Commission, 250 U. S. 566.

[9] Downham v. Alexandria, 9 Wall. 659, 19 L. ed. 807; Miller v. Joseph, 17 Wall. 655, 21 L. ed. 741; Gregory v. McVeigh, 23 Wall. 294, 23 L. ed. 156.

[10] Fisher v. Perkins, 122 U. S. 522, 30 L. ed. 1192; Gt. Western Tel. Co. v. Burnham, 162 U. S. 339, 40 L. ed. 991.

[11] Fisher v. Perkins, 122 U. S. 522, 30 L. ed. 1192; Stratton v. Stratton, 239 U. S. 55. Where the highest State court denied a writ of error because it thought that the judgment below was right, the writ ran to the court immediately below. Western Union Tel. Co. v. Crovo, 220 U. S. 364, 55 L. ed. 498.

[12] Gelston v. Hoyt, 3 Wheat. 246, 4 L. ed. 381; Kanouse v. Martin, 15 How. 198, 14 L. ed. 660; M'Guire v. Commonwealth, 3 Wall. 382, 18 L. ed. 164; Polleys v. Black R. I. Co., 113 U. S. 81, 28 L. ed. 938; Rothschild v. Knight, 184 U. S. 334, 46 L. ed. 573; Wedding v. Meyler, 192 U. S. 573, 581, 48 L. ed. 570, 573.

[13] Atherton v. Fowler, 91 U. S. 143, 147, 23 L. ed. 265, 266.

[14] Atherton v. Fowler, 91 U. S. 143, 147, 23 L. ed. 265, 266; Wedding v. Meyler, 192 U. S. 573, 581, 48 L. ed. 570, 573. Where an application to the highest court of the State for a writ of error to an inferior court has been refused, the writ should be addressed to the inferior court. Bacon v. Texas, 163 U. S. 207, 41 L. ed. 132; Stanley v. Schwalby, 162 U. S. 255, 40 L. ed. 960; Western Union Tel. Co. v. Crovo, 220 U. S. 364, 55 L. ed. 498. But see Norfolk & Suburban Turnpike Co. v. Virginia, 225 U. S. 264, 56 L. ed. 1082. If the clerk of the State court refuses to transmit a

The writ of error to a State court must, like the writ to a District Court, be accompanied by a citation and a bond.[15] The citation must be signed and the bond approved by the chief justice, judge or chancellor of the court to which the writ is addressed, or by a Justice of the Supreme Court of the United States.[16] The defendant in error must have at least thirty days' notice before the hearing of the cause.[17] Otherwise writs of error to State courts and the practice and proceedings under them are substantially similar to writs of error to District Courts of the United States, and the practice and proceedings thereunder.[18] The Supreme Court may inquire whether, owing to any intervening event, the Federal questions have ceased to be material and will then dispose of the case in the light thereof.[19]

copy of the record in obedience to the writ of error, he may be compelled to do so by an order; U. S. v. Booth, 18 How. 477, 15 L. ed. 464; or a mandamus, U. S. v. Gomez, 3 Wall. 752, 18 L. ed. 212; even though the State Court forbade him to transmit the record, U. S. v. Booth, 18 How. 477, 15 L. ed. 464; but the clerk will not be thus compelled to transmit a copy of the record after a writ of error has been allowed but before it is issued; *Ex parte* Ralston, 119 U. S. 613, 30 L. ed. 506.

[15] U. S. R. S., §§ 999, 1000. See *infra*, § 699.

[16] U. S. R. S., §§ 999, 1000; Gleason v. Florida, 9 Wall. 779, 19 L. ed. 730; Butler v. Gage, 138 U. S. 52, 34 L. ed. 869.

[17] U. S. R. S., § 999.

[18] U. S. R. S., § 1003. As to costs, see Stevens v. Cent. Nat. Bank, 168 N. Y. 560.

[19] Gulf, Col. & Santa Fe Ry. Co. v. Dennis, 224 U. S. 503, 56 L. ed. 860; where, pending a writ of error from the Supreme Court of the United States to review a judgment of an inferior State court, not reviewable by the State Supreme Court, the latter, in another case, adjudged the statute in controversy to be a violation of the State constitution, and the Supreme Court of the United States thereupon vacated the judgment and remanded the case to the court below, that the latter might give effect to the intervening decision of the highest State court. Where it appeared, by evidence outside the record, that before the issue of the writ of error, a public officer against whom a writ was prayed had died and his successor qualified, the writ was dismissed. State of Florida v. Croom, 226 U. S. 309, 57 L. ed. —. "Whatever was matter of fact in the State court, whose judgment or decree is under review, is matter of fact" in the Supreme Court of the United States. Lloyd v. Matthews, 155 U. S. 222, 227, 39 L. ed. 128, 130. A judgment which correctly refused injunctive relief against a State regulation may not be attacked on writ of error as a judgment infringing Federal rights, upon the ground that the same field of regulation has since been occupied by the Federal Gov-

The Supreme Court of the United States will not, when reviewing the judgment of a State court, take judicial notice of a public act of another State, unless the practice of the State Court so permits.[20]

§ 693. Writs of error from and appeals to the circuit courts of appeals. The Judicial Code provides: "The circuit courts of appeals shall exercise appellate jurisdiction to review by appeal or writ of error final decisions[1] in the district courts, including the United States district court for Hawaii[2] and the United States district court for Porto Rico, in all cases other than those in which appeals and writs of error may be taken direct to the Supreme Court, as provided in section two hundred and thirty-eight,[3] unless otherwise provided by law."[4] The ter-

ernment under an act of Congress enacted after the judgment was rendered. Vandalia R. R. v. Public Service Comm., 242 U. S. 255; *infra*, § 711h.

[20] Lloyd v. Matthews, 155 U. S. 222, 39 L. ed. 128.

§ 693. [1] The decision of a District Court upon exceptions to an award of arbitrators in a dispute between employers and employed appointed under the Act of July 15, 1913, Comp. St., § 8667, see *supra*, § 77g, may be reviewed by the appropriate Circuit Court of Appeals. Georgia & F. Ry. Co. v. Brotherhood of L. Engineers, C. C. A., 217 Fed. 755, *infra*, § 695.

[2] A decree in admiralty is thus appealable. Wilder's S. S. Co. v. Low, C. C. A., 112 Fed. 161. The Circuit Court of Appeals for the Ninth Circuit has no jurisdiction to review a decision of the District Court of Hawaii, when the sole question involved is one concerning the construction of the Constitution of the United States. Wright v. McFarlane & Co., C. C. A., 122 Fed. 770.

[3] *Supra*, § 688.

[4] Jud. Code, § 128, 36 St. at L. 1087, re-enacting 26 St. at L. § 693. The words "unless otherwise provided by law," refer only to provisions of the same act, or of contemporaneous or subsequent acts, and do not include provisions of earlier statutes. Gray, J., in The Paquete Habana, 175 U. S. 677, 683, 44 L. ed. 320, 322. "These words must be taken to refer to existing provisions and not to be merely a futile permission to future legislatures to make a change. They do not save every existing provision, of course, or the act would fail of its purpose. But they save some. There is no case to which they can apply more clearly than one in which, by reason of its interest, the United States has manifested its will to submit to no judgment not sanctioned by its highest court." U. S. v. Dalcour, 203 U. S. 408, 420, 421, 51 L. ed. 248, 251, per Holmes, J.; Dickinson v. U. S., 174 Fed. 808. The Circuit Courts of Appeals have jurisdiction of appeals, Ogden v. U. S., 148 U. S. 390, 37 L. ed. 493; and it has been held of writs of error, U.

ritorial jurisdiction, of these courts and the District Courts of the United States which are subject to their respective jurisdictions, has been previously explained.[5]

"Where upon a hearing in equity in a district court, or by a judge thereof in vacation, an injunction shall be granted, continued, refused, or dissolved by an interlocutory order or decree, or an application to dissolve an injunction shall be refused, or an interlocutory order or decree shall be made appointing a receiver, an appeal may be taken from such interlocutory order

S. v. Coudert, C. C. A., 73 Fed. 505, to judgments of the Circuit and District Courts in suits upon claims against the United States; *supra*, § 36, provided, at least, when the claimant is the party aggrieved, that his claim exceeds $3,000 or has been forfeited to the United States for fraud, Reid v. U. S., 211 U. S. 529, 53 L. ed. 313; of appeals from orders and judgments of the District Courts, King v. McLean Asylum of Mass. Gen. Hospital, C. C. A., 64 Fed. 139. U. S. v. Fowkes, C. C. A., 53 Fed. 13; Carter v. Roberts, 177 U. S. 496, 44 L. ed. 861; and of the District Judges, Webb v. York, C. C. A., 74 Fed. 753; upon applications for the writ of *habeas corpus* where the discharge from imprisonment was not sought because of an alleged violation of a right secured by the Constitution or a treaty; Davis v. Burke, C. C. A., 97 Fed. 501. See *supra*, §§ 467, 688; Passavant v. U. S., 148 U. S. 214, 217, 37 L. ed. 426, 427; U. S. v. Hopewell, C. C. A., 51 Fed. 798, 799; Louisville Pub. Warehouse Co. v. Collector, C. C. A., 49 Fed. 561; of writs of error to judgments in actions against collectors to recover duties; Hubbard v. Soby, 146 U. S. 56, 36 L. ed. 886; of appeals from, or writs of error to, the orders of District Courts directing the deportation of Chinese; Tsoi Yii v. U. S., C. C. A., 129 Fed. 585; U. S. v. Hung Chang, C. C. A., 130 Fed. 439. *Cf.* The United States, Petitioner, 194 U. S. 194, 48 L. ed. 931; U. S. v. Gee Lee, C. C. A., 50 Fed. 271; Gee Cue Beng v. U. S., C. C. A., 184 Fed. 383, *cf.* § 694, *infra;* but not, it was held, of a writ of error to an order by a judge for such a deportation, where no final order or judgment was entered in the District Court, and the bill of exceptions allowed was not there filed, and the transcript was certified by the District Judge instead of by the clerk; U. S. v. Hung Chang, C. C. A., 130 Fed. 439 (where the Circuit Court of Appeals suggested that the District Court had not lost jurisdiction and should enter the order and direct the filing of the bill of exceptions); of appeals from orders granting warrants for the removal of prisoners to other districts; U. S. v. Fowkes, C. C. A., 53 Fed. 13, 14; *cf.* § 489, *supra*, and formerly at least of appeals from orders of the District Courts enforcing orders of the Interstate Commerce Commission, Interstate Com. Com'n v. Atchison, T. & S. F. R. Co., 149 U. S. 264.

[5] *Supra*, § 4.

or decree granting, continuing, refusing, dissolving, or refusing to dissolve, an injunction, or appointing a receiver, to the circuit court of appeals, notwithstanding an appeal in such case might, upon final decree under the statutes regulating the same, be taken directly to the Supreme Court: *Provided,* That the appeal must be taken within thirty days from the entry of such order or decree, and it shall take precedence in the appellate court; and the proceedings in other respects in the court below shall not be stayed unless otherwise ordered by that court, or the appellate court, or a judge thereof, during the pendency of such appeal: *Provided, however,* That the court below may, in its discretion, require as a condition of the appeal an additional bond."[6]

"Writs of error and appeals from the final judgments and decrees of the supreme courts of the Territory of Hawaii and of Porto Rico, wherein the amount involved, exclusive of costs, to be ascertained by the oath of either party or of other competent witnesses, exceeds the value of $5,000, may be taken and prosecuted in the circuit courts of appeals."[7]

"In all cases other than those in which a writ of error or appeal will lie direct to the Supreme Court of the United States as provided in section two hundred and forty-seven, in which the amount involved or the value of the subject-matter in con-

[6] Ibid., Jud. Code, Sec. 129, 36 St. at L. 1087, re-enacting 26 St. at L. 828, Sec. 7, as amended 28 St. at L. 666, 31 St. at L. 660, 34 St. at L. 116. Appeals from orders granting or denying after notice and hearing interlocutory injunctions suspending or restraining the enforcement, operation, or execution of, or setting aside in whole or in part, orders of the Interstate Commerce Commission, Act of October 22, 1913, ch. 32, 38 St. at L. 220, Comp. St. § 998, *supra,* § 100b, and orders of the United States Shipping Board (Act of Sept. 7, 1916, ch. 451, § 31, 39 St. at L. 735, Comp. St. § 8146; *supra,* § 100c); and appeals from interlocutory injunctions suspending or restraining the operation or execution of a State statute by restraining the action of a State officer in the enforcement of execution of such statute or in the enforcement of execution of an order made by an administrative board or commission acting under and pursuant to the State statutes. (Jud. Code, § 266, 36 St. at L. 1087, as amended by Act of March 4, 1913, Comp. St. § 1243, *supra,* § 105d) are appealable directly to the Supreme Court of the United States. See *supra,* § 688.

[7] Act of Jan'y 28, 1915, ch. 22, § 2, 38 St. at L. 804, Comp. St. § 1126a. See *infra,* § 696.

troversy shall exceed five hundred dollars, and in all criminal cases, writs of error and appeals shall lie from the district court for Alaska or from any division thereof, to the circuit court of appeals for the ninth circuit, and the judgments, orders, and decrees of said court shall be final in all such cases. But whenever such circuit court of appeals may desire the instruction of the Supreme Court of the United States upon any question or proposition of law which shall have arisen in any such case, the court may certify such question or proposition to the Supreme Court, and thereupon the Supreme Court shall give its instruction upon the question or proposition certified to it, and its instructions shall be binding upon the circuit court of appeals."[8] "The circuit court of appeals for the ninth circuit is empowered to hear and determine writs of error and appeals from the United States court for China, as provided in the Act entitled 'An Act creating a United States court for China and prescribing the jurisdiction thereof,' approved June thirtieth, nineteen hundred and six."[9]

The District Court of Porto Rico is "attached to and included in the first circuit of the United States, with the right of appeal and review by said circuit court of appeals in all cases where the same would lie from any district court to a circuit court of appeals of the United States, and with the right of appeal and

[8] Jud. Code, § 134, 36 St. at L. 1087. See Coquitlam v. U. S., 163 U. S. 346, 41 L. ed. 184; Union Cent. Life Ins. Co. v. Champlin, C. C. A., 116 Fed. 858. "All appeals, and writs of error, and other cases, coming from the district court for the district of Alaska to the circuit court of appeals for the ninth circuit, shall be entered upon the docket and heard at San Francisco, California, or at Portland, Oregon, or at Seattle, Washington, as the trial court before whom the case was tried below shall fix and determine: Provided, That at any time before the hearing of any appeal, writ of error, or other case, the parties thereto, through their respective attorneys, may stipulate at which of the above-named places the same shall be heard, in which case the case shall be remitted to and entered upon the docket at the place so stipulated and shall be heard there." Act of Jan'y 11, 1909, ch. 15, 35 St. at L. 585; Act of March 3, 1911, ch. 231, § 135, 36 St. at L. 1135, Comp. St. § 1126.

[9] Jud. Code, Sec. 131, 36 St. at L. 1087, re-enacting in part 34 St. at L. 814. See Toeg v. Suffert, C. C. A., 167 Fed. 125; Price v. U. S., C. C. A., 169 Fed. 791. See §§ 73, 687, *supra*.

review directly by the Supreme Court of the United States in all cases where a direct appeal would be from such district courts."[10]

"The Circuit Court of Appeals of the Fifth Circuit of the United States shall have jurisdiction to review, revise, modify, reverse, or affirm the final judgments, and decrees of the District Court of the Canal Zone and to render such judgments as in the opinion of the said appellate court should have been rendered by the trial court in all actions and proceedings in which the Constitution, or any statute, treaty, title, right or privilege of the United States, is involved and a right thereunder denied,[11] and in cases in which the value in controversy exceeds one thousand dollars, to be ascertained by the oath of either party, or by other competent evidence,[12] and also in criminal causes wherein the offense charged is punishable as a felony.[13] And such appellate jurisdiction, subject to the right of review by or appeal to the Supreme Court of the United States as in other cases authorized by law, may be exercised by said circuit court of appeals in the same manner under the same regulations, and by the same procedure as nearly as practicable as is done in reviewing the final judgments and decrees of the district courts of the United States."[14]

"In all cases arising in the Virgin Islands which on March 3, 1917, were "reviewable by the courts of Denmark, writs of error and appeals shall be to the Circuit Court of Appeals for the Third Circuit, and except as provided in sections two hundred and thirty-nine and two hundred and forty of the Judicial Code, the judgments, orders, and decrees of such court shall be final in all such cases."[15]

"The Supreme Court of the United States, the Circuit Court of Appeals of the United States, and the Supreme Courts of the Territories, in vacation and chambers and during

[10] Act of March 2, 1917, ch. 145, § 42, 39 St. at L. 966, Comp. St. § 3803r. *Supra*, § 70.

[11] *Supra*, §§ 691-692a.

[12] *Infra*, § 696.

[13] A judgment imposing a fine of $25 for contempt was not reviewed. Smith v. Government of Canal Zone, C. C. A., 239 Fed. 133. See *infra*, § 696.

[14] Act of August 24, 1912, ch. 390, § 9, 37 St. at L. 565, Comp. St. § 10045.

[15] Ch. 171, § 2, 39 St. at L. 1132, Comp. St. § 3924¼b.

their respective terms, as now or as they may be hereafter held, are hereby invested with appellate jurisdiction of controversies arising in bankruptcy proceedings from the courts of bankruptcy from which they have appellate jurisdiction in other cases. The Supreme Court of the United States shall exercise a like jurisdiction from courts of bankruptcy not within any organized circuit of the United States and from the Supreme Court of the District of Columbia. (*b*) The several Circuit Courts of Appeal shall have jurisdiction in equity, either interlocutory or final, to superintend and revise in matter of law the proceedings of the several inferior courts of bankruptcy within their jurisdiction. Such power shall be exercised on due notice and petition by any party aggrieved."[16] "That appeals, as in equity cases, may be taken in bankruptcy proceedings from the courts of bankruptcy to the circuit court of appeals of the United States, and to the Supreme Court of the Territories, in the following cases, to wit: (1) from a judgment adjudging or refusing to adjudge the defendant a bankrupt; (2) from a judgment granting or denying a discharge; and (3) from a judgment allowing or rejecting a debt or claim of five hundred dollars or over. Such appeal shall be taken within ten days after the judgment appealed from has been rendered, and may be heard and determined by the appellate court in term or vacation, as the case may be."[17] This statute has been discussed in the Chapter on Bankruptcy.[18] The Circuit Court of Appeals have original jurisdiction of applications by the Federal Trade Commission for the enforcement of the commission's orders, as has been previously explained,[19] and also of appeals from the orders of the Secretary of Agriculture concerning a violation of the title of the Act of August 15, 1921, concerning stockyards.[20]

[16] 30 St. at L. 544, 553, § 24.

[17] Ibid., § 25. See *supra*, § 667.

[18] *Supra*, §§ 666-668.

[19] Act of Sept. 26, 1914, ch. 311, § 5, 38 St. at L. 719, Comp. St. § 8836e; *supra*, § 77h. Federal Trade Commission v. Gratz, C. C. A., 258 Fed. 314.

[20] Ch. —, § 203, "Whenever the Secretary has reason to believe that any packer has violated or is violating any provision of this title, he shall cause a complaint in writing to be served upon the packer, stating his charges in that respect, and requiring the packer to attend and testify at a hearing at a time and place designated therein, at least thirty days after the service of such complaint; and at such time and place there shall be afforded the packer a reasonable

Where the jurisdiction of the District Court is questioned and

opportunity to be informed as to the evidence introduced against him (including the right of cross-examination), and to be heard in person or by counsel and through witnesses, under such regulations as the Secretary may prescribe. Any person for good cause shown may on application be allowed by the Secretary to intervene in such proceeding, and appear in person or by counsel. At any time prior to the close of the hearing the Secretary may amend the complaint; but in case of any amendment adding new charges the hearing shall, on the request of the packer, be adjourned for a period not exceeding fifteen days.

"(b) If, after such hearing, the Secretary finds that the packer has violated or is violating any provisions of this title covered by the charges, he shall make a report in writing in which he shall state his findings as to the facts, and shall issue and cause to be served on the packer an order requiring such packer to cease and desist from continuing such violation. The testimony taken at the hearing shall be reduced to writing and filed in the records of the Department of Agriculture.

"(c) Until a transcript of the record in such hearing has been filed in a circuit court of appeals of the United States, as provided in section 204, the Secretary at any time, upon such notice and in such manner as he deems proper, but only after reasonable opportunity to the packer to be heard, may amend or set aside the report or order, in whole or in part.

"(d) Complaints, orders, and other processes of the Secretary under this section may be served in the same manner as provided in section 5 of the Act entitled, 'An Act to create a Federal Trade Commission, to define its powers and duties, and for other purposes,' approved September 26, 1914." (Comp. St. § 8716¼bb.) § 204. "(a) An order made under section 203 shall be final and conclusive unless within thirty days after service the packer appeals to the circuit court of appeals for the circuit in which he has his principal place of business, by filing with the clerk of such court a written petition praying that the Secretary's order to be set aside or modified in the manner stated in the petition, together with a bond in such sum as the court may determine, conditioned that such packer will pay the costs of the proceedings if the court so directs.

"(b) The clerk of the court shall immediately cause a copy of the petition to be delivered to the Secretary, and the Secretary shall forthwith prepare, certify, and file in the court a full and accurate transcript of the record in such proceedings, including the complaint, the evidence, and the report and order. If before such transcript is filed the Secretary amends or sets aside his report or order, in whole or in part, the petitioner may amend the petition within such time as the court may determine, on notice to the Secretary.

"(c) At any time after such transcript is filed the court, on application of the Secretary, may issue a temporary injunction restraining, to the extent it deems proper, the

sustained, the Circuit Court of Appeals can review the decision.

packer and his officers, directors, agents, and employees, from violating any of the provisions of the order pending the final determination of the appeal.

"(d) The evidence so taken or admitted, duly certified and filed as aforesaid as a part of the record, shall be considered by the court as the evidence in the case. The proceedings in such cases in the circuit court of appeals shall be made a preferred cause and shall be expedited in every way.

"(e) The court may affirm, modify, or set aside the order of the Secretary.

"(f) If the court determines that the just and proper disposition of the case requires the taking of additional evidence, the court shall order the hearing to be reopened for the taking of such evidence, in such manner and upon such terms and conditions as the court may deem proper. The Secretary may modify his findings as to the facts, or make new findings, by reason of the additional evidence so taken, and he shall file such modified or new findings and his recommendations, if any, for the modification or setting aside of his order, with the return of such additional evidence.

"(g) If the circuit court of appeals affirms or modifies the order of the Secretary, its decree shall operate as an injunction to restrain the packer, and his officers, directors, agents, and employees from violating the provisions of such order or such order as modified.

"(h) The circuit court of appeals shall have exclusive jurisdiction to review, and to affirm, set aside, or modify, such orders of the Secretary, and the decree of such court shall be final except that it shall be subject to review by the Supreme Court of the United States upon certiorari, as provided in section 240 of the Judicial Code, if such writ is duly applied for within sixty days after entry of the decree. The issue of such writ shall not operate as a stay of the decree of the circuit court of appeals, in so far as such decree operates as an injunction, unless so ordered by the Supreme Court.

"(i) For the purposes of this title the term "circuit court of appeals," in case the principal place of business of the packer is in the District of Columbia, means the Court of Appeals of the District of Columbia." (Comp. St. § 8716¼c.)

§ 205. "Any packer, or any officer, director, agent, or employee of a packer, who fails to obey any order of the Secretary issued under the provisions of section 203, or such order as modified—

"(1) After the expiration of the time allowed for filing a petition in the circuit court of appeals to set aside or modify such order, if no such petition has been filed within such time; or

"(2) After the expiration of the time allowed for applying for a writ of certiorari, if such order, or such order as modified, has been sustained by the circuit court of appeals and no such writ has been applied for within such time; or

"(3) After such order, or such order as modified, has been sustained by the courts as provided in section 204, shall on conviction be

if there are other assignments of error.[21] It may certify this question to the Supreme Court[22] and reverse its decision until the certificate has been answered.[23] It has been held that it may take jurisdiction when one of the defendants raises no question except that of jurisdiction, if there are other errors assigned by his fellow defendants.[24] In such a case, the decision of the Circuit Court of Appeals is final, unless reviewed by *certiorari;*[25] but it has been held that the Circuit Court of Appeals cannot take jurisdiction when the only assignment of error is a question of jurisdiction, whether the court of first instance has taken jurisdiction[26] or has dismissed the case for

fined not less than $500 nor more than $10,000, or imprisoned for not less than six months nor more than five years, or both. Each day during which such failure continues shall be deemed a separate offense." (Comp. St. § 8716¼cc.)

[21] Boston & Maine R. R. Co. v. Gokey, 210 U. S. 155, 52 L. ed. 1002; U. S. v. Sutton, C. C. A., 47 Fed. 129; Cabot v. McMaster, C. C. A., 65 Fed. 533; The Alliance, C. C. A., 70 Fed. 273; Grand Trunk Western Ry. Co. v. Reddick, C. C. A., 160 Fed. 898; Meeker v. Lehigh Valley R. Co., C. C. A., 183 Fed. 548; Morrisdale Coal Co. v. Pennsylvania R. Co., C. C. A., 183 Fed. 929; Olds v. Herman H. Hettler Lumber Co., C. C. A., 195 Fed. 9; Smith v. Farbenfabriken of Elberfeld Co., C. C. A., 203 Fed. 477; U. S. ex rel. Butterworth & Lowe v. Sessions, C. C. A., 205 Fed. 502; Morgan v. Ward, C. C. A., 224 Fed. 698; Turk v. Illinois Cent. R. Co., C. C. A., 218 Fed. 315; Cobb v. Sertic, C. C. A., 218 Fed. 320; Kawin & Co. v. American Colortype Co., C. C. A., 243 Fed. 317; Patterson v. Delaware & Hudson Co., C. C. A., 251 Fed. 253; Hume v. City of New York, C. C. A., 255 Fed. 488; Stebbins v. Selig, C. C. A., 257 Fed. 230; Drake v. Tennessee, A. & G. R. Co., C. C. A., 268 Fed. 248; *supra*, § 688.

[22] U. S. v. Jahn, 155 U. S. 109, 39 L. ed. 87; Sun Printing & Pub. Ass'n v. Edwards, 194 U. S. 377, 48 L. ed. 1027; American S. R. Co. v. Johnston, C. C. A., 60 Fed. 503; Rust v. United Water Works Co., C. C. A., 70 Fed. 129; Fisheries Co. v. Lennen, C. C. A., 130 Fed. 533; Boston & M. R. Co. v. Gokey, C. C. A., 149 Fed. 42; Grand Trunk Western Ry. Co. v. Reddick, C. C. A., 160 Fed. 898.

[23] Morrisdale Coal Co. v. Pennsylvania R. Co., C. C. A., 183 Fed. 929.

[24] A. J. Phillips Co. v. Grand Trunk Western Ry. Co., C. C. A., 195 Fed. 12.

[25] Boston & Maine R. R. v. Gokey, 210 U. S. 155; Weber Bros. v. Grand Lodge of Kentucky, F. & A. M., C. C. A., 171 Fed. 839.

[26] Fisheries Co. v. Lennen, C. C. A., 2nd Ct., 130 Fed. 533; Boston & M. R. Co. v. Gokey, C. C. A., 1st Ct., 149 Fed. 42; Town of Waterford v. Elson, C. C. A., 2nd Ct., 149 Fed. 91; Kentucky State Board of Control for Charitable Institutions v. Lewis, C. C. A., 6th Ct., 176 Fed.

want of jurisdiction.[27] Where the jurisdiction of the District Court attached solely by reason of a diversity of citizenship and a constitutional or a treaty question subsequently arises in the case by the defendant's pleading or otherwise, the Circuit Court of Appeals has jurisdiction and must, it has been held, review all the questions decided therein, and its decision will be final upon the constitutional question as well as upon the other points in the case unless it certifies that or other questions to the Supreme Court, or the Supreme Court reviews it by a *certiorari;*[28] but the decision of the District Court in such case can be reviewed immediately by the Supreme Court, which may pass upon all material questions therein.[29] Where the plaintiff by a proper pleading shows that the jurisdiction is given to the District Court both by reason of diverse citizenship and also because there is a controversy arising under the Constitution of the United States, the decision can be reviewed immediately by either the Supreme Court or the Circuit Court of Appeals;[30] and the Supreme Court may take jurisdiction of appeals and

556; Olds v. Herman H. Hettler Lumber Co., C. C. A., 6th Ct., 195 Fed. 9; A. J. Phillips Co. v. Grand Trunk Western Ry. Co., C. C. A., 6th Ct., 195 Fed. 12; U. S. ex rel. Butterworth & Lowe v. Sessions, C. C. A., 6th Ct., 205 Fed. 502 (an application for a mandamus). See *supra*, § 688. *Contra*, Reliable Incubator & Brooder Co. v. Stahl, C. C. A., 7th Ct., 105 Fed. 663.

[27] U. S. v. Jahn, 155 U. S. 109, 114, 115, 39 L. ed. 87, 90; U. S. v. Larkin, 208 U. S. 333, 52 L. ed. 517; Davis & R. Mfg. Co. v. Barber, C. C. A., 60 Fed. 465; The Annie Faxon, C. C. A., 87 Fed. 961; Evans-Snider-Buel Co. v. McCaskill, C. C. A., 101 Fed. 658; Dudley v. Board of Com'rs of Lake County, C. C. A., 103 Fed. 209; Halpin v. Amermna, C. C. A., 138 Fed. 548.

[28] Am. Sugar Refining Co. v. New Orleans, 181 U. S. 277, 45 L. ed. 859; Ayers v. Polsdorfer, 187 U. S. 585, 47 L. ed. 314; Arbuckle v. Blackburn, 191 U. S. 405, 48 L. ed. 239; Spencer v. Duplan Silk Co., 191 U. S. 526, 48 L. ed. 287; Keyser v. Lowell, C. C. A., 117 Fed. 400.

[29] Am. Sugar Refining Co. v. New Orleans, 181 U. S. 277, 45 L. ed. 859; Loeb v. Columbia T'p Trustees, 179 U. S. 472, 45 L. ed. 280.

[30] Am. Sugar Refining Co. v. New Orleans, 181 U. S. 277, 281, 282, 45 L. ed. 859, 862; Cary Mfg. Co. v. Acme Flexible Clasp Co., 187 U. S. 427, 47 L. ed. 244; Macfadden v. U. S., 213 U. S. 288, 53 L. ed. 801; Railroad Commission of Ohio v. Worthington, 225 U. S. 101, 56 L. ed. 1004, affirming C. C. A., 187 Fed. 965; Reed v. U. S., C. C. A., 224 Fed. 378; Crescent Mfg. Co. v. Wilson, C. C. A., 242 Fed. 462. But see City of Seattle v. Thompson, C. C. A., 114 Fed. 96.

cross-appeals by all the parties and of the whole case.[31] If prior appeal or writ of error in such a case is taken to the Circuit Court of Appeals, the Supreme Court cannot review the judgment or decree of the District Court immediately,[32] but it may review the decision of the Circuit Court of Appeals in a proper case.[33] It has been said that, in such a case, the Circuit Court of Appeals cannot pass upon the constitutional question, but may affirm or reverse without deciding the same, unless it certifies the question to the Supreme Court.[34] Where the sole ground of Federal jurisdiction is that there is a controversy arising under the Constitution of the United States, the Supreme Court has exclusive jurisdiction to review the same, and it cannot be reviewed by the Circuit Court of Appeals[35] al-

[31] Field v. Barber Asphalt Paving Co., 194 U. S. 618, 48 L. ed. 1142.

[32] Macfadden v. U. S., 213 U. S. 288, 53 L. ed. 801.

[33] Railroad Commission of Ohio v. Worthington, 225 U. S. 101, 56 L. ed. 1004, affirming C. C. A., 187 Fed. 965.

[34] U. S. v. Lee Yen Tai, C. C. A., 113 Fed. 465. The Circuit Court of Appeals should not consider the constitutionality of a State statute which was not attacked in the court below. Western Union Tel. Co. v. Winland, C. C. A., 182 Fed. 493. Where the writ of error was granted solely on the ground that the Circuit Court of Appeals had failed to consider the case, the judgment was reversed and the case remanded to that court, with instructions to hear and decide the same. Lutcher & Moore Lumber Co. v. Knight, 217 U. S. 257, 54 L. ed. 757. Upon the dismissal by the Supreme Court of a writ of error, the Circuit Court of Appeals has jurisdiction to modify its judgment so as to conform to a decision of the Supreme Court in another case. Boise City, Idaho v. Boise Artesian Hot & Cold Water Co., C. C. A., 208 Fed. 546. Councilmen of City of Frankfort v. Deposit Bank of Frankfort, C. C. A., 124 Fed. 18. In the Second Circuit it has been held: that the Circuit Court of Appeals has no power to pass upon a question involving the construction of the Constitution or a treaty, although there are other grounds of Federal jurisdiction. U. S. v. Lee Yen Tai, C. C. A., 113 Fed. 465; *Re* Abbey Press, C. C. A., 134 Fed. 51 (a petition for the revision of an order in bankruptcy, in which the author was counsel); *supra*, §§ 688, 688a.

[35] Am. Sugar Refining Co. v. New Orleans, 181 U. S. 277, 281, 45 L. ed. 859, 861; City of New York v. Consol. Gas Co., 253 U. S. 219 in which the author was counsel; City of Paducah v. East Tennessee Tel. Co., C. C. A., 182 Fed. 625. The same rule prevails on appeals from the District Court of Hawaii. Wright v. McFarlane & Co., C. C. A., 122 Fed. 770.

though other questions are involved.[36] In such a case, the Supreme Court will ordinarily reverse the decree without passing upon the merits.[37] The taking of a prior appeal to the Circuit Court of Appeals, which has jurisdiction thereof,[38] or, it seems, the prior argument in such a case in the Circuit Court of Appeals of an appeal taken subsequently to an appeal from the District Court to the Supreme Court, when the appellants are the same, waives the other.[39] The Circuit Court of Appeals cannot compel a party who has sued out writs of error from both the Supreme Court and the Circuit Court of Appeals to review a judgment of a District Court to elect between them and to dismiss the latter writ if the former is not abandoned.[40] The same rule applies to an appeal taken to the Circuit Court of Appeals after an appeal to the Supreme Court when both courts have jurisdiction of the same.[41] Judgments of the District Courts can be reviewed by the Circuit Courts of Appeals irrespective of the value of the matter in dispute.[42] Upon appeals in admiralty the Circuit Courts of Appeals may review questions of both fact and law.[43]

[36] Carolina Glass Co. v. South Carolina, 240 U. S. 305; Owensboro v. Owensboro Water Works, C. C. A., 115 Fed. 318. But see Pike's Peak Power Co. v. Colorado Springs, C. C. A., 105 Fed. 1.

[37] Union & Planters' Bank v. Memphis, 189 U. S. 71, 74, 47 L. ed. 712, 714.

[38] Carter v. Roberts, 177 U. S. 496, 44 L. ed. 861; Cary Mfg. Co. v. Acme Flexible Clasp Co., 187 U. S. 427, 47 L. ed. 244 otherwise not; Pullman's Palace Car Co. v. Central Transportation Co., s.c. C. C. A., 76 Fed. 401; Darnell v. Illinois Cent. R. Co. et al., 206 Fed. 445.

[39] Robinson v. Caldwell, 165 U. S. 359, 41 L. ed. 745. *Cf.* Kansas City N. W. R. R. Co. v. Zimmerman, 210 U. S. 336, 52 L. ed. 1084.

[40] Lamar v. U. S. 241, U. S. 103. The proper practice is to apply to the Circuit Court of Appeals for a continuance of the cause until the decision by the Supreme Court, s.c. Pullman's Palace Car Co. v. Central Transp. Co., 76 Fed. 401.

[41] Van Gesner v. U. S., C. C. A., 153 Fed. 46.

[42] No. Pac. R. Co. v. Amato, 144 U. S. 465, 36 L. ed. 506; *s.* c. in C. C. A., 49 Fed. 881. The Paquete Habana, 175 U. S. 677, 686, 44 L. ed. 320, 323. Held *contra* as to District Courts in No. Am. Trading & Transp. Co. v. Smith, C. C. A., 93 Fed. 7.

[43] The Havilah, C. C. A., 48 Fed. 684. The Philadelphia, C. C. A., 60 Fed. 423. The findings of a commissioner as to value, when the evidence is conflicting and the witnesses have appeared before him, will rarely be disturbed. The George

"The Chief Justice and the associate justices of the Supreme Court assigned to each circuit, and the several district judges within each circuit, shall be competent to sit as judges of the circuit court of appeals within their respective circuits. In case the Chief Justice or an associate justice of the Supreme Court shall attend at any session of the circuit court of appeals, he shall preside. In the absence of such Chief Justice, or associate justice, the circuit judges in attendance upon the court shall preside in the order of the seniority of their respective commissions. In case the full court at any time shall not be made up by the attendance of the Chief Justice or the associate justice, and the circuit judges, one or more district judges within the circuit shall sit in the court according to such order or provision among the district judges as either by general or particular assignment shall be designated by the court: *Provided*, That no judge before whom a cause or question may have been tried or heard in a district court, or existing circuit court, shall sit on the trial or hearing of such cause or question in the circuit court of appeals."[44] It has been held that a Circuit Court of Appeals is legally constituted where is it composed of three District Judges of the Circuit regularly designated then to attend, in the absence of any Circuit Judge or Justice of the Supreme Court.[45] "No appeal or writ of error by which any order,

L Garlick, C. C. A., 107 Fed. 542. *Cf.* §§ 592, *supra*. Where one party took a writ of error from the Supreme Court upon the question of jurisdiction and the other from the Circuit Court of Appeals upon the other questions, the Circuit Court of Appeals postponed the argument of the latter until after the former was decided. No. Pac. R. Co. v. Glaspell, C. C. A., 49 Fed. 482. See Pullman's P. C. Co. v. Central Transp. Co., 171 U. S. 138, 43 L. ed. 108; U. S. v. Jahn, 155 U. S. 109, 114, 39 L. ed. 87, 90.

[44] Jud. Code, § 120, 36 St. at L. 1087. The disqualification arises when the judge has tried or heard any question upon which it is the duty of the Circuit Court of Appeals to pass, including the validity of a removal from a State court. Rexford v. Brunswick-Balke-Collender Co., 228 U. S. 339, 57 L. ed. —. Should counsel for the plaintiff in error or appellant concede that there was no error in the decision which a judge has made, the judge is not disqualified; but it is improper for the court to ask counsel whether an objection to the qualification of a judge or to the jurisdiction of the court is withdrawn, since such objection should be purely voluntary. Ibid.

[45] Peters v. Hanger, C. C. A., 136 Fed. 181. Where the writ was granted solely on the ground that

judgment, or decree may be reviewed in the Circuit Court of Appeals under the provisions of this act shall be taken or sued out except within six months after the entry of the order, judgment, or decree sought to be reviewed: *Provided, however,* that in all cases in which a lesser time is now by law limited for appeals or writs of error, such limits of time shall apply to appeals or writs of error, in such cases, taken to or sued out from the Circuit Courts of Appeals. And all provisions of law now in force, regulating the methods and system of review, through appeals or writs of error, shall regulate the methods and system of appeals and writs of error, provided for in this act in respect of the Circuit Courts of Appeals, including all provisions for bonds or other securities to be required and taken on such appeals and writs of error. And any judge of the Circuit Court of Appeals, in respect of cases brought or to be brought to that court, shall have the same powers and duties as to the allowances of appeals and writs of error, and the conditions of such allowances, as by law belong to the justices or judges in respect of other courts of the United States, respectively."[46] "Whenever, on appeal or writ of error or otherwise, a case coming from a District [or Circuit] Court shall be reviewed and determined in the Circuit Court of Appeals, in a case in which the decision in the Circuit Court of Appeals is final, such cause should be remanded to the said District [or Circuit] Court for further proceedings to be there taken in pursuance of such determination."[47] The Circuit Courts of Appeals, have power to issue all writs not specifically provided for by statute, which may be necessary for the exercise of their respective jurisdictions, and agreeable to the usages and principles of law.[48]

the Circuit Court of Appeals had failed to consider the case, the judgment was reversed and the case remanded to that court, with instructions to hear and decide the same. Lutcher & Moore Lumber Co. v. Knight, 217 U. S. 257, 54 L. ed. 757.

[46] 26 St. at L. 829, § 11. Such a court may grant an original application for the substitution of parties in a case there pending, without regard to the decision of the District Court denying such an application. Sumpter Lumber Co. v. Sound Timber Co., C. C. A., 251 Fed. 408.

[47] 26 St. at L. 829, § 10.

[48] Jud. Code, § 262, 36 St. at L. 1087, re-enacting in substance, 26 St. at L. 827, § 12; *supra,* §§ 455-467. The Circuit Courts of Appeals have no power to issue writs of mandamus to compel the District and Circuit Courts to dismiss suits for

§ 694. Appeals to the District Courts. By the Judicial Code "The district courts shall have appellate jurisdiction of the judgments and orders of United States commissioners in cases arising under the Chinese exclusion laws."[1] The District

want of jurisdiction; U. S. v. Swan, C. C. A., 65 Fed. 647; U. S. v. Severens, C. C. A., 71 Fed. 768; *supra*, § 686; nor to issue writs of *certiorari* as original process to review final judgments of the District or Circuit Court; Travis County v. King I. Br. & Mfg. Co., C. C. A., 92 Fed. 690; *supra*, § 460; nor to issue the writ of *habeas corpus* for service outside of the circuit, even, it has been held, to review a decision of a court of a Territory within its circuit, *Re* Boles, C. C. A., 48 Fed. 75; *supra*, §§ 461, 466.

§ 694. [1] Act of March 3, 1911, ch. 231, § 25, 36 St. at L. 1094, Comp. St. § 1007; see *supra*, § 463: "Any Chinese person, or person of Chinese descent, found unlawfully in the United States or its Territories, may be arrested upon a warrant issued upon a complaint, under oath, filed by any party on behalf of the United States, by any justice, judge, or commissioner of any United States court, returnable before any justice, judge, or commissioner of a United States court, or before any United States court, and when convicted, upon a hearing, and found and adjudged to be one not lawfully entitled to be or remain in the United States, such person shall be removed from the United States to the country whence he came. But any such Chinese person convicted before a commissioner of a United States court may, within ten days from such conviction, appeal to the judge of the district court for the district. A certified copy of the judgment shall be the process upon which said removal shall be made, and it may be executed by the marshal of the district or any officer having authority of a marshal under the provisions of this section. And in all such cases the person who brought or aided in bringing such person into the United States shall be liable to the Government of the United States for all necessary expenses incurred in such investigation and removal; and all peace officers of the several States and Territories of the United States are hereby invested with the same authority in reference to carrying out the provisions of this act, as a marshal or deputy marshal of the United States, and shall be entitled to like compensation, to be audited and paid by the same officers." Act of Sept. 13, 1888, ch. 1015, § 13, 25 St. at L. 479, Comp. St. § 4313; U. S. v. Gin Dock Sue, 230 Fed. 657. This statute is still in force notwithstanding the subsequent provisions of the general Immigration Laws which provide for the deportation within five years after their entry into the United States of aliens unlawfully admitted. Such subsequent provisions apply to Chinese who have unlawfully entered this country within the specified time, and in proceedings thereunder instituted, there is no appeal to the District Court, except by means of the writ of *habeas corpus* as herein before described. *Supra*, § 463. U. S. ex rel.

Toy Gwok Chee v. Prentis, C. C. A., 202 Fed. 65; *Ex parte* Woo Shing, 226 Fed. 141; U. S. ex rel. Lem Him v. Prentis, 230 Fed. 935. But see *Ex parte* Woo Jan, 228 Fed. 927. A Chinaman who has been in the United States more than five years can not be deported except in pursuance of the Act of September 13, 1888, ch. 1015, § 13, 25 St. at L. 479, Comp. St. § 4313; *Ex parte* Tom Yuen, 230 Fed. 656. It has been held that the appeal to the District Judge does not stay the proceedings and that an order staying the execution of the judgment of the commissioner is necessary for a supersedeas. *Re* Ah Toy (N. D. Cal.), 45 Fed. 795. *Contra*, U. S. v. Lee (W. D. Tenn.), 184 Fed. 651. Pending an appeal to the District Judge or Court from an order of deportation, an alleged Chinese may be admitted to bail. U. S. v. Yee Yet, 190 Fed. 577. The order must be in the district where the Chinese is residing, not to another to which he is taken after his arrest. U. S. v. Chin Tong, 192 Fed. 485. The appeal to the district judge is tried *de novo* and not on the record made before the commissioner. U. S. v. Wong Ock Hong, 179 Fed. 1004; U. S. v. Lee, 184 Fed. 651; U. S. v. Chin Sing Quong, C. C. A., 224 Fed. 752. The failure of the commissioner to certify his judgment to the District Court is not a jurisdictional defect. The court is authorized to require him to do so. Ibid. In the absence of rules upon the subject, the notice of appeal should be in writing; it should be filed with the clerk of the court, a duplicate served on the commissioner and another copy upon the United States attorney for the district. *Re* Ah Toy, 45 Fed. 795. The entitling of the notice of appeal in the District Court and not before the commissioner, when the same was left with the commissioner, is not a jurisdictional defect. Ibid. No order allowing the appeal is required. *Re* Ah Toy, 45 Fed. 795. The deportation proceedings are civil, not criminal. *Re* Chin Wah, 182 Fed. 256; Woo Jew Dip v. U. S., 192 Fed. 471. But the Chinaman is entitled to due process of law. McDonald v. Siu Tak Sam, C. C. A., 225 Fed. 710. A denial of the right to counsel may be strong evidence that he was denied a fair hearing. Jeung Bow v. U. S., C. C. A., 228 Fed. 868. See *supra*, § 463. The illegality may be established by a preponderance of evidence and need not be proved beyond a reasonable doubt. Woo Jew Dip v. U. S., 192 Fed. 471. By the Act of May 5, 1892, § 3, "any Chinese person or persons of Chinese descent arrested under the provisions of this Act, or the acts hereby extended, shall be adjudged to be unlawfully within the United States, unless the person shall establish by affirmative proof, to the satisfaction of such justice, judge or commissioner, his lawful right to remain in the United States." 27 St. at L. 25. *Ex parte* Lung Wing Wun, 161 Fed. 211; U. S. v. Fong Sen., 205 Fed. 398. It has been held that the Government has the burden of proof that the person sought to be deported is Chinese or of Chinese descent and not of the exempt class, and that an affidavit by a Government inspector making such a charge is not evidence upon the hearing. U. S. v. Lee, 184 Fed. 651; *Ex parte* Loung June alias Leong Jun, 160

Fed. 251. After such proof has been made, a Chinese gains no rights by standing mute. U. S. v. Chin Ken, 183 Fed. 332; aff'd Chin Ken v. U. S., C. C. A., 191 Fed. 817. Such affirmative proof by the testimony of Chinese alone, although their evidence is received with caution, U. S. v. Chin Sing Quong, C. C. A., 224 Fed. 752. The testimony of the alien as to the place of his birth is incompetent, Lee Sim v. U. S., C. C. A., 218 Fed. 432; but, since pedigree or descent can be proved by hearsay his testimony that his father told him he was born in the United States was received. U. S. v. Lem You, 224 Fed. 519. Testimony that he is a merchant without any statement of the facts, was disregarded as a conclusion. U. S. v. Chin Sing Quong, 224 Fed. 752. It has been said that he must establish his citizenship beyond a reasonable doubt. Moy Guey Lum v. U. S., C. C. A., 211 Fed. 91. It has been held that a Chinese within the United States cannot be arrested without a warrant based upon *prima facie* proof that he is unlawfully within the United States. U. S. v. Hom Lim, 214 Fed. 456. The statutory certificate given to a Chinese before his temporary return to China for a visit in the absence of fraud is conclusive evidence of the facts therein set forth in pursuance of the statute. U. S. v. Moy Nom, 249 U. S. 772. When it is not produced the burden of proving its previous existence and loss is upon the Chinaman. Lau Lau v. U. S., C. C. A., 223 Fed. 768. But see U. S. v. Hom Lim, 214 Fed. 456. A written translation by an interpreter of a statement made by a Chinese upon an examination in his presence subsequent to the arrest, was held to be admissible in evidence, although the interpreter did not testify that he could not recollect what was said without referring to the writing. Guan Lee v. U. S., C. C. A., 198 Fed. 596. Statements in the opinion of the commissioner cannot be considered as evidence. Lew Ling Chong v. U. S., C. C. A., 222 Fed. 195. It has been held: that a previous decision of the Department that a Chinese should be deported, must be followed in a subsequent proceeding. *Ex parte* Lung Foot, 174 Fed. 70; but that decisions of the Department refusing to direct a deportation were not conclusive in subsequent proceedings. *Ex parte* Stancampiano, 161 Fed. 164; U. S. v. Lim. Jew, 192 Fed. 644. A previous decision of a commissioner and that of an immigration inspector, which has been affirmed on appeal, must be followed in a subsequent proceeding, *Ex parte* Lung Foot, 174 Fed. 70; see Tama Miyake v. U. S., C. C. A., 257 Fed. 732; although by the State law executions in civil cases expire at the end of a year unless renewed. *Ex parte* Wong Wing, 220 Fed. 352. But a person who relies upon such a judgment must prove that he was the person therein named and described. *Ex parte* Long Lock, 173 Fed. 208. A decision as to the right of the Chinese to enter the United States or remain therein, made under a former statute, is not conclusive as regards the new grounds for exclusion created by subsequent litigation. *Ex parte* Loung June alias Leong Jun, 160 Fed. 251; U. S. v. Lim Jew, 192 Fed. 644, aff'd. Lim Jew v. U. S., C. C. A., 196 Fed. 736. A judgment by a District Court

Courts of the Eastern District of Arkansas,[2] the Northern District of California,[3] the Southern District of California,[4] the District of Montana,[5] and the District of Wyoming[6] have jurisdictions of appeals from judgments of conviction by the Commissioners of the National Parks within their respective districts.[7] Each such court has power to prescribe the rules, procedure and practice for such appeals.[8] In cases arising in the Yellowstone National Park the practice on such appeals, unless changed by such rules is governed by the laws of Wyoming as to appeals from justices of the peace to the State district courts in cases of misdemeanor.[9]

The District Courts of the United States have also jurisdic-

acquitting the Chinese in a criminal prosecution, when the questions involved in the application for his deportation were material to the decision, is a bar to his deportation. Chin Kee v. U. S., 196 Fed. 74. But a certificate by a United States commissioner that the Chinese was tried before him for being unlawfully in the United States and discharged, is not a judgment, nor a copy of a judgment, nor admissible in evidence. *Ex parte* Lung Foot, 174 Fed. 70. See *supra*, § 463. Such an appeal to the District Court may be dismissed for want of prosecution and cannot then be restored to the docket at a subsequent term, even with the consent of the District Attorney. U. S. v. Chin Dong Ying, 229 Fed. 819. An appeal lies to the Circuit Court of Appeals from a judgment of the District Court affirming an order of deportation. Woo Jew Dip v. U. S., C. C. A., 192 Fed. 471. Upon an appeal to the Circuit Court of Appeals the findings of the District Court are rarely disturbed. Lew Loy v. U. S., C. C. A., 242 Fed. 405; Woo Vey v. U. S., C. C. A., 242 Fed. 838, certiorari denied, 245 U. S. 660, 38 Sup. Ct. 60, 62 L. ed. 535. Moy Guey Lum v. U. S., C. C. A., 211 Fed. 91.

[2] Act of April 20, 1904, ch. 1400, § 6, 33 St. at L. 188, as amended March 2, 1907, 34 St. at L. 1218, as amended, March 3, 1911, 36 St. at L. 1086, Comp. St., § 5266; Rider v. U. S., C. C. A., 149 Fed. 164.

[3] Act of June 2, 1920, ch. ——, § 7, 41 St. at L. 733, Comp. St., § 5216a.

[4] Ibid., § 8, Comp. St., § 5208b.

[5] Act of August 22, 1914, ch. 264, § 6, 38 St. at L. 700, Comp. St., § 5248f.

[6] Act of May 7, 1904, ch. 72, § 5, 28 St. at L. 74, Comp. St., § 5194.

[7] *Supra*, §§ 66, 483h. Although this court had original jurisdiction of offenses as against the United States, it could not render a valid judgment of conviction upon such an appeal, where the commissioner was without jurisdiction. Rider v. U. S., C. C. A., 149 Fed. 164.

[8] Act of June 2, 1920, 41 St. at L. 733, §§ 7, 8, Comp. St., §§ 5216c, 5208d.

[9] 28 St. at L. 74, Comp. St., § 5194. See Jud. Code, § 26, 36 St. at L. 1087.

tion to set aside for errors of law apparent upon the record the awards of arbitrators of controversies between common carriers and their employees submitted under the Act of July 15, 1913 as is herein before explained,[10] provided that exceptions thereto are filed in the Clerk's office within ten days after the filing of such awards.[11]

§ 695. Judgments, orders, and decrees which may be reviewed by writs of error or appeals. An interlocutory order or decree granting or continuing, refusing or dissolving, or refusing to dissolve, an injunction in equity or appointing a receiver in a District Court, in a case in which an appeal from a final judgment may be taken, to the Circuit Court of Appeals, may be reviewed by such Circuit Court of Appeals on appeal, provided the appeal be taken within thirty days from the entry of such order or decree.[1] Otherwise, neither the Circuit Court of Appeals, nor the Supreme Court, has jurisdiction to review by writ of error or appeal any order, judgment, or decree which is not final.[2] A judgment or decree, to be final for the purpose of an appeal or writ of error, must terminate the litigation, so that on affirmance by the court of review, the court below will have nothing to do but to execute the order, judgment, or decree which it has already ordered.[3] A writ of error will issue to a

[10] 38 St. at L. 104, §§ 5, 8, Comp. St., § 8677, *supra*, §§ 77g, 693.

[11] U. S. v. Yuen Yee Sum, 153 Fed. 494.

§ 695. [1] 26 St. at L. 828, § 7; 31 St. at L. 660, *supra*, §§ 300, 325, 693.

[2] McLish v. Roff, 141 U. S. 661, 35 L. ed. 893; Chicago, St. P., M. & O. Ry. Co. v. Roberts, 141 U. S. 690, 35 L. ed. 905. The words: "final decisions in the district courts" mean the same thing as "final judgments and decrees" as used in former acts regulating appellate jurisdiction. *Ex parte* Tiffany, 252 U. S. 32, 36.

[3] Bostwick v. Brinkerhoff, 106 U. S. 3, 27 L. ed. 73; Grant v. Phœnix Ins. Co., 106 U. S. 429, 27 L. ed. 237; St. L., I. M. & S. R. Co. v. So. Ex. Co., 108 U. S. 24, 27 L. ed. 638; *Ex parte* Norton, 108 U. S. 237, 27 L. ed. 709; Winthrop I. Co. v. Meeker, 109 U. S. 180, 27 L. ed. 898; Mower v. Fletcher, 114 U. S. 127, 29 L. ed. 117.

The following *judgments and orders at law* have been held *not* final, and consequently not reviewable. A judgment overruling a demurrer to a plea of abatement, Cunningham v. Rodgers, C. C. A. 171 Fed. 835. A judgment overruling an order sustaining a demurrer to a plea in recoupment where there was no disposition of another plea. Treadwell v. Corker & Smith, C. C. A., 245 Fed. 348. A judgment in a criminal prosecu-

judgment upon which an execution can issue, although the judg-

tion overruling a special plea of immunity, with leave to plead over, Heike v. U. S., 217 U. S. 423, 54 L. ed. 821. An order sustaining a demurrer, with leave to amend within a certain period, although such time has expired, when no order or judgment of dismissal had been entered. Dickinson v. Sunday Creek Co., C. C. A., 178 Fed. 78; *Cf.* J. W. Darling Lumber Co. v. Porter, C. C. A., 256 Fed. 455. A judgment of voluntary nonsuit, Evans v. Phillips, 4 Wheat. 73, 4 L. ed. 516; although the judge below refused to reinstate the cause after the nonsuit, U. S. v. Evans, 5 Cranch, 280, 3 L. ed. 101; Welch v. Mandeville, 7 Cranch, 152, 3 L. ed. 299; unless the defendant brings error. Conn. Fire Ins. Co. v. Manning, C. C. A., 177 Fed. 893; Cyber Lumber Co. v. Erkhart, C. C. A., 247 Fed. 284. An order sustaining a demurrer as to one cause of action and overruling the same, with leave to answer, as to the other, when the defendant has answered the second cause of action. Sheppy v. Stevens, 200 Fed. 946. An order denying a motion for judgment for want of a sufficient affidavit of defense, Wenar v. Jones, 217 U. S. 593, 54 L. ed. 896; Shumaker v. Security Life & Annuity Co. of America, C. C. A., 159 Fed. 112. A decree which in part sustained and in part overruled a demurrer, but which did not dismiss the petition was held not final, and not reviewable on appeal. G. W. Tel. Co. v. Burnham, 162 U. S. 339, 40 L. ed. 991; De Armas v. U. S., 6 How. 103, 12 L. ed. 361. A judgment in an action of *quo warranto* sustaining a demurrer, but not including a judgment of ouster, or anything that prevents the exercise of the privileges alleged to have been usurped. Miners' Bank v. U. S., 5 How. 213, 12 L. ed. 121. Where a State statute permitted an amendment of a pleading after a demurrer had been sustained, it was held that a judgment of the State court sustaining a demurrer to a petition was not a final judgment, Clark v. Kansas City, 172 U. S. 334, 43 L. ed. 467; until it appeared that the plaintiff's right to amend had been abandoned or taken away. Clark v. Kansas City, 176 U. S. 114, 44 L. ed. 392. A writ of error will not issue to an order sustaining a demurrer with leave to the plaintiff "to discontinue on payment of costs," when there has been no discontinuance or entry of judgment against the plaintiff. Morris v. Dunbar, C. C. A., 149 Fed. 406. Nor to a judgment affirming a judgment sustaining a demurrer without dismissing the suit. Missouri & Kansas Inter. Ry. Co. v. City of Olathe, Kansas, 222 U. S. 185, 56 L. ed. 156. Nor to an order denying the plaintiff's application to amend his declaration. Stillwagon v. Baltimore & O. R. Co., C. C. A., 159 Fed. 97; J. W. Darling Lumber Co. v. Porter, C. C. A., 256 Fed. 455.

Nor to an order *granting* or *denying* a motion for a new trial, except to review the jurisdiction, Ayers v. Watson, 137 U. S. 584, 34 L. ed. 303. Nor to an order affirming an order granting or denying such a motion. Houston v. Moore, 3 Wheat. 433, 4 L. ed. 428; Beaupre v. Noyes, 138 U. S. 397, 402, 34 L. ed. 991, 992; Johnson v. Keith, 117 U. S. 199, 29 L. ed. 888.

A judgment or order of a District Court of the United States, Manning v. German Ins. Co., C. C. A., 107 Fed. 52; Farrell v. First Nat. Bank of Philadelphia; or of the highest court of a State, Houston v. Moore, 3 Wheat, 433, 4 L. ed. 428; or of a Supreme Court of a Territory, Caballero v. Succession of Criado, C. C. A., 250 Fed. 345; granting a new trial, or reversing an order granting a new trial, Cotton v. Hawaii, 211 U. S. 162, 53 L. ed. 131; is not a final order and cannot be immediately reviewed by writ of error unless there was no jurisdiction to make the order; Nelson v. Meehan, C. C. A., 12 L. R. A. (N. S.) 374, 155 Fed. 1, *infra*, § 711b. A judgment of a Circuit Court of Appeals ordering a new trial may be reviewed by *certiorari*. Flannelly v. Delaware & Hudson Co., 225 U. S. 597, 56 L. ed. 1221. Where the plaintiffs after the Circuit Court of Appeals had reversed a judgment for damages and ordered a new trial, waived their right to a new trial and consented to a final disposition of the case by such court which dismissed their complaint; the Supreme Court reviewed the order of dismissal; Thomsen v. Cayser, 243 U. S. 66.

Nor to an order of a District Court appointing commissioners in a condemnation proceedings, So. Ry. Co. v. Postal Tel. Co., C. C. A., 93 Fed. 393; Luxton v. No. R. Br. Co., 147 U. S. 337, 37 L. ed. 194; *supra*, § 482. But see Wheeling & O. Br. Co. v. Wheeling, 138 U. S. 287, 34 L. ed. 967; nor to an order directing a trial by jury to assess the damages although the right of condemnation has been decided. Grays Harbor Logging Co. v. Coats-Fordney Logging Co., 243 U. S. 251. Nor to an order directing a second trial before a jury to assess the damages in such a proceeding. Macfarland v. Brown, 187 U. S. 239, 47 L. ed. 159; Macfarland v. Byrnes, 187 U. S. 247, 47 L. ed. 162; U. S. v. Beatty, 232 U. S. 465. Nor to an order giving the right to elect a second jury to assess benefits. Macfarland v. Byrnes, 187 U. S. 247, 47 L. ed. 162.

The certificate by the Circuit Court of the District of Columbia of a finding of fact by a jury upon an issue sent by the Orphans' Court, which is as conclusive as a verdict upon the court to which it is certified, is not a final judgment to which a writ of error will issue for error in instructing the jury, since it does not put an end to the suit in the Orphans' Court. Van Ness v. Van Ness, 6 How. 62, 12 L. ed. 344. A writ of error will not issue to the decision of the court below upon a motion to enter an *exoneretur* of bail, Morsell v. Hall, 13 How. 212, 14 L. ed. 117. Nor to the judgment of a State court, which is only a direction to transfer the possession of a railroad to the Comptroller-General of the State. Hand v. Hagood, 131 U. S. clxxxi, and 26 L. ed. 301. Nor to an order of a District Court refusing to grant a certificate of reasonable cause for filing an information for alleged violation of revenue laws. U. S. v. Frerichs' Pl., 106 U. S. 160, 27 L. ed. 128. Nor to an order of the Supreme Court of a Territory, dismissing a writ or order setting aside a sheriff's return to an execution and awarding an alias execution. Wells v.

McGregor, 13 Wall. 188, 20 L. ed. 538. Nor to an order denying a motion to quash an execution. Boyle v. Zacharie, 6 Pet. 648, 8 L. ed. 532; Evans v. Gee, 14 Pet. 1, 10 L. ed. 327; Amis v. Smith, 16 Pet. 303, 10 L. ed. 973; McCargo v. Chapman, 20 How. 555, 15 L. ed. 1021; Tracey v. Holcombe, 24 How. 426, 16 L. ed. 742; Loeber v. Schroeder, 149 U. S. 580, 37 L. ed. 856. Noojin v. U. S., C. C. A., 164 Fed. 692. Nor to an order denying a motion to quash a *fieri facias*. Loeber v. Schroeder, 149 U. S. 580, 37 L. ed. 856. Nor to a judgment in the court below on a writ of error *coram vobis; supra*, § 480. Picket v. Legerwood, 7 Pet. 144, 8 L. ed. 638. Nor, it seems, to an order of the court below, made on a motion for a writ of restitution. Barton v. Forsyth, 5 Wall. 190, 18 L. ed. 545; Dredge v. Forsyth, 2 Black. 563, 17 L. ed. 253; Smith v. Trabue, 9 Pet. 4, 9 L. ed. 30. Nor, it was held, to an order dismissing a writ of error for want of prosecution. Harrington v. Holler, 111 U. S. 796, 28 L. ed. 602. Nor to an order remanding a cause to a State court for want of jurisdiction. Chicago, St. P., M. & O. R. Co. v. Roberts, 141 U. S. 690, 35 L. ed. 905; *supra*, § 557. Nor to an order of the Supreme Court of a Territory dismissing a writ of error to a District Court because of the failure of the plaintiff in error to file the transcript and have the cause docketed within the time required by law. Harrington v. Holler, 111 U. S. 796, 28 L. ed. 602. Nor to an order striking a case from the docket. Loflin v. Ayers, C. C. A., 164 Fed. 841. Nor to an order quashing an inquisition to assess damages when another inquisition might be taken under the statute. Chesapeake & O. Canal Co. v. Union Bank of Georgetown, 8 Pet. 259, 8 L. ed. 937. Nor, it has been held, to an order quashing an attachment. Atl. Lumber Co. v. L. Bucki & Son L. Co., C. C. A., 92 Fed. 864; Hammer v. Scott, C. C. A., 60 Fed. 343. But see Standley v. Roberts, C. C. A., 59 Fed. 836; Salmon v. Mills, C. C. A., 66 Fed. 32; U. S. ex rel. Mudsill Min. Co. v. Swan, C. C. A., 65 Fed. 647; *supra*, § 470. Nor to an order in North Carolina directing the return to the defendant of property replevied. Porter v. Davidson, C. C. A., 68 Fed. 257. Nor to an order of the Court of Appeals of the District of Columbia, reversing a decision of the Commissioner of Patents, which refused to cancel a certificate of the registration of a trademark. Baldwin v. R. S. Howard Co., 256 U. S. 35. As to the review of orders of naturalization the authorities are in conflict. See *supra*, § 151b. Two recent cases, U. S. v. Neugebauer, C. C. A., 221 Fed. 938; Appeal of Cook, C. C. A., 242 Fed. 932, hold that they cannot be reviewed. A writ of error will not lie to an order of a court of review directing the entry of judgment in accordance with the opinion above without fixing a definite amount, Martinez v. Inter. Banking Corporation, 220 U. S. 214, 55 L. ed. 438; or that a plaintiff whose pleading has been dismissed below shall have leave to amend, in accordance with the opinion. Louisiana Nav. Co. v. Oyster Commission, 226 U. S. 99, 57 L. ed. —; or directing other proceedings at law or in equity. Winn v. Jackson, 12

Wheat. 135, 6 L. ed. 577; Mayberry v. Thompson, 5 How. 121, 12 L. ed. 78; Holcombe v. McCusick, 20 How. 552, 15 L. ed. 1020; Rankin v. State, 11 Wall. 380, 20 L. ed. 175; St. Clair Co. v. Lovingston, 18 Wall. 628, 21 L. ed. 813; Parcels v. Johnson, 20 Wall. 653, 22 L. ed. 410; McComb v. Knox Co., 91 U. S. 1, 23 L. ed. 185; Zeller v. Switzer, 91 U. S. 487, 23 L. ed. 366; Baker v. White, 92 U. S. 176, 23 L. ed. 480; Davis v. Crouch, 94 U. S. 514, 24 L. ed. 281; Bostwick v. Brinkerhoff, 106 U. S. 3, 27 L. ed. 73; Johnson v. Keith, 117 U. S. 199, 29 L. ed. 888; Smith v. Adams, 130 U. S. 167, 32 L. ed. 895; Rice v. Sanger, 144 U. S. 197, 36 L. ed. 403; Brown v. Marion Nat. Bank, 146 U. S. 619, 36 L. ed. 1106; Union Mut. Ins. Co. v. Kirchoff, 160 U. S. 374, 40 L. ed. 461; Rumsey v. New York Life Ins. Co., C. C. A., 267 Fed. 554. Where two writs of error have been taken to the Circuit Court of Appeals by different parties to review the same judgment, upon one of them the judgment has been affirmed, and afterwards, upon the other, there is a reversal and a new trial ordered as to certain matters; the Supreme Court of the United States will not review either decision by a writ of error, even when such writ was sued out before the reversal. Montana Min. Co. v. St. Louis Min. & Mill. Co., 186 U. S. 24, 46 L. ed. 1039. A judgment of the Circuit Court of Appeals ordering a reversal and judgment for the defendant may be reviewed by writ of error. Troxell v. Delaware, L. & W. R. R. Co., 227 U. S. 434, 57 L. ed. —. A decree of an intermediate court of review, reversing a decree of the court of first instance as to some of the findings and conclusions therein contained and directing a new decree to be entered in accordance with the opinion which authorizes a reference, is not a final decree and cannot be immediately reviewed by the Supreme Court. Earle v. Myers, 207 U. S. 244, 52 L. ed. 191. Where the Circuit Court of Appeals, in an action for a penalty, reversed the judgment because the penalty imposed was insufficient and directed judgment below in accordance with its opinion, it was held that a writ of error from the Supreme Court might immediately issue. Baltimore & O. Southwestern R. R. Co. v. U. S., 220 U. S. 94, 55 L. ed. 384, modifying S. C., C. C. A., 159 Fed. 33; *Cf.* Wilson v. Daniel, 3 Dall. 401, 1 L. ed. 655; Blumenthal v. Shaw, C. C. A., 70 Fed. 801. By the law of Louisiana and the rule adopted there by the District Court of the United States, a judgment without the signature of the judge could not be enforced, and consequently it was not a final judgment to which a writ of error might issue, Life & Fire Ins. Co. of N. Y. v. Wilson, 8 Pet. 291, 8 L. ed. 949. Where the record does not contain a final judgment the court cannot assume that such a judgment was entered and is without authority to exert jurisdiction. People *ex rel.* Gersch v. City of Chicago, 226 U. S. 451, 57 L. ed. —. *A writ of error will issue* to an order of a District Court striking out an answer, and containing a final judgment for the claim on which suit was brought. Fuller v. Claflin, 93 U. S. 14, 23 L. ed. 785. To an order in an action of replevin, quashing and vacating the writ;

dismissing the action at the plaintiff's costs, and awarding execution because the court has no jurisdiction. *Ex parte* Balt. & O. R. Co., 108 U. S. 566, 27 L. ed. 812. To a judgment entered upon an order directing an involuntary nonsuit, Elmore v. Grymes, 1 Pet. 469, 7 L. ed. 224; Central Transp. Co. v. Pullman's P. Car. Co., 139 U. S. 24, 39, 35 L. ed. 55, 61; Fadley v. Baltimore & O. R. Co., C. C. A., 153 Fed. 514; or dismissing the complaint in an action at common law under the Code practice, Central Transp. Co. v. Pullman's P. Car. Co., 139 U. S. 24, 39, 35 L. ed. 55, 61; even, it is said, when it also sets aside a judgment. Newcomb v. Burbank, 159 Fed. 569; Connecticut Fire Ins. Co. v. Manning, 177 Fed. 893. To an order dismissing the petition of a creditor who intervenes in an action in which a writ of attachment has been issued and levied. Grumbel v. Pitkin, 113 U. S. 545, 28 L. ed. 1128. To an order quashing a writ of garnishment and dismissing the garnishee with costs. U. S. *ex rel.* Mudsill Min. Co. v. Swan, C. C. A., 65 Fed. 647. To an order distributing the proceeds of a sale under a marshal's levy. Grumbel v. Pitkin, 113 U. S. 545, 28 L. ed. 1128. To a judgment of a State court reversing a judgment of an inferior court, and directing the latter court to enter a specified judgment, leaving nothing to its discretion. Board of Com'rs of Tippecanoe County v. Lucas, 93 U. S. 108, 23 L. ed. 822; Mower v. Fletcher, 114 U. S. 127, 29 L. ed. 117. To a judgment of a State court reversing a judgment against a defendant upon the ground that he was entitled to an exemption which he claimed under the Bankruptcy Act, and affirming a judgment against sureties upon the ground that they were not entitled to the benefit of the discharge of their principal. O'Dowd v. Russell, 14 Wall. 402, 20 L. ed. 857. To a judgment of the Supreme Court of Virginia affirming a judgment which sustains proceedings to condemn certain property, adjudges that it was necessary for the petitioner to take the same, and names commissioners to ascertain what would be a just compensation for the respondent, where the Court of Appeals of that State has held the judgment to be final and conclusive unless immediately reviewed. Wheeling & B. Br. Co. v. Wheeling Br. Co., 138 U. S. 287, 34 L. ed. 967. But see Luxton v. North River Br. Co., 147 U. S. 337, 37 L. ed. 194; *supra*, § 482. To the final judgment of a court of competent jurisdiction upon a proceeding under section 2326 of the Revised Statutes to determine an adverse claim to mineral land. Chambers v. Harrington, 111 U. S. 350, 28 L. ed. 452. To an order of the Court of Appeals of the District of Columbia affirming an order admitting a will to probate. Ormsby v. Webb, 134 U. S. 47, 33 L. ed. 805. To an order abating a judgment of conviction imposing a fine. U. S. v. N. Y. Cent. & H. R. R. Co., C. C. A., 164 Fed. 325; U. S. v. Dunne, C. C. A., 173 Fed. 254. To an order under the Alaska Code, denying a motion to strike from the judgment a provision that execution issue against the defendant's person after a return, unsatisfied, of execution

ment is imperfect and informal.[4] A judgment of dismissal with costs is final and may be reviewed.[5] "If by any direction the entire cause is in fact determined, the decision, when reduced to form and entered in the records of the court, constitutes a final judgment, subject in a proper case to our review, whatever may be its designation."[6]

An order finally disposing of a collateral proceeding; such as an application to punish a person not a party for contempt,[7] or for a peremptory writ of mandamus,[8] or a writ of prohibition,[9] or denying a motion to set aside a judgment by default when the service of process was defective,[10] or denying an application by a person not a party for the return or delivery of property[11] or papers;[12] may be reviewed by writ of error,[13] or appeal,[14] as the case may be; but not an order in an action at law or suit in equity directing a witness to produce books or answer questions.[15]

against his property. Mitchell v. Porter, C. C. A., 194 Fed. 49.

[4] Wilson v. Daniel, 3 Dall. 401, 1 L. ed. 655.

[5] New Orleans R. Co. v. Morgan, 10 Wall. 256; Newcomb v. Burbank, 169 Fed. 569; although a blank is left for the insertion of the amount of the costs after taxation, Allis-Chalmers Co. v. U. S., C. C. A., 162 Fed. 679. So an order of dismissal which contains a judgment for costs. Col. E. Ry. Co. v. Union Pac. Ry. Co., C. C. A., 94 Fed. 312. But *not* an order or judgment reversing a judgment of dismissal, when the defendant has the right to plead again below. Morgan v. Thompson, C. C. A., 124 Fed. 203.

[6] Board of Com'rs of Tippecanoe County v. Lucas, 93 U. S. 108, 113, 23 L. ed. 822, 824.

[7] Nelson v. U. S., 201 U. S. 92, 50 L. ed. 673; Alexander v. U. S., 201 U. S. 117, 121, 50 L. ed. 686, 688; Shuler v. Raton Waterworks Co., C. C. A., 247 Fed. 634; *supra*, §§ 436, 437; L. E. Waterman Co. v. Standard Drug Co., C. C. A., 202 Fed. 167, dismissing the proceeding.

[8] Memphis v. Brown, 94 U. S. 715, 24 L. ed. 244; Davies v. Corbin, 112 U. S. 36, 28 L. ed. 627; Detroit & Mackinac Ry. Co. v. Michigan R. R. Commission, 240 U. S. 564.

[9] Mt. Vernon-Woodberry Cotton Duck Co. v. Alabama Interstate Power Co., 240 U. S. 30.

[10] Stevirmac Oil & Gas Co. v. Dittman, 245 U. S. 210, 38 Sup. Ct. 116, 62 L. ed. 248.

[11] Ex parte Tiffany, 252 U. S. 32.

[12] Perlman v. U. S., 247 U. S. 7, 38 Sup. Ct. 417, 62 L. ed. 950.

[13] Mt. Vernon-Woodberry Cotton Duck Co. v. Alabama Interstate Power Co., 240 U. S. 30; Detroit and Mackinac Ry. Co. v. Michigan R. R. Commission, 240 U. S. 564; *supra* §§ 692, 692c, 693.

[14] Ellis v. Interstate Commerce Commission, 237 U. S. 434.

[15] Alexander v. U. S., 201 U. S. 117, 50 L. ed. 686, although he is an officer of a defendant corporation. Webster Coal Co. v.

According to the English Chancery practice a final decree was a decree which completely determined every question arising in the cause; and every decree which reserved the further consideration of any question arising in a cause till the future hearing was interlocutory.[16] Moreover, technically, every decree was considered interlocutory until it was signed and enrolled.[17] A decree, the operation of which is subsequently suspended at the same term, is not final.[18] Under the Federal Judiciary Acts, a different definition of a final decree in equity has been made. For the purpose of appeals, every decree is considered final which decides the right to property and orders that it be sold or delivered to a party, or to an intervenor,[19] or creates a lien upon property by the issue of receivers' certificates,[20] or otherwise, or

Cassatt, 207 U. S. 181, 52 L. ed. 160; Pennsylvania Coal & Coke Co. v. Cassatt, 207 U. S. 187, 52 L. ed. 163. Nor to an order directing the inspection and survey of a mine, pending a suit to enjoin a trespass upon the same. Montana Ore P. Co. v. Butte & B. Consol. Min. Co., C. C. A., 126 Fed. 168. Held otherwise as to an order by the Interstate Commerce Commission directing a witness to answer certain questions. Ellis v. Interstate Commerce Commission, 237 U. S. 434.

16 Seton on Decrees (4th ed.), 2.

17 Forum Romanum; Seton on Decrees (4th ed.), 2; *supra*, §§ 397, 406.

18 Ohio River Co. v. Fisher, C. C. A., 115 Fed. 929.

19 Carondelet Canal and Nav. Co. v. Louisiana, 233 U. S. 362, notwithstanding a reservation as to some property not appurtenant and provision for an accounting; Central Trust Co. v. Marietta & N. G. Ry. Co., C. C. A., 48 Fed. 864; although the same decree refers another part of the controversy to a master, Maas v. Longstorf, C. C. A., 166 Fed. 41; Stokes v. Williams, C. C. A., 226 Fed. 148. A decree permitting an intervenor to use the property pending the litigation, on conditions prescribed, was held to be interlocutory only, and not appealable. Columbia Avenue Trust Co. v. MacAfee Co., C. C. A., 136 Fed. 402. Where a decree confirmed a report adjusting the accounts of a partnership directed the recovery by one party of a sum of money against the others and a sale of the firm property; a subsequent decree confirmed such sale and ordered a receiver to pay the proceeds to the former party with the right to issue execution for the balance formerly decreed to be due him with costs; it was held: that it was doubtful whether the first decree was appealable and that it might be reviewed upon an appeal from the second decree, Halfpenny v. Miller, C. C. A., 232 Fed. 113. But see Fidelity & Guaranty Co. v. Burke, C. C. A., 238 Fed. 881.

20 Bibber-White Co. v. White River Val. El. R. Co., C. C. A., 115 Fed. 786; Texas Co. v. International & G. N. Ry. Co., C. C. A., 237 Fed. 931.

directs a specific sum of money to be paid to a party,[21] or to an intervenor,[22] or to a clerk,[23] or to a receiver,[24] or by a receiver into court,[25] or by a stranger to the suit, or out of a fund in court; provided that the successful party is entitled to compel its immediate execution.[26] It has been said that a decree dis-

[21] Trustees v. Greenough, 105 U. S. 527, 26 L. ed. 1157; Baxter v. Bevil Phillips & Co., 219 Fed. 309.

[22] Central Trust Co. v. Marietta & N. G. Ry. Co., C. C. A., 48 Fed. 850, 860 (where the receiver was directed to pay for property in notes). So, an order on a petition of intervention in a foreclosure suit directing that the petitioner's claim be a charge upon the property and its income, prior to the rights of the mortgagee, Central Tr. Co. v. Grant Locomotive Works, 135 U. S. 207, 34 L. ed. 97; and an order fixing the amount of an attorney's lien and directing payment to him of the amount due. Tuttle v. Claflin, C. C. A., 88 Fed. 122; Central Trust Co. v. U. S. Light & Heating Co., C. C. A., 233 Fed. 420.

[23] *Re* Michigan Cent. R. R. Co., C. C. A., 124 Fed. 727.

[24] Ruggles v. Patton, C. C. A., 143 Fed. 312. So it seems are an order granting a motion for a consolidation and an extension of a receivership which provides that the acceptance of the benefits thereof shall be deemed a consent to all administrative orders previously made in the case. Bankers' Trust Co. v. Missouri, K. & T. Ry. Co., C. C. A., 251 Fed. 789, 796, and an order directing a Federal receiver to turn over mortgaged property to a receiver of a State court. Empire Trust Co. v. Brooks, C. C. A., 232 Fed. 641.

[25] Hinckley v. Gilman, C. & S. R. Co., 94 U. S. 467, 24 L. ed. 166. But, it has been held that neither an order approving a monthly report of a receiver, nor one directing him to pay expenses incurred by him, is appealable before the final settlement of his accounts. Heinze v. Butte & Boston Consol. Min. Co., C. C. A., 129 Fed. 337.

[26] Taney, C. J., in Forgay v. Conrad, 6 How. 201, 204, 12 L. ed. 404, 405; Michoud v. Girod, 4 How. 503, 11 L. ed. 1076; Ray v. Law, 3 Cranch, 179, 2 L. ed. 404; Whiting v. Bank of U. S., 13 Pet. 6, 10 L. ed. 33; Wabash & E. Canal Co. v. Beers, 1 Black, 54, 17 L. ed. 41; Bronson v. Railroad Co., 2 Black, 524, 17 L. ed. 359; Milwaukee & M. R. Co. v. Soutter, 2 Wall. 440, 17 L. ed. 860; Thomson v. Dean, 7 Wall. 342, 19 L. ed. 94; Railroad Co. v. Bradleys, 7 Wall. 575, 19 L. ed. 274; Stovall v. Banks, 10 Wall. 583, 19 L. ed. 1036; French v. Shoemaker, 12 Wall. 86, 20 L. ed. 270; Marin v. Lalley, 17 Wall. 14, 21 L. ed. 596; Trustees v. Greenough 105 U. S. 527, 26 L. ed. 1157; Farmer's Loan & Tr. Co., Petitioner, 129 U. S. 206, 32 L. ed. 656; Lewisburg Bank v. Sheffey, 140 U. S. 445, 35 L. ed. 493; Chicago & V. R. Co. v. Fosdick, 106 U. S. 47, 83, 27 L. ed. 47, 64; Sage v. Railroad Co., 96 U. S. 712, 24 L. ed. 641; Hoffman v. Knox, C. C. A., 50 Fed. 484. But see Jacksonville, T. & K. Ry. Co. v. American Cont. Co., 57 Fed.

66; Edgell v. Felder, C. C. A., 99 Fed. 324; Central Tr. Co. v. Marietta & N. Y. Ry. Co., C. C. A., 48 Fed. 850. But see McGourkey v. Toledo & O. Ry. Co., 146 U. S. 536, 36 L. ed. 1079. Baxter v. Bevil Phillips & Co., 219 Fed. 309. "Under the decisions an adjudication is a final appealable order, if it involves a determination of a substantial right against a party in such a manner as leaves him no adequate relief, except by recourse to an appeal. In the suit at bar appellant claims a legal right to immediate possession of the premises, and asserts that he is entitled to have that right determined with all reasonable speed." Quoted with approval in Odell v. Batterman Co., C. C. A., 223 Fed. 292, 295; Gas & Electric S. Co. v. Manhattan & Queens Trac. Corpn., C. C. A., 266 Fed. 625. A decree dismissing a bill with costs to be subsequently taxed was held to be a final decree, although a judgment for the costs was entered after their taxation. The following orders and judgments were held to be *appealable*. Grant v. Lowe, C. C. A., 89 Fed. 881. An order of seizure and sale in Louisiana where there was no opposition was held to be a final order. Boatmen's Sav. Bank v. Wagenspack, 12 Fed. 66. Where the general term of the Supreme Court of the District of Columbia affirmed an order of the special term which determined that the domicile of a decedent was in the District, and that such court had "original jurisdiction in the matter of his estate." Benjamin's Heirs v. Dubois, 118 U. S. 46, 30 L. ed. 52. An order reviving a suit in the name of the executor of the deceased plaintiff, for whom a decree was rendered, and investing the substituted plaintiff with all the rights of the original plaintiff to enforce the decree, is Terry v. Sharon, 131 U. S. 40, 33 L. ed. 94; but *not* an order reviving a suit that has abated before a final decree therein. Mackaye v. Mallory, C. C. A., 79 Fed. 1. An order denying a prayer of a receiver for a settlement of his accounts and that the complainants be directed to pay the costs and expenses of his receivership, have been held to be appealable. Chapman v. Atlantic Trust Co., C. C. A., 119 Fed. 257. One denying an application by a mortgagee for a sale, Gay v. Hudson River El. Power Co., C. C. A., 184 Fed. 689; or an application to set aside a writ of assistance and for the delivery to the petitioner of property seized thereunder, Dexter Horton Nat. Bank of Seattle, Wash. v. Hawkins, C. C. A., 190 Fed. 924; or dissolving an attachment unless the plaintiff files a bond, McDermott v. Hayes, C. C. A., 197 Fed. 129. A decree rendered by a district judge, in a case where he has no vote, is good until vacated, and therefore *appealable*. Baker v. Power, 124 U. S. 167, 31 L. ed. 382. A decree which set aside a lease of the property of a corporation and appointed a receiver to manage the corporate affairs, to whom the directors were ordered to deliver the property, books and papers of the corporation; provided for an accounting by the defendant directors of the profits and royalties under the lease; but reserved to the court "such further direction as may be necessary to carry the de-

missing a bill is not final nor appealable when a crossbill in the

cree into effect, concerning costs, or as may be equitable and just." Winthrop I. Co. v. Meeker, 109 U. S. 180, 27 L. ed. 898. In a suit by an express company against a railroad company to require the defendant to carry plaintiff's express matter upon the payment of reasonable charges, a decree that defendant must carry for reasonable rates, and fixing for the time being the maximum thereof, notwithstanding a reference by interlocutory decree or supplemental order for the settlement of accounts which accrued pending the suit. St. Louis, I. M. & S. Ry. Co. v. So. Exp. Co., 108 U. S. 24, 27 L. ed. 638; Missouri K. & T. Ry. Co. v. Dinsmore, 108 U. S. 30, 27 L. ed. 640. A decree for specific performance of a contract to furnish electric power, although the cause was retained in order to enforce payment of sums subsequently falling due; Montgomery Light & W. P. Co. v. Montgomery T. Co., 219 Fed. 963. A decree to enforce specific performance of a contract by a coal company to deliver the output of its washery although it directed an accounting for previous transactions, Marian Coal Co. v. Peale, C. C. A., 204 Fed. 161; or forbidding the construction of water works before the expiration of a franchise. Vicksburg v. Henson, 231 U. S. 259. Where an assignee in bankruptcy filed a bill to set aside a confession of judgment by the bankrupt and execution sales thereunder, and to restrain the foreclosure of the mortgage given by the bankrupt on the same property upon its reconveyance to him to secure an alleged balance of purchase-money, a decree finding the confessed judgment, execution sale, and mortgage valid, allowing the foreclosure to proceed, but ordering that any surplus arising therefrom should be paid to the assignee. Ex parte Norton, 108 U. S. 237, 27 L. ed. 709; Andrews v. Nat. F'y & P. Wks., C. C. A., 73 Fed. 516. An order denying permission to a receiver to have a judgment against his corporation set aside. Rust v. United Waterworks, C. C. A., 70 Fed. 129. An order denying a landlord leave to sue a receiver for possession of leased premises on account of a breach of covenant before the receivership. Odell v. H. Batterman Co., C. C. A., 233 Fed. 292.

An order denying an application by a stranger to be substituted for the original complainant is not appealable. Sumpter Lumber Co. v. Sound Timber Co., C. C. A., 257 Fed. 408. As to appeals from orders denying leave to intervene, see *supra*, § 259; City of New York v. Consol. Gas Co., 253 U. S. 249, in which the author was counsel; Buel v. Farmers' L. & Tr. Co., C. C. A., 104 Fed. 889; Jones & Laughlin v. Sands, C. C. A., 79 Fed. 913; Rust v. United Waterworks Co., C. C. A., 70 Fed. 129; Security Tr. Co. v. Sullivan, C. C. A., 77 Fed. 778; Lewis v. Balt. & L. R. Co., C. C. A., 62 Fed. 218; Hamlin v. Toledo, St. L. & K. C. R. Co., C. C. A., 78 Fed. 664; Land Title & Trust Co. v. Asphalt Co. of America, C. C. A., 127 Fed. 1; Blaffer v. New Orleans Water Supply Co., C. C. A., 160 Fed. 389.

same suit is still pending undetermined.[27] An appeal may be taken from an order or decree, which confirms a sale so that no reversal of any order subsequently made would divest the title. even though the consideration of other matters arising upon the pleadings is reserved "for further consideration."[28]

A decree dismissing a bill as to certain defendants, but reserving the ultimate decision of a separable controversy between the plaintiff and other defendants;[29] a decree dismissing a bill against the only defendants served with process, although others, who were not indispensable parties, have not been served;[30] and a decree dismissing a bill against one defendant, although no decree has been entered against another, against whom an order has been entered taking the bill as confessed,[31] have been held to be appealable. But a decree dismissing a bill against one of several defendants sought to be jointly charged,[32] although they were not served with process and the remaining

[27] Buffalo Specialty Co. v. Vancleef, 217 Fed. 91, 94.

[28] St. Louis, I. M. & S. R. Co. v. So. Exp. Co., 108 U. S. 24, 27 L. ed. 638; Mo., K. & T. R. Co. v. Dinsmore, 108 U. S. 30, 27 L. ed. 640; Lewisburg Bank v. Sheffey, 140 U. S. 445, 35 L. ed. 493; Sanders v. Bluefield Works & Imp. Co., C. C. A., 106 Fed. 587; Chase v. Driver, C. C. A., 92 Fed. 780; New Orleans v. Peake, C. C. A., 52 Fed. 74. A decree dismissing a bill with costs to be subsequently taxed was held to be a final decree, although a judgment for the costs was entered after their taxation. Fowler v. Hamill, 139 U. S. 549, 35 L. ed. 266. A decree is final which settles all the rights of the parties involved in the pleadings, though it gives leave to either of them to apply at the foot of the decree in relation to any matter not finally determined by it. French v. Shoemaker, 12 Wall. 86, 20 L. ed. 270. But see Dainese v. Kendall, 119 U. S. 53, 30 L. ed. 305.

[29] Hill v. Chicago & Evanston R. R. Co., 140 U. S. 52, 35 L. ed. 331; Jackson v. Jackson, C. C. A., 175 Fed. 710. But see Keystone Manganese & Iron Co. v. Martin, 132 U. S. 91, 33 L. ed. 275.

[30] Bradshaw v. Miners' Bank, C. C. A., 81 Fed. 902.

[31] Stewart v. Masterson, 131 U. S. 151, 33 L. ed. 114. See Judson v. Courier Co., 25 Fed. 705.

[32] Hohorst v. Hamburg-American Packet Co., 148 U. S. 262, 37 L. ed. 443; National Bank of Rondout v. Smith, 156 U. S. 330, 39 L. ed. 441; Carmichael v. Texarkana, C. C. A., 58 L.R.A. 911, 116 Fed. 845; Menge v. Warriner, C. C. A., 120 Fed. 816; Cay v. Vereen, C. C. A., 144 Fed. 839; El. Protection Co. v. Am. Bank Protection Co., C. C. A., 184 Fed. 916; General El. Co. v. Allis-Chalmers Co., C. C. A., 194 Fed. 413. But see Dainese v. Kendall, 119 U. S. 53, 30 L. ed. 305.

defendant was duly served;[33] a decree dismissing a bill against one defendant, who if liable, would be entitled to a right of subrogation against another, whose liability was still undetermined;[34] and a decree against a single defendant granting a permanent injunction against the infringement of certain claims in a patent,[35] or against the infringement of one of two patents,[36] which the decree adjudicated to be valid, and a similar decree dismissing a bill as to certain claims under a patent,[37] or as to one of two trademarks[38] adjudicated to be void, but reserving the final determination concerning the other claims or patents; have been held to be not appealable. A decree, which directs the payment of money and delivery of property by some defendants and reserves the controversy as regards the others,[39]

[33] Beck & Pauli Lith. Co. v. Wacker & B. B. M. Co., C. C. A., 76 Fed. 10.

[34] Baker v. Old Nat. Bank, C. C. A., 91 Fed. 449.

[35] Draper Corporation v. Stafford Co., 255 Fed. 554.

[36] Bacon v. Gennett, C. C. A., 220 Fed. 663.

[37] *Re* National Enameling & Stamping Co., 201 U. S. 156, 50 L. ed. 707; Globe-Wernicke Co. v. Fred Macey Co., C. C. A., 119 Fed. 696; Memphis Keeley Institute v. Leslie E. Keeley Co., C. C. A., 144 Fed. 628; Library Bureau v. Yawman & Erbe Mfg. Co., C. C. A., 147 Fed. 245. *Contra*, Chicago Wooden Ware Co. v. Miller Ladder Co., C. C. A., 133 Fed. 541; Scriven v. North, C. C. A., 134 Fed. 366, where a decree dismissing so much of the bill as set up infringement of patents and trade-marks but granted an injunction against unfair competition as to the profits of which it directed an accounting was held to be final and appealable.

[38] Groblewski v. John Chmiell Co., C. C. A., 264 Fed. 325. *Contra*, Historical Pub. Co. v. Jones Bros. Pub. Co., C. C. A., 231 Fed. 784, (two copyrights).

[39] Forgay v. Conrad, 6 How. 201, 12 L. ed. 404.

It has been held that the following orders and decrees in equity are *not* final and *cannot* be reviewed by appeal: An order directing money to be paid by a party into court, Louisiana Nat. Bank v. Whitney, 121 U. S. 284, 30 L. ed. 961; Norris Safe & Lock Co. v. Manganese Steel Safe Co., C. C. A., 150 Fed. 577, or to a receiver. Lodge v. Twell, 135 U. S. 232, 34 L. ed. 153. An order directing the delivery of property by a party to a receiver, to abide the result of the suit, Grant v. Phœnix Mut. L. Ins. Co., 106 U. S. 429, 27 L. ed. 237. Nor it seems an order denying a motion that a receiver be directed to set apart for the benefit of the complainant and apply for the complainant's benefit such fund as he afterward derives from its income and profits. Bankers' Trust Co. v. Missouri, K. & T. Ry. Co., C. C. A., 251 Fed. 789, 796. But it has been held that the order of the District Court for Alaska directing the delivery to a

receiver of a placer mine, with directions to operate the same, which would soon exhaust the supply of gold, was *appealable*, *Re* McKenzie, 180 U. S. 536, 45 L. ed. 657; Ternanses v. Melsing, C. C. A., 106 Fed. 775; *supra*, §§ 300, 325; and so was an order directing a master to examine the papers in a box and give them to the different parties, to whom they belonged. Potter v. Beal, C. C. A., 50 Fed. 860, 863. Not *appealable* are: A decree adjudging the right of possession, but appointing a special master to take evidence as to the identity of the articles to be delivered. Rexford v. Brunswick-Balke-Collender Co., 228 U. S. 339, 57 L. ed. —. See Cutting v. Woodward, C. C. A., 234 Fed. 307. An order directing the delivery of property to a new trustee appointed by the court, when another matter is reserved for further consideration, Pulliam v. Christian, 6 How. 209, 12 L. ed. 408; but see Winthrop Iron Co. v. Meeker, 109 U. S. 180, 27 L. ed. 898. A judgment after the trial of an issue at law directing a suit in equity for interpleader when no decree in equity had been entered. Bacon v. Gennett, C. C. A., 220 Fed. 663. A decree for an accounting, Am. Sulphite Pulp Co. v. Carthage Sulphite Pulp Co., C. C. A., 224 Fed. 501. An order deciding that complainants were entitled to recover damages and referring the case to a special master to find and report the amount thereof. Odbert v. Marquet, C. C. A., 175 Fed. 44. A decree directing a conveyance of land, which directs an accounting and does not prescribe the time within which the conveyance shall be made, Maas v. Longstorf, C. C. A., 166 Fed. 41. An order directing a sale which does not describe the property to be sold sufficiently specifically to warrant an immediate sale, Railroad Co. v. Swasey, 23 Wall. 405. An order directing a sale which does not appoint the time of sale, Buckingham v. McLean, 13 How. 150, 14 L. ed. 90; unless it authorizes a master to fix the time of sale. Odbert v. Marquet, C. C. A., 175 Fed. 44; Parsons v. Robinson, 122 U. S. 112, 30 L. ed. 1122. An order setting aside a final decree where the appellant has obtained leave to amend, Fisher v. Simon, C. C. A., 67 Fed. 387.

But, *appealable* have been held, a decree upon an original bill, which sets aside a former decree for fraud and orders further proceedings in the former suit. Hendryx v. Perkins, C. C. A., 114 Fed. 801. An order setting aside a decree that struck from the files amended pleadings, which bring in property not originally involved in a suit, Miocene Ditch Co. v. Moore, C. C. A., 150 Fed. 483. An order granting a new trial, which the court had no jurisdiction to allow, Nelson v. Mehan, C. C. A., 12 L.R.A.(N.S.) 374, 155 Fed. 1.

Not appealable: A decree upon a cross-bill which does not dispose of the original bill, *Ex parte* Railroad Co., 95 U. S. 221, 24 L. ed. 355; Ayres v. Carver, 17 How. 591, 15 L. ed. 179; Winters v. Ethell, 132 U. S. 207, 33 L. ed. 339. Emery v. Central Trust & Safe Deposit Co., C. C. A., 204 Fed. 965; Gladys Belle Oil Co. v. Mackey, C. C. A., 216 Fed. 129. A decree in a partition suit which adjudges that the appellees are owners each of one-eighth of the property, and refers

the matter to a master, Green v. Fisk, 103 U. S. 518, 26 L. ed. 486; see also Perkins v. Fourniquet, 6 How. 206, 12 L. ed. 506; Elder v. McClaskey, C. C. A., 70 Fed. 529; or to commissioners, to proceed to partition, Dangerfield v. Caldwell, C. C. A., 151 Fed. 554. A decree of affirmance which does not tax costs nor specify the sum for which it is rendered, Wheeler v. Harris, 13 Wall. 51, 20 L. ed. 531; The Lucille, 19 Wall. 73, 22 L. ed. 64; but see Fowler v. Hamill, 139 U. S. 549, 35 L. ed. 266; *contra* of affirmance upon writ of error, Texas & Pac. Ry. Co. v. Gentry, 163 U. S. 353, 363, 41 L. ed. 186, 191. An order or decree denying relief except upon the performance of certain conditions, Barker v. Craig, 127 U. S. 213, 22 L. ed. 147; Stratton v. Dewey, C. C. A., 79 Fed. 32; unless it clearly appears that the appellant has refused to comply with the conditions, Tuttle v. Claflin, C. C. A., 66 Fed. 7. An order overruling exceptions to a report of a master dismissing a claim and approving the report is not appealable. Walter Scott & Co. v. Wilson, C. C. A., 115 Fed. 284, 285; per curiam, "It neither determines the appellant's right nor disposes of its suit. It still remains within the power of the court below to set aside that report, to re-refer the case, and to direct further evidence to be taken. A confirmed report, at best, stands in the same relation to a decree as a verdict to a judgment. It may be almost certain that the decree will follow it, but it cannot be enforced until the decree is entered." Kingsbury v. Kingsbury, 20 Mich. 212. A docket entry "Opinion—Decree for complainants, is not a decree and so not appealable till a former decree has been entered thereupon." Herrick v. Cutcheon, C. C. A., 55 Fed. 6. A statement on the records of the court: "Court order: prisoner remanded. Register 2 of Departments 1 to 10, page 249," is not a final judgment nor an order, and is not reviewable. Clarke v. McDade, 165 U. S. 168, 171, 41 L. ed. 673, 674.

Where, after certain property had been sold under a trust deed executed to secure three promissory notes to the holder of two of the notes, an action was brought by the holder of the remaining note to set aside the sale, and for an account of the rents collected, and of the amount due upon the notes held by each, and the special term of the Supreme Court of the District of Columbia set aside the sale by an order from which an immediate appeal was taken; an order of the general term, reviewing the order below, ratifying and confirming the sale, and remanding the cause to the special term "for further proceedings," was held not to be a final order within the meaning of the statute allowing appeals from that court to the Supreme Court of the United States. Dainese v. Kendall, 119 U. S. 53, 30 L. ed. 305. No appeal can be taken from a decree setting aside one sale and ordering another, Butterfield v. Usher, 91 U. S. 246, 23 L. ed. 318; except by the purchaser, Blossom v. Milwaukee & C. R. Co., 1 Wall. 655, 17 L. ed. 673. See *infra*, § 697. But see Grant v. Lowe, C. C. A., 89 Fed. 881. Nor from a decree setting aside an assignment and directing a reference to determine the rights of creditors. Talley v.

provided that the amount is immediately payable and does not need an accounting for its determination;[40] and an order refusing to dismiss a bill as regards one of two complainants, which alleges that it was joined without its consent,[41] are appealable.

An appeal lies to the Circuit Court of Appeals from an interlocutory decree or order, which grants, or continues, or refuses or dissolves, or refuses to dissolve, an injunction, or appoints a receiver.[42] Upon such an appeal the whole bill may be dismissed;[43] but a cross-appeal by the complainant cannot be sus-

Curtain, C. C. A., 58 Fed. 4. Nor from an order discharging a previous order to the marshal to seize property of the defendant. Riddle v. Hudgins, C. C. A., 58 Fed. 490. Nor from a decree directing an account to be taken of rents and proceeds of lands with an option to appellant to purchase them and leave certain other questions to be decided thereafter. Crawford v. Points, 13 How. 11, 14 L. ed. 29. Nor from a decree to take an account upon evidence and report to the court. Beebe v. Russell, 19 How. 283, 15 L. ed. 668. Nor from a decree that the plaintiff recover of the defendant the highest market value of certain bonds to be ascertained by the court in special term, where the amount has not been ascertained. Follansbee v. Ballard Pav. Co., 154 U. S. 651, and 25 L. ed. 802.

Where a decree dismissed a bill with costs, but contained a recital declaring that the patent on which the complainant sued was valid, it was said that the defendant could not appeal from that part of the decree. Corning v. Troy Iron & N. Factory, 15 How. 451, 465, 14 L. ed. 768, 774.

[40] Meagher v. Minnesota Threshing Mfg. Co., 145 U. S. 608, 36 L. ed. 834.

[41] Brush El. Co. v. El. Improvement Co., C. C. A., 51 Fed. 557.

[42] 26 St. at L. 826; 31 St. at L. 660; 34 St. at L. 116; Barnett v. Conklin, C. C. A., 268 Fed. 177; *supra*, §§ 300, 325. But not an order of the Commissioner of Patents dissolving an interference proceeding. Parker v. Craft, C. C. A., 258 Fed. 988. Nor a decision of the Court of Appeals of the District of Columbia upon an appeal from a decision of the Commissioner of Patents. Frasch v. Moore, 211 U. S. 1, 53 L. ed. 65. See *supra*, § 147. *Cf.* An order denying a stay of proceedings in the same case is not the denial of an injunction. Griesa v. Mutual Life Ins. Co., C. C. A., 165 Fed. 48; Emery v. Central Tr. & Safe Deposit Co., C. C. A., 204 Fed. 966; although an order denying a stay of proceedings in another case be so considered. No appeal was entertained from a decree staying proceedings till the entry of a decree of a State court or the further order of the Federal court, Merriman v. Chicago & E. I. Co., C. C. A., 64 Fed. 535.

[43] Smith v. Vulcan Iron Works, 165 U. S. 518, 41 L. ed. 810. *Re* Tampa Suburban R. Co., 168 U. S. 583, 42 L. ed. 589; Harriman v. Northern Securities Co., 196 U. S.

tained.[44] The Supreme Court of the United States cannot review such an order or decree by an appeal from the Circuit Court of Appeals[45] or from the court of first instance,[46] although it is entered after a hearing and makes the injunction permanent provided that it directs an accounting before a master.[47] Nor, it has been held, when it retains the case for the purpose of settling any question concerning matters as to which relief is prayed in the complaint that may arise before the expiration of the existing articles of incorporation of the complainant.[48] Unless it dismisses the bill.[49] But the decision of the Circuit Court of Appeals in all such cases may be reviewed by the Supreme Court by *certiorari*,[50] and the Circuit Court of Appeals may certify to the Supreme Court any question involved upon such appeal, even one of jurisdiction.[51]

It has been held that an order which is purely administrative in its nature, such as an order granting leave to sue a receiver,[52] and an order purely incidental to a final judgment or decree previously entered[53] are not appealable. That no appeal will

641, 49 L. ed. 631; *supra*, § 300. See Shubert v. Woodward, C. C. A., 167 Fed. 47.

[44] *Ex parte* National Enamelling & Stamping Co., 201 U. S. 156, 50 L. ed. 707.

[45] Kirwan v. Murphy, 170 U. S. 205, 42 L. ed. 1009; Mitchell Store Building Co. v. Carroll, 232 U. S. 379; Union Pacific R. R. Co. v. Board of County Commissioners, 247 U. S. 282, "where the decisions below were rested on the ground of adequate legal remedy, which might have been made the basis for a final dismissal of the bill." *Supra*, § 688a.

[46] Brown v. Swann, 9 Peters 1, 9 L. ed. 29; McCollum v. Eager, 2 How. 61, 11 L. ed. 179: Barnard v. Gibson, 7 How. 650, 12 L. ed. 857; Beebe v. Russell, 19 How. 283, 15 L. ed. 668; Thomas & Co. v. Wooldridge, 23 Wall. 283, 23 L. ed. 135 (an order dissolving an injunction); Hayes v. Fisher, 102 U. S. 121, 26 L. ed. 95; McGourkey v. Toledo & Ohio Central Ry. Co., 146 U. S. 536, 36 L. ed. 1079.

[47] *Ibid.*

[48] Covington v. First Nat. Bank, 185 U. S. 270, 46 L. ed. 906.

[49] Shaffer v. Carter, 252 U. S. 37; *supra*, § 688.

[50] *Re* Tampa Suburban R. Co., 168 U. S. 583, 42 L. ed. 589 (a receiver); Harriman v. Northern Securities Co., 196 U. S. 641, 49 L. ed. 631; *supra*, § 689.

[51] U. S. v. Jahn, 155 U. S. 109, 39 L. ed. 87; McLish v. Roff, 141 U. S. 661, 668, 35 L. ed. 893, 895.

[52] N. Y. Security & Tr. Co. v. Illinois Transfer R. Co., C. C. A., 104 Fed. 710. *Cf.* Mercantile Tr. Co. v. Farmers' L. & Tr. Co., C. C. A., 81 Fed. 254.

[53] Callan v. May, 2 Black 541, 17 L. ed. 281. *Not* appealable are, an order after a judgment or decree

lie from an order striking from the files a petition filed without leave at the previous term, although such paper bears the file mark of the clerk.[54]

Appeals in admiralty are previously considered.[55]

Where, in pursuance of a special act of Congress, the Court of Claims reopened a case in which judgment had been rendered for the claimant, and, as a part of the original judgment, awarded him a further sum, which had been omitted by mistake, the order adjudging the additional sum was held to be merged in the original judgment, an appeal from which was barred by the lapse of time, and consequently to be not appealable.[56] A judgment of the Court of Claims which is purely advisory is not appealable.[57]

§ 696. Value of the matter in dispute upon writs of error and appeals. The final judgments and decrees of the State courts are reviewed by the Supreme Court;[1] the final judgments and decrees of the District Courts, including the District Court of Hawaii,[2] except those in bankruptcy;[3] and of the

for possession directing the issue of a writ of *habere facias possessionem*. *Ibid.* See Baxter v. Bevil Phillips & Co. et al., 219 Fed. 309. An order granting leave to file a bill of exceptions; Honey v. Chicago, B. & Q. R. Co., C. C. A., 82 Fed. 773. An order of the lower court pending an appeal, directing a reference to ascertain whether a tenant should pay rent to the defendant or to a receiver previously appointed, Grant v. Phoenix Life Ins. Co., 121 U. S. 118. *Appealable*, have been held to be: An order confirming a sale. This brings up, however, only rulings subsequent to the order for the sale. Lisman v. Knickerbocker Tr. Co., C. C. A., 211 Fed. 413, 417; *infra*, § 711f. An order refusing to modify a decree because of a subsequent agreement between the parties, U. S. v. Trogler, C. C. A., 237 Fed. 181; and an order vacating a previous order made on settlement of a compromise decree allowing fees to counsel, McPherson v. U. S., C. C. A., 245 Fed. 35. But see Painter v. Union Trust Co., C. C. A., 246 Fed. 240.

[54] Born v. Schneider, 128 Fed. 179.

[55] *Supra*, § 592.

[56] U. S. v. Grant, 110 U. S. 225, 28 L. ed. 127.

[57] *Re* Sanborn, 148 U. S. 222, 37 L. ed. 429, *supra*, §§ 686, 688.

§ 696. [1] Jud. Code, § 237 re-enacting U. S. R. S. § 709; Buel v. Van Ness, 8 Wheat. 312, 5 L. ed. 624; *supra*, § 693.

[2] Jud. Code, §§ 128, 238, re-enacting 26 St. at L. 826, 827, §§ 5, 6; No. Pac. R. Co. v. Amato, 144 U. S. 465, 36 L. ed. 506; S. C., C. C. A., 49 Fed. 881; The Paquete Habana, 175 U. S. 677, 44 L. ed. 320.

[3] 30 St. at L. 544, 553, § 25; *supra*, §§ 669, 688.

Court of Appeals of the District of Columbia,[4] are reviewed, by the Supreme Court and the Circuit Courts of Appeals as the case may be; the interlocutory orders of the District Courts, including the District Court of Hawaii,[5] appointing receivers and granting, or continuing, or dissolving, or refusing, or refusing to dissolve injunctions, and the judgments of the District Courts adjudging and refusing to adjudge the defendants bankrupts and granting or denying a discharge, are reviewed by the Circuit Courts of Appeals; in the respective cases of which these appellate courts have jurisdiction,[6] without regard to the amount involved; except in cases to recover claims against the United States, when the claimant cannot appeal unless his claim exceeds one thousand dollars or has been forfeited to the United States for fraud.[7] The judgments of the District Courts in bankruptcy which allow or reject a claim of five hundred dollars or more are reviewed by the Circuit Courts of Appeals.[8] The final judgments and decrees of the Circuit Courts of Appeals in all other cases, where the decisions of these courts are not final, may be reviewed by the Supreme Court of the United States by appeal or writ of error, as the case may be, where the matter in controversy exceeds one thousand dollars besides costs.[9] The judgments and decrees of the Circuit Courts of Appeals when final may be reviewed by the Supreme Court by *certiorari,* irrespective of the amount involved.[10] The final judgments and decrees of the District Court for the District of Alaska, or for any division thereof, are reviewed immediately by the Supreme Court of the United States irrespective of the amount involved in cases in which such court has otherwise jurisdiction.[11] In all other civil cases in which the amount in-

4 Jud. Code, § 250, 36 St. at L. 1087. See *supra,* § 691.

5 Jud. Code, 129, 36 St. at L. 1087, re-enacting 26 St. at L. 828, § 7; 31 St. at L. 158, § 86; Wright v. MacFarlane & Co., C. C. A., 122 Fed. 770. See §§ 300, 325, *supra.*

6 30 St. at L. 544, 553, § 25; *supra,* § 666.

7 Reid v. U. S., 211 U. S. 529, 53 L. ed. 313.

8 30 St. at L. 544, 553, § 25; *supra,* § 666.

9 26 St. at L. 826, 829, § 6; *supra,* § 688; San Pedro L. A. & S. L. R. R. Co. v. U. S., 247 U. S. 307, 38 Sup. Ct. 498, 32 L. ed. 1129.

10 *Ibid.; supra,* § 689.

11 Jud. Code, § 247, 36 St. at L. 1087, see *supra,* § 691.

volved or the value of the subject matter in controversy exceeds five hundred dollars, and in all criminal cases, they are reviewed by the United States Circuit Court of Appeals for the Ninth Circuit.[12] The judgments and decrees of the Supreme Court and the District Court of Porto Rico, are reviewed by the Supreme Court of the United States, in the cases of which it has otherwise jurisdiction, irrespective of the amount involved.[13]

"In all cases other than those in which a writ of error or appeal will lie direct to the Supreme Court of the United States as provided in section two hundred and forty-seven, in which the amounts involved or the value of the subject matter in controversy shall exceed five hundred dollars, and in all criminal cases, writs of error and appeals shall lie from the district court for Alaska or from any division thereof, to the circuit courts of appeals for the ninth circuit, and the judgments, orders and decrees of said court shall be final in all such cases. But whenever such Circuit Court of Appeals may desire the instruction of the Supreme Court of the United States upon any question or proposition of law which shall have arisen in any such cases, the court may certify such question or proposition to the Supreme Court, and thereupon the Supreme Court shall give its instruction upon the question or proposition certified to it, and its instructions shall be binding upon the Circuit Court of Appeals."[14]

Final judgments and decrees of the District Court of the Canal Zone are reviewed by the Circuit Court of Appeals of the Fifth Circuit "in all actions and proceedings in which the Constitution or any statute, treaty, title, right or privilege of the United States, is involved and a right thereunder denied and in cases in which the value in controversy exceeds one thousand dollars, to be ascertained by the oath of either party, or by

[12] *Ibid.*, § 134. See *supra*, § 691.

[13] *Ibid.*, § 244, re-enacting, 31 St. at L. 85, § 35; Maricopa & P. R. Co. v. Territory of Arizona, 156 U. S. 347, 39 L. ed. 447; Springville City v. Thomas, 166 U. S. 707, 41 L. ed. 1172. *Supra*, § 692.

[14] Act of March 3, 1911, ch. 231, § 134, 36 St. at. L. 1134, Comp. St. § 1125; *supra*, § 693. A motion to dismiss was denied where the value of the amount involved was doubtful and was said so to be by the Chief Justice of the Hawaiian Supreme Court when he allowed the appeal. Ihihi et al. v. Kahaulelio,

other competent evidence,[15] and also in criminal causes wherein the offense charged is punishable as to a felony."[16] The judgments of the Court of Claims may be reviewed by appeal on behalf of the plaintiff, in case of a suit on a claim against the United States, where the amount in controversy exceeded three thousand dollars or his claim was forfeited to the United States for fraud, and on behalf of the United States in all cases decided adversely to them.[17]

Where the right to an appeal or writ of error depends on the value of the matter in dispute, such value must be estimable in money.[18] Consequently, in such cases, where the matter in dis-

C. C. A., 263 Fed. 817. An affidavit that the value of the land in suit exceeded $25,000 was held not to be sufficient to confer jurisdiction where only a half interest of the same was affected and the affidavit did not show that the affiant appraised the half interest only. Enriquez v. Enriquez, 222 U. S. 123, 56 L. ed. 122. The denial of a writ of mandamus to compel the recognition of certain judgments exceeding 5,000 and a levy of taxes by municipal officers of five mills on the dollar, each year, to pay the same, involves the jurisdictional amount. Beadles v. Smyser, 209 U. S. 393, 52 L. ed. 849. The fact that the decree grants a divorce and separation, and awards alimony, is no objection to the jurisdiction. De La Rama v. De La Rama, 201 U. S. 303, 50 L. ed. 765. It was held that there could be no review of a proceeding by a railroad company to compel a board to revoke an order for the transportation of detectives free, since the value in controversy did not appear. Board of Public Utility Commissioners v. Manila Electric R. & Light Co., 249 U. S. 262, 39 Sup. Ct. 272, 63 L. ed. 596. As to the review of decrees settling accounts, Kennedy v. Sinnott, 179 U. S. 606, 45 L. ed. 339; admitting wills to probate, Ormsby v. Webb, 134 U. S. 47, 33 L. ed. 805; and upon applications for the writs of habeas corpus. Cross v. Burke, 146 U. S. 82, 36 L. ed. 896; Perrine v. Slack, 164 U. S. 452, 41 L. ed. 510.

15 A counter-claim which is disallowed in a judgment for plaintiff is included in computing the jurisdictional amount, Pacific Mail S. S. Co. v. Balderach, C. C. A., 229 Fed. 562; Pacific Mail S. S. Co. v. Beneby, C. C. A., 250 Fed. 444. See *supra*, § 693.

16 37 St. at L. 565, Comp. St. § 10045. A judgment imposing a fine of $25 for contempt was not reviewed. Smith v. Government of Canal Zone, C. C. A., 239 Fed. 133. See *supra*, § 693.

17 Jud. Code, § 242, 36 Stat. at L. 1087, re-enacting U. S. R. S., § 707; 24 St. at L. 506, § 9; *supra*, § 686.

18 So held of the right to a county seat. Smith v. Adams, 130 U. S. 167, 32 L. ed. 895. A county clerk who is not shown to be a taxpayer has no pecuniary interest in the assessment of property there for taxation. Caffrey v. Oklahoma Territory, 177 U. S. 346, 44 L. ed. 799.

pute is the right to personal liberty or the right to the custody of a child, by *habeas corpus* or otherwise,[19] the right to a divorce in which no alimony is sought or granted,[20] the right to the issue of a patent,[21] or the registration of a trademark,[22]—no appeal or writ of error can be maintained.

The value of the matter in dispute at the time of the entry of the judgment is alone to be considered,[23] including interest accrued before judgment and therein included.[24] No interest subsequently accrued;[25] nor, it has been held, in cases from Porto

See also Cameron v. U. S. 146 U. S. 533, 36 L. ed. 1077.

[19] Lee v. Lee, 8 Pet. 44, 8 L. ed. 860; Pratt v. Fitzhugh, 1 Black, 271, 17 L. ed. 206; Barry v. Mercein, 5 How. 103, 12 L. ed. 70; Lau Ow Bew v. U. S., 144 U. S. 47, 36 L. ed. 340; Perrine v. Slack, 164 U. S. 452, 41 L. ed. 510; Cross v. Burke, 146 U. S. 82, 36 L. ed. 896; Thompson v. Thompson, 226 U. S. 551, 57 L. ed. —.

[20] Simms v. Simms, 175 U. S. 162, 166, 44 L. ed. 115, 116. Where the decree directed the payment of alimony, the value of the matter in dispute was estimated by a consideration of the expectancy of life of the wife. Thompson v. Thompson, 226 U. S. 551, 560, 57 L. ed. —.

[21] Durham v. Seymour, 161 U. S. 235, 40 L. ed. 682.

[22] South Carolina v. Seymour, 153 U. S. 353, 38 L. ed. 742.

[23] Bank of U. S. v. Daniel, 12 Peters 32, 9 L ed. 989; Walker v. U. S., 4 Wall. 163, 18 L. ed. 319. As to the plaintiff's right to reduce the judgment by filing a *remittitur* of part of the verdict, and thus prevent an appeal, see *supra*, § 480. Where part of the judgment had been paid it was held that the balance, not the original amount, was the matter in dispute. Thorp v. Bonnifield, 177 U. S. 15, 44 L. ed. 652. So where part of the amount of the judgment was not disputed below. Wabash, St. L. & P. Ry. Co. v. Knox, 110 U. S. 304, 28 L. ed. 155; Cox v. Western L. & C. Co., 123 U. S. 375, 31 L. ed. 178. It has been held that the plaintiff cannot, by excepting to the allowance of part of the damages awarded to him and to the refusal by the trial court to permit a *remittitur*, when he brings a writ of error to correct this alleged error, obtain the dismissal of defendant's writ of error upon the ground that the actual value of the matter in dispute is less than the jurisdictional amount. Balt. & O. R. Co. v. Griffith, 159 U. S. 603.

[24] Quebec S. S. Co. v. Merchant, 133 U. S. 375, 33 L. ed. 656; Keller v. Ashford, 33 U. S. 610, 33 L. ed. 667. Mass. Ben. L. Ass'n v. Miles, 137 U. S. 689, 33 L. ed. 667. But not interest added by an *ex parte* amendment of the judgment on the defendant's motion. No. Pac. R. Co. v. Booth, 152 U. S. 671, 38 L. ed. 591. As to the method of calculating the interest when there have been payments on account of the principal, see Woodward v. Jewell, 140 U. S. 247, 35 L. ed. 478.

[25] Walker v. U. S., 4 Wall. 163, 18 L. ed. 319; Knapp v. Banks, 2

Rico, interest previously accrued when provided for in the judgment, but not included therein;[26] nor right claimed at the outset of the suit but abandoned before the judgment was entered, can be taken into consideration.[27] Where a defendant's counter-claim has been dismissed and judgment rendered for the plaintiff, the amount of the counter-claim added to the amount of the plaintiff's recovery is the value of the matter in dispute,[28] unless the bill of exceptions shows that on the trial the defendant abandoned all or a part of his counter-claim;[29] or the counter-claim does not inject a new element of value into the case.[30] The probative force of the judgment, and its effect as an estoppel in a subsequent suit between the same parties to recover a larger amount, as in the case of a judgment in a suit to collect a coupon, cannot be considered as adding to the value

How. 73, 11 L. ed. 184; W. U. T. Co. v. Rogers, 93 U. S. 565, 23 L. ed. 977; Thompson v. Butler, 95 U. S. 694, 24 L. ed. 540.

[26] Ortega v. Lara, 202 U. S. 339, 50 L. ed. 1055. Upon appeal from a decree or writ of error to the judgment of an appellate court affirming the decree or judgment of a court below, ordinarily where such judgment or decree of affirmance expressly includes interest from a time antecedent to its entry and the interest is a part of the claim litigated, the interest is included in the computation of the value of the matter in dispute. Zeckendorf v. Johnson, 123 U. S. 617, 31 L. ed. 277; The Patapsco, 12 Wall. 451, 20 L. ed. 457; The Rio Grande, 19 Wall. 178, 22 L. ed. 60. See Keller v. Ashford, 133 U. S. 610, 617, 33 L. ed. 667, 671; Woodward v. Jewell, 140 U. S. 257, 258, 35 L. ed. 464, 465. If the judgment of affirmance is silent, as to interest, interest is not included in the computation. Railroad Co. v. Trook, 100 U. S. 112; District of Columbia v. Gannon, 130 U. S. 227, 32 L. ed. 922.

[27] Tintsman v. National Bank, 100 U. S. 6; Export and Import Lumber Co. v. Port Banga Lumber Co., 237 U. S. 388.

[28] Dushane v. Benedict, 120 U. S. 630, 30 L. ed. 810; Block v. Darling, 140 U. S. 234, 35 L. ed. 476; Buskstaff v. Russell, 151 U. S. 626, 38 L. ed. 292; Clark v. Sibway, 142 U. S. 682, 35 L. ed. 1157; Sire v. Ellithorpe A. B. Co., 137 U. S. 579, 34 L. ed. 801; Harten v. Löffler, 212 U. S. 397, 53 L. ed. 568. Where the matter set up in the cross-bill is directly responsive to the averments in the original bill, and is directly connected with the transactions therein set forth as the gravamen of the plaintiff's case, the amount claimed in the cross-bill may be considered in determining the jurisdiction on appeal from a decree upon both bills. Lovell v. Cragin, 136 U. S. 130, 141, 34 L. ed. 372, 375.

[29] Bradstreet Co. v. Higgins, 112 U. S. 227, 28 L. ed. 715.

[30] Martinez v. International Banking Corporation, 220 U. S. 214, 55 L. ed. 438. *See supra*, § 198.

of the matter in dispute.[31] As a general rule, where judgment is for the defendant, the amount of the plaintiff's claims is the value of the matter in dispute; but this rule is subject to the qualification that the demand shall clearly appear to have been made in good faith for such amount.[32] When there is an appeal

[31] Elgin v. Marshall, 106 U. S. 578, 580, 27 L. ed. 249, 250; Bruce v. Manchester & K. R. Co., 117 U. S. 514, 29 L. ed. 990; Clay Center v. Farmers' L. & Tr. Co., 145 U. S. 224, 36 L. ed. 685; Reid v. U. S. 211 U. S. 529, 53 L. ed. 313.

Huntington v. Saunders, 163 U. S. 319, 41 L. ed. 174. *Cf.* Richardson v. Green, 130 U. S. 104, 32 L. ed. 1872; Wabash v. Rudolph, 217 U. S. 561, 54 L. ed. 883. See § 6, *supra*. Where the application was for a judgment directing the continuous levy of taxes to pay previous judgments for a series of years, it was held that the aggregate amount of such judgments measured the value of the matter in dispute. Beadles v. Smyser, 209 U. S. 393, 399, 52 L. ed. 849, 852. Where separate actions for a penalty were properly consolidated and the Circuit Court of Appeals had reversed a judgment for an inadequate penalty and directed judgment below in accordance with its opinion; it was held that the correct amount of possible penalties in all the actions consolidated was the measure of the matter in dispute. Baltimore & O. Southwestern R. R. Co. v. U. S., 220 U. S. 94, 55 L. ed. 384.

[32] If, for instance, a greater amount than $5,000 was claimed in the *ad damnum* clause of the declaration, and the bill of particulars showed the actual claim to be less, the latter would be the value of the matter in dispute. Gorman v. Havird, 141 U. S. 206, 207, 35 L. ed. 717, 718, per Brown, J. So in an action for trespass on land worth $1,800, by the levy upon the same of an execution for less than $30, when there was no allegation of special damage, and it appeared that the plaintiff had released the levy by paying the amount of the execution, although spite was alleged, and the damages laid at $6,000, the court held that the matter in dispute was less than $5,000. Magruder v. Armes, 180 U. S. 496, 45 L. ed. 638. See Bradstreet Co. v. Higgins, 112 U. S. 227, 28 L. ed. 715. Where the object of a suit is to apply property worth more, to the payment of a debt worth less, than the jurisdictional amount, the amount of the debt, not the value of the property, is the test of jurisdiction. Gibson v. Shufeldt, 122 U. S. 27, 29, 30 L. ed. 1083, 1084, per Gray, J.; Peyton *v.* Robertson, 9 Wheat. 527, 6 L. ed. 151; Farmers' Bank of Alexandria v. Hooff, 7 Pet. 168, 8 L. ed. 646; Ross v. Prentiss, 3 How. 771, 11 L. ed. 824. In a suit to establish the right to an office, the aggregate amount of the salary for the unexpired term claimed by the plaintiff in error is the value of the matter in dispute. U. S. v. Addison, 22 How. 174, 16 L. ed. 304; Smith v. Whitney, 116 U. S. 167, 29 L. ed. 601; Handley v. Stutz, 137 U. S. 366, 34 L. ed. 706. See N. E. Mtge. Security Co. v. Gay, 145 U. S. 123, 36 L. ed. 646; U. S. v. Wanamaker.

147 U. S. 149, 37 L. ed. 118. A sum claimed for disbursements not alleged to have been made by the plaintiff is not included. Gorman v. Havird, 141 U. S. 206, 35 L. ed. 717. In a suit to remove a trustee, the value of the matter in dispute is the value of the trust estate, not the value of the trustee's commissions or other compensation. Kenaday v. Edwards, 134 U. S. 117, 33 L. ed. 853. But see Caffrey v. Territory of Oklahoma, 177 U. S. 346, 44 L. ed. 799. In a suit to recover land the value of the interest in the same claimed by the plaintiff is that of the matter in dispute. Green v. Fisk, 154 U. S. 668, and 26 L. ed. 486; Vicksburg, S. &. P. R. Co. v. Smith, 135 U. S. 195; 34 L. ed. 95; Black v. Jackson, 177 U. S. 349, 44 L. ed. 801; Cameron v. U. S., 146 U. S. 533, 36 L. ed. 1077. In a suit to recover the possession of leasehold premises, the amount expended by the lessee in the improvement of the premises may be considered in estimating the value of the matter in dispute. Harris v. Barber, 129 U. S. 366, 32 L. ed. 697. In a proceeding to recover summary possession of mortgaged property held by a tenant of the mortgagor, the value of the defendant's leasehold, not that of the land, was held to be that of the matter in dispute. Willis v. Eastern Tr. & B. Co., 167 U. S. 76, 42 L. ed. 83. Where the plaintiff sought to review a judgment giving it possession of land upon the payment of money which was awarded to the defendant, the latter sum, not the value of the land, was the value of the matter in dispute. Pittsburg L. & C. Works v. State Nat. Bank, 154 U. S. 626, and 24 L. ed. 270. In a suit of trespass *quare clausum fregit* and *de bonis asportatis*, the amount of the judgment for the value of one taken from the land was the value of the matter in dispute, not the value of the land, where neither party set up title, although the judgment might collaterally affect the title. N. J. Zinc Co. v. Trotter, 108 U. S. 564, 27 L. ed. 828. In a suit for an injunction, the value of the object sought to be gained by the bill, not the amount of the plaintiff's damages, is ordinarily the value of the matter in dispute. Miss. & Mo. R. Co. v. Ward, 2 Black, 485, 17 L. ed. 311; Market Co. v. Hoffman, 101 U. S. 112, 25 L. ed. 782. In a suit to enjoin the issue of municipal bonds, the jurisdictional amount is not the amount of the whole issue sought to be enjoined, but the amount of taxes which the complainant would be compelled to pay for interest and a sinking fund. El Paso Water Co. v. El Paso, 152 U. S. 157, 38 L. ed. 396; Colvin v. Jacksonville, 158 U. S. 456, 39 L. ed. 1053. *Cf.* Elliott v. Sackett, 108 U. S. 132, 27 L. ed. 678. In a suit to enjoin an association of railway companies from enforcing a joint agreement in violation of the interstate commerce law, allegations that the daily interstate shipments thereunder exceeded in value $1,000, and that free competition would cause great losses and possibly financial ruin to the defendants, were held to be sufficient to show that the value of the matter in dispute exceeded $1,000. U. S. v. Trans-Missouri Freight Ass'n, 166 U. S. 290, 41 L. ed. 1007. But see El Paso Water Co. v. El Paso, 152 U. S. 157, 38 L. ed. 396. Where alternative relief was sought

and both alternatives denied below, if the matter in dispute as to either exceeds the statutory amount, jurisdiction of the appeal will be sustained. Shappirio v. Goldberg, 192 U. S. 232, 48 L. ed. 419. In a suit to compel an executor to account for certain assets, the value of plaintiff's interest in such assets, not the value of the assets, is that of the matter in dispute. Miller v. Clark, 138 U. S. 223, 34 L. ed. 966. So held of a suit by a judgment creditor to set aside an insolvent assignment and for an accounting. Hollander v. Fechheimer, 162 U. S. 326, 40 L. ed. 985. Where a number of plaintiffs claiming under the same title and having a common interest in the relief sought, unite in a suit, the adverse party having no interest in the apportionment or distribution of the amount recovered among them, their united interests constitute the matter in dispute. Gibson v. Shufeldt, 122 U. S. 27, 30, 30 L. ed. 1083, 1084, per Gray, J.; Estes v. Gunter, 121 U. S. 183, 30 L. ed. 884; Shields v. Thomas, 17 How. 3, 15 L. ed. 93; Market Co. v. Hoffman, 101 U. S. 112, 25 L. ed. 782; Davies v. Corbin, 112 U. S. 36, 28 L. ed. 627; Friend v. Wise, 111 U. S. 797, 28 L. ed. 602. So held of an action to recover damages for causing death where the damages were divided among several next of kin. Texas & Pac. Ry. Co. v. Gentry, 163 U. S. 353, 41 L. ed. 186. So held of a judgment against several defendants jointly for the possession of several parcels of land. Friend v. Wise, 111 U. S. 797, 28 L. ed. 602. But see Chamberlain v. Browning, 177 U. S. 605, 44 L. ed. 906. Where a suit is brought by one for himself and all others jointly interested, the aggregate interest of those who join with him, not that of the whole class, constitutes the disputed matter. Bruce v. Manchester & K. R. Co., 117 U. S. 514, 516, 29 L. ed. 990, 991; Handley v. Stutz, 137 U. S. 366, 34 L. ed. 706. But see Union Bank of Chicago v. Kansas City Bank, 136 U. S. 223, 34 L. ed. 341; Tupino v. La Compania General de Tabacos de Filipinas, 214 U. S. 268, 53 L. ed. 992. Where several persons join in one suit to assert separate and distinct interests, and these interests alone are in dispute, their interests upon appeal are considered separately, and the amount of the interest of each is the limit of the appellate jurisdiction even when they sue in behalf of themselves and all others similarly interested. Gibson v. Shufeldt, 122 U. S. 27, 34, 30 L. ed. 1083, 1086, per Gray, J.; Seaver v. Bigelows, 5 Wall. 208, 18 L. ed. 595; Russell v. Stansell, 105 U. S. 303, 26 L. ed. 989; Chatfield v. Boyle, 105 U. S. 231, 26 L. ed. 944; Adams v. Crittenden, 106 U. S. 576, 27 L. ed. 99; Schwed v. Smith, 106 U. S. 188, 27 L. ed. 156; F. L. & Tr. Co. v. Waterman, 106 U. S. 265, 27 L. ed. 115; Hassall v. Wilcox, 115 U. S. 598, 29 L. ed. 504; Fourth Nat. Bank v. Stout, 113 U. S. 684, 28 L. ed. 1152; Stewart v. Dunham, 115 U. S. 61, 29 L. ed. 329; Paving Co. v. Mulford, 100 U. S. 147, 25 L. ed. 591; *Ex parte* Phoenix Ins. Co., 117 U. S. 367, 29 L. ed. 923; Wheeler v. Cloyd, 134 U. S. 537, 33 L. ed. 1008; Union Bank of Chicago v. Kansas City Bank, 136 U. S. 223, 34 L. ed. 341; Smith M. P. Co. v. McGroarty, 136 U. S. 237, 34 L. ed.

of which the court has jurisdiction and which opens the whole case, a cross-appeal which involves less than the jurisdictional amount may also be entertained.[33] Where the value of the matter in dispute does not appear upon the record, affidavits upon this point may be filed either in the inferior court or in the supreme appellate court.[34] When filed in the inferior court they must be sent with the record.[35] The burden of proof is upon the plaintiff in error or appellant.[36] A finding or a statement upon the subject in an order of the court below is given

346; Clay v. Field, 138 U. S. 464, 479, 480, 34 L. ed. 1044, 1049, per Mr. Justice Bradley: "The general principle observed in all cases is that if several persons be joined in a suit in equity or admiralty, and have a common and undivided interest, though separable as between themselves, the amount of their joint claim or liability will be the test of jurisdiction; but where their interests are distinct, and they are joined for the sake of convenience only, and because they form a class of parties whose rights or liabilities arose out of the same transaction, or have relation to a common fund or mass of property sought to be administered, such distinct demands or liabilities cannot be aggregated together for the purpose of giving this court jurisdiction by appeal, but each must stand or fall by itself alone." *Supra*, § 17. Distinct judgments in favor of or against separate parties, although in the same record, cannot be joined when determining the jurisdiction. Tupino v. La Compania General de Tabacos de Filipinas, 214 U. S. 268. Where different claimants obtain a decree in their favor for sums to be paid separately to each of them, the largest amount thus decreed is the value of the matter in dispute. *Ex parte* Baltimore & O. R. Co., 106 U. S. 5, 27 L. ed. 78; The Nevada, 106 U. S. 154, 27 L. ed. 149. Where a man obtained a decree for the payment of two sums of money to him by the same persons, one to be retained by him for his own benefit, the other to be held by him as trustee for others, the aggregate of the two sums was held to be the value of the matter in dispute. The Propeller Burlington, 137 U. S. 386, 390, 34 L. ed. 731, 732. See Hawley v. U. S., 108 U. S. 543, 27 L. ed. 820.

[33] Walsh v. Meyer, 111 U. S. 31, 28 L. ed. 338; U. S. v. Mosby, 133 U. S. 273, 33 L. ed. 625.

[34] Wilson v. Blair, 119 U. S. 387, 30 L. ed. 441; Street v. Ferry, 119 U. S. 385, 30 L. ed. 439; Gibson v. Shufeldt, 122 U. S. 27, 30 L. ed. 1083; Roura v. Government of the Philippine Island, 218 U. S. 386, 54 L. ed. 1080. For a case where the affidavits were held not to be sufficient, see Enriquez v. Enriquez, 222 U. S. 127, 56 L. ed. 124.

[35] Wilson v. Blair, 119 U. S. 387, 30 L. ed. 441; Davie v. Heyward, 33 Fed. 93; Rector v. Lipscomb, 141 U. S. 557, 35 L. ed. 857.

[36] Johnson v. Wilkins, 116 U. S. 392, 29 L. ed. 671; Wilson v. Blair, 119 U. S. 387, 30 L. ed. 441.

great weight,[87] but is not conclusive.

§ 697. Parties to writs of error and appeals. All parties on the record who are injuriously affected by a final judgment or decree may appeal or sue out a writ of error. An intervenor has the right of appeal from a final decree, judgment, or order by which he is injuriously affected.[1] A purchaser at a foreclosure sale has a right to appeal from an order by which he is injuriously affected.[2] The cases in which a receiver can appeal

[87] Gage v. Pumpelly, 108 U. S. 164; 27 L. ed. 668; Potts v. Hollon, 177 U. S. 365, 44 L. ed. 808; Red River Cattle Co. v. Needham, 137 U. S. 632, 34 L. ed. 799. It seems that where such a finding or order was made upon conflicting, affidavits below, new affidavits cannot be filed in the Supreme Court. Ibid. *Cf.* Moelle v. Sherwood, 148 U. S. 21, 37 L. ed. 350.

§ 697. [1] *Ex parte* Jordan, 94 U. S. 248, 24 L. ed. 123; Krippendorf v. Hyde, 110 U. S. 276, 28 L. ed. 145; Williams v. Morgan, 111 U. S. 684, 28 L. ed. 559; Hassall v. Wilcox, 115 U. S. 598, 29 L. ed. 504; Savannah v. Jessup, 106 U. S. 563, 27 L. ed. 276; Perlman v. U. S., 247 U. S. 7, 38 Sup. Ct. 417, 62 L. ed. 950; Tuttle v. Claflin, C. C. A., 88 Fed. 122; *Re* Michigan Cent. R. Co., C. C. A., 124 Fed. 727. A person injuriously affected by a decision may be allowed to intervene for the purpose of taking an appeal or writ of error; even to review an application for a mandamus; *Ex parte* First Nat. Bank of Chicago, 207 U. S. 61, 65, 52 L. ed. 103, 105. No intervention in a court of review will be permitted in order to raise new issues not presented to the court below. Scrugham v. Shoup, C. C. A., 256 Fed. 325. The right to appeal from an order denying the right to intervene is discussed *supra*, § 259; *Ex parte* Cutting, 94 U. S. 14, 24 L. ed. 49; Buel v. Farmers' L. & Tr. Co., C. C. A., 104 Fed. 839; Reid v. Judges of Circuit Court, C. C. A., 175 Fed. 774. A State which has refused to intervene in, or to become a party to, a suit affecting property in which it claims an interest cannot appeal. Georgia v. Jesup, 106 U. S. 458, 27 L. ed. 216; South Carolina v. Wesley, 155 U. S. 542.

A party does not lose his right to review an order because proceedings are pending against him for contempt in disobedience to the same. Exploration Mercantile Co. v. Pacific H. & S. Co., C. C. A., 177 Fed. 825. *Cf.* § 251 *Supra.*

[2] He can appeal from an order refusing to confirm the sale or setting it aside. Magann v. Segal, C. C. A., 92 Fed. 252. See Davis v. Mercantile Co., 152 U. S. 590, 38 L. ed. 563. Thus, when not concluded by the terms of the sale, or of the order or decree under which the sale was made, he may appeal from a subsequent final order or decree which determines in what securities, if of diverse value, his bid shall be made good, Kneeland v. Am. L. & Tr. Co., 136 U. S. 89, 95, 34 L. ed. 379, 382; or the amount of compensation for trustees or others, Wil-

have been previously described.[3] It seems that a purchaser of the rights of a party injuriously affected may take an appeal.[4] Persons who had contributed to the expense of a defense, although not parties, were allowed to appeal in the name of the nominal defendants without the formal consent of the latter when the decree had weight as a precedent against them.[5] An indemnitor vouched in to defend a suit has been allowed to sue out a writ of error.[6] Where an alien had been discharged from extradition by the writ of *habeas corpus*, the consul of the government that sought the extradition was allowed to take an appeal.[7] Otherwise no one but a party to the record has the right to an appeal or a writ of error.[8] And a party cannot ap-

liams v. Morgan, 111 U. S. 684, 28 L. ed. 559; or the validity and amount of claims by intervenors or others; which he has agreed to pay before the amount was adjusted. Kneeland v. Am. L. & Tr. Co., 136 U. S. 89, 95, 3 L. ed. 379, 382; Louisville, E. & St. L. R. Co. v. Wilson, 138 U. S. 501, 505, 34 L. ed. 1023, 1025. He should be made a party to an appeal from an order affecting his bid or denying a motion to set aside the sale. Davis v. Mercantile Tr. Co., 152 U. S. 590, 38 L. ed. 563. A purchaser cannot appeal from a decree establishing the validity of a receivers' certificates, or other claims, which he has agreed to pay without reserving the right to contest their validity. Swann v. Wright's Ex'r, 110 U. S. 590, 28 L. ed. 252; *supra*, § 243. A Circuit Court of Appeals refused to take judicial notice of the fact that an appellant who called himself a "purchasing trustee" had bought the property when the transcript did not show it. Fitzgerald v. Evans, C. C. A., 49 Fed., 426; *supra*, § 329.

[3] *Supra*, §§ 311, 325. See Rust v. United Waterworks Co., C. C. A., 70 Fed. 129. A party to a suit may appeal from a final order or decree by which his application to compel a receiver to account for or pay over money or deliver property to him has been denied; and the receiver is a proper party respondent to such an appeal. Hovey v. McDonald, 109 U. S. 150, 155, 27 L. ed. 888, 889. A claimant who has been granted leave to file a petition for the surrender of the property has such a right of appeal. Dexter Horton Nat. Bank v. Hawkins, C. C. A., 190 Fed. 924.

[4] Andrews v. Ill. Nat. Foundry & P. Works, C. C. A., 36 L. R. A. 139, 76 Fed. 166; s. c., C. C. A., 36 L. R. A. 153, 77 Fed. 774. As to a substituted receiver's rights, see Bowden v. Johnson, 107 U. S. 251, 27 L. ed. 386.

[5] Andrews v. Thum, C. C. A., 61 Fed. 149; s. c., (C. C. A.), 67 Fed. 91; *Cf.* Hunt v. Oliver, 109 U. S. 177, 27 L. ed. 897.

[6] Robb v. Security Trust Co., C. C. A., 121 Fed. 460.

[7] Ornelas v. Ruiz, 161 U. S. 502, 507, 40 L. ed. 787, 789.

[8] Bayard v. Lombardi, 9 How. 530, 13 L. ed. 245; Payne v. Niles,

peal from a decree or judgment which does not injuriously affect him.[9] All parties against whom a joint judgment or joint decree

20 How. 219, 15 L. ed. 895; *Ex parte* Cockcroft, 104 U. S. 578, 26 L. ed. 856; Guion v. Liverpool, L. & G. Ins. Co., 109 U. S. 173, 27 L. ed. 895; Indiana S. R. Co. v. Liverpool, L. & G. Ins. Co., 109 U. S. 168, 27 L. ed. 895; Georgia v. Jesup, 106 U. S. 458, 27 L. ed. 216; South Carolina v. Wesley, 155 U. S. 542, 39 L. ed. 254; U. S. ex rel. State of Louisiana v. Boarman, J., C. C. A., 217 Fed. 757. An interest in the question of law decided does not give a stranger the right to appeal, although the public authorities have notified him of their intention to act in accordance with the decision. Joyce v. Bulger, 240 Fed. 817. An appeal or writ of error cannot be maintained in the name of a vessel; it must be in the name of a person interested in the vessel, The Burns, 9 Wall. 237, 19 L. ed. 620. The friends of a party who is imprisoned cannot sue out a writ of error in his name without his authority; *Ex parte* Dorr, 3 How. 103, 11 L. ed. 514; but an appeal from an order upon a writ of *habeas corpus* remanding a prisoner who is charged with lunacy may be taken by his next friend. King v. McLean Asylum of Massachusetts General Hospital, C. C. A., 64 Fed. 325. An appeal taken by a district attorney without the authority of the Attorney General will be sustained if subsequently ratified by the latter. U. S. v. Curry, 6 How. 106, 12 L. ed. 363. A motion to dismiss upon the ground that a State was not a party was denied when it appeared that the proceeding was actually begun and prosecuted on the State's behalf, the State was named in the transcript, and the State's attorney, through inadvertence, appeared generally in the Supreme Court.

[9] Crawshay v. Soutter, 6. Wall. 739, 18 L. ed. 845; Louisiana v. Jack, 244 U. S. 397; Brigham City v. Toltec Ranch Co., C. C. A., 101 Fed. 85; Tyler v. Judges of the Court of Registration, 179 U. S. 405, 45 L. ed. 252; Lampasas v. Bell, 180 U. S. 276, 45 L. ed. 527; New Orleans v. Einsheimer, 181 U. S. 153, 45 L. ed. 794. Northern Union Gas Co. v. Mayer, C. C. A., 174 Fed. 817, holding that a city had no right to appeal from an order directing the master, upon the filing of a bond by the complainant, to repay to the latter deposits of excessive fees collected from customers. But see San Francisco Gas & El. Co. v. City and County of San Francisco, 164 Fed. 884, 887; *supra*, § 113. It was further held that the gas company, having no legal right to the money, could not complain because of the omission from the order of a clause which it requested. Ibid. A plaintiff may sue out a writ of error to reverse a judgment in his favor, because he contends that he should have recovered more. U. S. v. Dashiel, 3 Wall. 688, 18 L. ed. 268. No writ of error sued out by the accused will lie to a dismissal of an indictment, although the accused claims the right to a speedy trial of the charge. Lewis v. U. S., 216 U. S. 611, 54 L. ed. 637. A public officer of a State cannot sue out a writ of error to review the judg-

is entered, even those who have defaulted below,[10] must join in the writ of error or appeal, unless one or more, when asked, refuse so to do, and such request and refusal appear upon the record.[11] There are two reasons for this: that the successful party may be at liberty to proceed in the enforcement of his judgment or decree against the parties who do not desire to have it reviewed; and that the appellate tribunal shall not be required to decide a second or third time the same question on the same record.[12] The formal practice upon a writ of error

ment of a State court directing him to obey a statute, which he claims to be unconstitutional, but by which he is not injuriously affected. Smith v. Indiana, 191 U. S. 138, 48 L. ed. 125 (where a county auditor was a plaintiff in error and the statute directed a certain exemption from the assessed valuation of real estate). Slater v. Thompson, C. C. A., 255 Fed. 768. The interest must be subsisting, Hamilton Trust Co. v. Cornucopia Mines Co., et al., C. C. A., 223 Fed. 494. A formal party can take no appeal, U. S. v. Exploration Co., C. C. A., 203 Fed. 387; Fulton Inv. Co. v. Dorsey, C. C. A., 220 Fed. 298; Hamilton Trust Co. v. Cornucopia Mines Co., C. C. A., 223 Fed. 494.

10 Copeland v. Waldron, C. C. A., 133 Fed. 217.

11 Masterson v. Herndon, 10 Wall. 416, 19 L. ed. 953; O'Dowd v. Russell, 14 Wall. 402, 20 L. ed. 857; Williams v. Bank of U. S., 11 Wheat. 414, 6 L. ed. 508; Owings v. Kincannon, 7 Pet. 399, 8 L. ed. 727; Heirs of Wilson v. Life & Fire Ins. Co., 12 Pet. 140, 9 L. ed. 1032; Hardee v. Wilson, 146 U. S. 179, 36 L. ed. 933; Inglehart v. Stanbury, 151 U. S. 68, 38 L. ed. 76; Sipperley v. Smith, 155 U. S. 86, 39 L. ed. 79; Beardsley v. Arkansas L. Ry. Co., 158 U. S. 123, 39 L. ed. 919; Estis v. Trabue, 128 U. S. 225, 32 L. ed. 437; Feibelman v. Packard, 108 U. S. 14, 27 L. ed. 634; Hohorst v. Hamburg Am. P. Co., 148 U. S. 262, 37 L. ed. 443; Nash v. Harshman, 149 U. S. 263, 37 L. ed. 727; St. Louis Un. El. Co. v. Nichols, C. C. A., 91 Fed. 832; Dodson v. Fletcher, C. C. A., 78 Fed. 214; s. c., C. C. A., 79 Fed. 129; Hook v. Mercantile Tr. Co., C. C. A., 95 Fed. 41; Grand Id. & W. C. R. Co. v. Sweeney, C. C. A., 95 Fed. 396; Humes v. Third Nat. Bank, C. C. A., 54 Fed. 917; Hedges v. Seibert C. O. C. Co., C. C. A., 50 Fed. 643; Loveless v. Ransom, C. C. A., 107 Fed. 626; Johnson v. Trust Co. of America, C. C. A., 104 Fed. 174; Ayres v. Polsdorfer, C. C. A., 105 Fed. 737; Fitzpatrick v. Graham, C. C. A., 119 Fed. 353; Bulte v. Igleheart Bros., C. C. A., 137 Fed. 492; Port v. Schloss Bros. & Co., C. C. A., 149 Fed. 731; Maytin v. Vela, 216 U. S. 598, 54 L. ed. 632; Provident Life & Tr. Co. v. Camden & T. Ry. Co., C. C. A., 177 Fed. 854; Ibbs v. Archer, C. C. A., 185 Fed. 37; Ireton v. Pennsylvania Co., C. C. A., 185 Fed. 84.

12 But see Cox v. U. S., 6 Pet. 172, 8 L. ed. 359; Masterson v. Herndon, 10 Wall. 416, 19 L. ed. 953.

in such a case is for the party who wishes the benefit of the writ to obtain a summons, bringing the party jointly interested with him before the court, and if the latter then refuses to join in the writ of error, to enter an order or judgment of severance, whereby the moving party can sue out the writ alone.[13] Thereupon the party who refuses to join is estopped from taking out a writ of error, and the court below can execute the judgment so far as it can be executed against him, despite a *supersedeas* obtained by the other.[14] Now, however, such a technical proceeding is no longer necessary; and when the record shows that one of the parties jointly affected has been notified in writing to appear and join in the appeal or writ of error, and has failed to appear, or appeared and refused to join, the court should on that ground grant an appeal or writ as to his own interest to the party who seeks it.[15] A statement in the petition for the appeal, that the other party jointly affected refuses to join in the appeal, is insufficient.[16] Where the appeal is allowed in open court, there need be no summons or severance.[17] Where all the parties are joined in the writ, the omission of some of them

[13] 2 Brooke's Abr. 238, tit. Summons and Severance; Todd v. Daniel, 16 Pet. 521, 10 L. ed. 1054; Masterson v. Herndon, 10 Wall. 416, 417, 418, 19 L. ed. 953, 954; Hardee v. Wilson, 146 U. S. 179, 181, 36 L. ed. 933, 934.

[14] Ibid.

[15] Masterson v. Herndon, 10 Wall. 416, 19 L. ed. 953; O'Dowd v. Russell, 14 Wall. 402, 36 L. ed. 933; Hardee v. Wilson, 146 U. S. 179, 180, 36 L. ed. 933; Farmers' L. & Tr. Co. v. McClure, C. C. A., 78 Fed. 211. The licensee of a patent, with the exclusive right over a certain territory, may appeal from an adverse decree in a suit brought by him as co-complainant with the patentee, although the patentee refuses to join in the appeal, provided that he has the patentee summoned and his refusal to join entered in the record. Excelsior Wooden Pipe Co. v. Seattle, C. C. A., 117 Fed. 140. A judge who has obeyed an order for a mandamus is not an indispensable party to a writ of error to review this, obtained by parties who have been allowed to intervene for that purpose, when he has refused to join with them. *Ex parte* First Nat. Bank of Chicago, 207 U. S. 61, 52 L. ed. 103.

[16] Masterson v. Herndon, 10 Wall. 416, 19 L. ed. 953; Hardee v. Wilson, 146 U. S. 179, 180, 36 L. ed. 933.

[17] McNulta v. West Chicago Park Com'rs, C. C. A., 99 Fed. 328; James H. Rice Co. v. Libbey, C. C. A., 105 Fed. 825; King v. Thompson, C. C. A., 110 Fed. 319.

from the petition is immaterial.[18] The inclusion as plaintiffs in error of persons who are not parties to the action does not vitiate the writ if all the necessary parties unite therein.[19] Where the record shows that there are other parties to the judgment jointly interested with the plaintiff in error, who have not joined in the writ of error, and who have not been served with notice of the proceedings in error, the appellate court may of its own motion dismiss the writ without giving leave to bring them in by an amendment;[20] although it seems that in an extraordinary case leave so to amend may be given after the time to sue out a new writ of error has expired.[21] An appearance without the permission of the court after the time to appeal has expired does not cure a defect arising from the failure of an indispensable party to join in the appeal.[22] Such a defect may be cured when the omitted party voluntarily appears before such time has expired.[23] Where the time to appeal for one of those jointly interested had expired, it was held that the others could not appeal without him.[24] A defendant whose interest is separate from that of the others may appeal or bring error

[18] Fitzpatrick v. Graham, C. C. A., 119 Fed. 353.

[19] Thomas v. Green County, C. C. A., 146 Fed. 969.

[20] Estis v. Trabue, 128 U. S. 225, 32 L. ed. 437; Mason v. U. S., 136 U. S. 581, 34 L. ed., 545; Dolan v. Jennings, 139 U. S. 385, 35 L. ed. 217; Higbee v. Chadwick, C. C. A., 220 Fed. 873. The appellate court will not presume that there are parties not named in the record, although some of the defendants in error are described as "Corning & Co." Gumbel v. Pitkin, 113 U. S. 545, 28 L. ed. 1128. The objection may be raised at any time. Loveless v. Ransom, C. C. A., 107 Fed. 626. But see Central L. & Tr. Co. v. Campbell Com. Co., 173 U. S. 84, 43 L. ed. 623.

Cf. Richards v. American Bank of Alaska, C. C. A., 234 Fed. 300; the Mary B. Curtis, C. C. A., 259 Fed. 9; The Seguranca, C. C. A., 250 Fed. 19.

But see Estis v. Trabue, 128 U. S. 225, 230, 32 L. ed. 437; Copland v. Waldron, C. C. A., 133 Fed. 217; Scrugham v. Shoup, C. C. A., 256 Fed. 325.

[21] Inland & Seaboard C. Co. v. Tolson, 136 U. S. 572, 34 L. ed. 539; Browning v. Boswell C. C. A., 209 Fed. 788; National Surety Co. v. Leflore County, C. C. A., 262 Fed. 325.

[22] Consumer's Cotton Oil Co. v. Nichol, C. C. A., 120 Fed. 818.

[23] Hill v. Western Electric Co., C. C. A., 214 Fed. 243.

[24] Ayres v. Polsdorfer, C. C. A., 105 Fed. 737.

without them.[25] All parties to the suit, including intervenors,[26]

[25] Brewster v. Wakefield, 22 How. 118, 16 L. ed. 301; Cox v. U. S., 6 Pet. 172, 8 L. ed. 359; Forgay v. Conrad, 6 How. 201, 12 L. ed. 404; Germain v. Mason, 12 Wall. 259, 20 L. ed. 392; Hanrick v. Patrick, 119 U. S. 156, 30 L. ed. 396; City Nat. Bank v. Hunter, 129 U. S. 557, 574, 32 L. ed. 752; Gilfillan v. McKee, 159 U. S. 303, 40 L. ed. 161; Winters v. U. S., 207 U. S. 564, 52 L. ed. 340 (a suit for trespass where the bill did not state whether the trespasses were joint or several and the answer of the appellants averred separate rights, interest and action upon their part). Gray v. Havemeyer, C. C. A., 53 Fed. 174; Hall v. Gambrill, C. C. A., 92 Fed. 32; Mercantile Tr. Co. v. Kanawha & O. Ry. Co., C. C. A., 58 Fed. 6; Grand Id. & W. C. R. Co. v. Sweeney, C. C. A., 103 Fed. 342; Louisville, N. A. & C. Ry. Co. v. Pope, C. C. A., 74 Fed. 1; Alsop v. Conway, C. C. A., 188 Fed. 568; Lamon v. Speer Hardware Co., C. C. A., 198 Fed. 453, overruling S. C., C. C. A., 190 Fed. 734, 111 C. C. A., 462, a summary judgment against principals and sureties under a *supersedeas* bond; Columbia River Packers' Ass'n v. McGown, C. C. A., 217 Fed. 196, a judgment upon an injunction bond; Orleans-Kenner Electric Ry. Co. v. Dunbar, C. C. A., 218 Fed. 344; Conn v. Drew, C. C. A., 250 Fed. 852. Where the appeal affected only one of several parcels of land which were subjects of litigation; Robison v. Washington Ry. & Electric Co., C. C. A., 258 Fed. 515; a judgment in tort in favor of one defendant and against the other who brought it up for review, National Surety Co. v. Leflore County, Miss., C. C. A., 262 Fed. 325. A suit by a surety to cancel a bond imposing a joint and several liability. Where the liability imposed by a decree, Continental & Commercial Trust & Savings Bank v. Corey Bros. Const. Co., C. C. A., 205 Fed. 282; or sought by the complainant to be enforced, Teel v. Chesapeake & O. Ry. Co. of Virginia, C. C. A., 205 Fed. 915; is joint and not joint and several; all the defendants against whom relief is granted or prayed, as the case may be, are necessary parties in the court of review. In a foreclosure suit to which the holders of several mechanics' liens are parties defendant, the decree settling their respective rights to priority is not joint as respects them, and one of them may appeal without joining the others as appellants; but if he claims the right to have the decree modified so as to give him a priority which was denied him below, he must make parties respondent those whose liens he seeks to have made subordinate to his. Gray v. Havemeyer, C. C. A., 53 Fed. 174; Grand Id. & W. C. R. Co. v. Sweeney, C. C. A., 103 Fed. 342. Where judgment in an action of trespass was rendered against one defendant by default, and against the other upon a plea, it was held that the latter could bring a writ of error alone. Macker v. Thomas, 7 Wheat. 530, 5 L. ed. 515.

[26] Browning v. Boswell, C. C. A., 209 Fed. 788. Where in an action of trespass brought to try the title to real estate, third persons intervened, setting up a claim of title

who would be injuriously affected by a reversal of a decree must be made respondents to an appeal therefrom;[27] even, it seems, when they have not appeared after the service of process upon them.[28] But not parties below who have no interest in maintaining or reversing the decree.[29] Parties to a suit, who were

derived through the plaintiffs, and a judgment in the plaintiffs' favor was entered against the defendants; the intervenors need not be made parties to the writ of error. Hanrick v. Patrick, 119 U. S. 156.

[27] Wilson v. Kiesel, 164 U. S. 248, 41 L. ed. 422; St. Louis Un. El. Co. v. Nichols, C. C. A., 91 Fed. 832; Boyle v. Stuttgart & A. R. R., C. C. A., 84 Fed. 9; Illinois Tr. & Sav. Bank v. Kilbourne, C. C. A., 76 Fed. 883; Kidder v. Fidelity I. & D. Co., C. C. A., 105 Fed. 821; Lewis v. Sittel, C. C. A., 165 Fed. 157. Thus the mortgagor, mortgagee and purchasers must be made respondents to an appeal from a decree of foreclosure and sale, or from an order refusing to modify or set aside a decree, Davis v. Mercantile Trust Co., 152 U. S. 590, 38 L. ed. 563; Farmers' L. & Tr. Co. v. Longworth, C. C. A., 76 Fed. 609; but not, it has been held, parties who have acquired liens subsequent to a mortgage; Brewster v. Wakefield, 22 How. 118, 16 L. ed. 301.

It has been held that the signer of a stipulation for the release of a boat is an indispensable party to an appeal by the claimants to a suit *in rem* in admiralty; The Mary B. Curtis, C. C. A., 250 Fed. 9. *Contra* Perriam v. Pacific Coast Co., C. C. A., 133 Fed. 140.

[28] Am. L. & Tr. Co. v. Clark, C. C. A., 83 Fed. 230. But see Marsh v. Nichols, 120 U. S. 598, 30 L. ed. 796.

[29] Basket v. Hassell, 107 U. S. 602, 27 L. ed. 500; McLeod v. New Albany, C. C. A., 66 Fed. 378; Postal Tel. & C. Co. v. Vane, C. C. A., 80 Fed. 961; Mills v. Provident L. & Tr. Co., C. C. A., 100 Fed. 344; Marchand v. Livandais, 127 U. S. 775, 32 L. ed. 324; Amadeo v. No. Assur. Co., 201 U. S. 194, 50 L. ed. 722; Higbee v. Chadwick, 220 Fed. C. C. A. 873. A joint liability for costs does not make a person an indispensable party. Ibid. Stakeholders, Love v. Export Storage Co., C. C. A., 143 Fed. 1, 11; Grier v. Union Nat. Life Ins. Co., 217 Fed. 293 (a receiver), and formal parties who claim no interest in the dispute are not necessary parties; Higbee v. Chadwick, C. C. A., 220 Fed. 873. Trustees of a railroad mortgage, who have been joined with the railroad company as defendants to a bondholder's foreclosure suit in which they have no personal interest, need not be joined with the railroad company on appeal. Railroad Co. v. Johnson, 15 Wall. 8, 21 L. ed. 118. See also Marchland v. Livandais, 127 U. S. 775, 32 L. ed. 324. A person may be an indispensable party to a suit in the court of first instance, but not an indispensable party in the court of review. Love v. Export Storage Co., C. C. A., 143 Fed. 1 (where trustees in bankruptcy were omitted from an appeal concerning the right to a fund in their hands). An insolvent railroad company need

not affected by an order upon an intervention, need not be made parties to an appeal therefrom.[30] Where the basis of an appeal is that a necessary party was not joined below, such omitted party should be served with a citation.[31] A receiver should be made a party to an appeal from an order or decree refusing to direct the payment of a claim out of a fund in his hands.[32] It has been held that the holders of receiver's certificates are sufficiently represented by the receiver upon an appeal by a creditor from a decree distributing the proceeds thereupon.[33] The great number of parties interested is no reason for omitting any of them, since service of a citation need not be made where the appeal is taken in open court at the same term.[34] It has been said that no one not a party to the judgment below can be a defendant to a writ of error.[35] An appeal by one of several defendants brings up so much of the case and such of the parties as are necessary for the determination of his rights.[36]

not join in an appeal from so much of a decree as distributes the proceeds of a foreclosure sale. Hardee v. Wilson, 146 U. S. 179, 36 L. ed. 933; Galveston, H. & N. Ry. Co. v. House, C. C. A., 102 Fed. 112.

30 Coler v. Allen, C. C. A., 114 Fed. 609 (holding that an insolvent mortgagor and other defendants, not interested, need not be made parties to an appeal from an order dismissing a bill of intervention, which sought to cancel the mortgage).

31 R. R. Equipment Co. v. So. Ry. Co., C. C. A., 92 Fed. 541. See Mendenhall v. Hall, 134 U. S. 559, 33 L. ed. 1012.

32 Illinois Tr. & Sav. Bank v. Kilbourne, C. C. A., 76 Fed. 883. But not receivers who have been discharged. St. Louis S. W. Ry. Co. v. Jackson, C. C. A., 95 Fed. 560. Nor when the fund is held by the clerk of the court and paid on orders signed by the judge. Edgell v. Felder, C. C. A., 99 Fed. 324.

See *Ex parte* Equitable Trust Co., C. C. A., 231 Fed. 574.

33 Galveston, H. & N. Ry. Co. v. House, C. C. A., 102 Fed. 112.

34 Kidder v. Fidelity I., Tr. & S. D. Co., C. C. A., 105 Fed. 821; *infra*, § 700. All the creditors of an insolvent partnership whose claims have been allowed in proceedings for the administration of its assets, are necessary parties to an appeal from an order of distribution made in the same. Bloomingdale v. Watson, C. C. A., 128 Fed. 268. All the creditors who assented to the same are indispensable parties to an appeal from an order refusing to set aside a composition. Marshall Field & Co. v. Wolf & Bros. Dry Goods Co., C. C. A., 120 Fed. 815.

35 Payne v. Niles, 20 How. 219, 15 L. ed. 895.

36 Milner v. Meek, 95 U. S. 252, 24 L. ed. 444.

Whenever any party to a judgment or decree in a Circuit Court dies before the time allowed for taking an appeal or bringing a writ of error has expired, it is not necessary to revive the suit by any formal proceeding.[37] If one of several plaintiffs or defendants dies before or after an appeal is taken, and the cause of action survives to the rest, the survivors have the right to proceed alone, unless the representative of the deceased applies to join with them.[38] The representative of the deceased party may file in the clerk's office a certified copy of his appointment, and thereupon may enter an appeal or bring writ of error, as the deceased party might have done.[39] Where the party in whose favor such a judgment or decree is taken dies before appeal taken or writ of error brought, the statute provides that notice to his representatives shall be given from the appellate court, as provided in case of the death of a party after appeal taken or writ of error brought.[40]

[37] Act of March 3, 1875, ch. 137, § 9, 18 St. at L. 473; McCluskey v. Marysville & Northern Ry. Co., 243 U. S. 36. It was formerly held, that when an executor had been removed after a decree against him, and an administrator *de bonis non* with the will annexed appointed, the administrator must be made a party to the suit before he could appeal. Taylor v. Savage, 1 How. 282, 11 L. ed. 132; s. c., 2 How. 395, 11 L. ed. 313. See Howard v. Leete, C. C. A., 257 Fed. 918. But see an analogous case where a receiver had been removed, which seems inconsistent with this ruling. Burden v. Johnson, 107 U. S. 251, 27 L. ed. 386.

[38] Moses v. Wooster, 115 U. S. 285, 29 L. ed. 391; U. S. R. S., § 156. But see Dolan v. Jennings, 139 U. S. 385, 35 L. ed. 217. Where notwithstanding the survival of the cause of action or liability to co-appellants, the representatives of the deceased appellant voluntarily come in and ask to be made parties, they may be admitted; Thorpe v. Mattingley, 1 Phillips' Ch. 200. Where the presence of the representatives of a deceased appellant is necessary for the due prosecution of an appeal, notwithstanding the survivorship of others, the appellate court may direct that the appeal be dismissed unless such representatives are made parties within a limited time; Blake v. Bogle, Macq. Pr. of H. of L. 244, note; Moses v. Wooster, 115 U. S. 285, 288, 29 L. ed. 391, 392.

[39] 18 St. at L. 473.

[40] 18 St. at L. 473. The rule of the Supreme Court to which reference is made is as follows: "XV. 1. Whenever, pending a writ of error or appeal in this court, either party shall die, the proper representatives in the personalty or realty of the deceased party, according to the nature of the case, may voluntarily come in and be admitted parties to the suit, and

thereupon the case shall be heard and determined as in other cases; and if such representatives shall not voluntarily become parties, then the other party may suggest the death on the record, and thereupon, on motion, obtain an order that unless such representatives shall become parties within the first ten days of the ensuing term, the party moving for such order, if defendant in error shall be entitled to have the writ of error or appeal dismissed; and if the party so moving shall be plaintiff in error, he shall be entitled to open the record, and on hearing have the judgment or decree reversed, if it be erroneous; *provided, however*, that a copy of every such order shall be printed in some newspaper of general circulation within the State, Territory or District from which the case is brought, for three successive weeks, at least sixty days before the beginning of the term of the Supreme Court then next ensuing. 2. When the death of a party is suggested, and the representatives of the deceased do not appear by the tenth day of the second term next succeeding the suggestion, and no measures are taken by the opposite party within that time to compel their appearance, the case shall abate. 3. When either party to a suit in a court of the United States shall desire to prosecute a writ of error or appeal to the Supreme Court of the United States, from any final judgment or decree, rendered in such court, and at the time of suing out such writ of error or appeal the other party to the suit shall be dead and have no proper representative within the jurisdiction of the court which rendered such final judgment or decree, so that the suit cannot be revived in that court, but shall have a proper representative in some State or Territory of the United States, the party desiring such writ of error or appeal may procure the same, and may have proceedings on such judgment or decree superseded or stayed in the same manner as is now allowed by law in other cases, and shall thereupon proceed with such writ of error or appeal as in other cases. And within thirty days after the commencement of the term to which such writ of error or appeal is returnable, plaintiff in error or appellant shall make a suggestion to the court, supported by affidavit, that the said party was dead when the writ of error or appeal was taken or sued out, and had no proper representative within the jurisdiction of the court which rendered said judgment or decree, so that the suit could not be revived in that court, and that said party had a proper representative in some State or Territory of the United States, and stating therein the name and character of such representative, and the State or Territory in which such representative resides; and, upon such suggestion, he may, on motion, obtain an order that, unless such representative shall make himself a party within the first ten days of the ensuing term of the court, the plaintiff in error or appellant shall be entitled to open the record, and on hearing have the judgment or decree reversed, if the same be erroneous; provided, however, that a proper citation reciting the substance of such order shall be served upon such representative, either person-

§ 698. Time within which writs of error and appeals must be taken. By the Act of September 6, 1916, "No writ of error, appeal, or writ of certiorari intended to bring up any cause for review by the Supreme Court shall be allowed or entertained unless duly applied for within three months after entry of the judgment or decree complained of: Provided, That writs of certiorari addressed to the Supreme Court of the Philippine Islands may be granted if application therefor be made within six months."[1] A section of the revised statutes not expressly

ally or by being left at his residence, at least sixty days before the beginning of the term of the Supreme Court then next ensuing: and provided, also, that in every such case if the representative of the deceased party does not appear by the tenth day of the term next succeeding said suggestion, and the measures above provided to compel the appearance of such representative have not been taken within the time as above required, by the opposite party, the case shall abate; and provided, also, that the said representative may at any time before or after said suggestion come in and be made a party to the suit, and thereupon the case shall proceed, and be heard and determined as in other cases." It has been held that where an appellee has died pending an appeal to the Supreme Court, the administrator of his domicile may be substituted in his place, although he was appointed in a different State from that where the suit was brought below; Noonan v. Bradley, 12 Wall. 121, 20 L. ed. 279; and that a person who purchased the interest of the appellee during his life and pending an appeal cannot after his death revive the appeal in his own name; Barribeau v. Brant, 17 How. 43, 15 L. ed. 34. When the time to appeal or bring error has expired it is too late to bring in the representatives of a party who died before the appeal was taken or the writ of error sued out. Dolan v. Jennings, 139 U. S. 385, 35 L. ed. 217; Mason v. U. S., 136 U. S. 581, 34 L. ed. —; Estis v. Trabue, 123 U. S. 225, 32 L. ed. 437. But see Knickerbocker L. Ins. Co. v. Pendleton, 115 U. S. 339, 29 L. ed. 432.

§ 698. [1] Ch. 448, § 6, 727, Comp. St. § 1228a. Previous to this statute no judgment, decree, or order of a District Court (except in a suit upon a claim against the United States), or of a State Court; U. S. R. S., § 1008; Allen v. So. Pac. R. Co., 173 U. S. 479, 43 L. ed. 775; Holt v. Indiana Mfg. Co., 176 U. S. 68, 44 L. ed. 374; or of a Supreme Court of the Territories, Jud. Code, § 248, 36 St. at L. 1087; or of the Supreme Court or of the District Court of Porto Rico; Ibid., § 244; or of the District Court of Alaska, Ibid., § 247; or of Hawaii; Ibid., § 238; U. S. R. S., § 1008; or of the Supreme Court of Hawaii, Ibid., § 246; in any action at law or in equity, could be reviewed by the Supreme Court, unless the writ or error was brought or the appeal taken within two years after the entry of such judgment, decree, or order.

By U. S. R. S., § 1009. "Appeals

repealed, provides that "Where a party entitled to prosecute a writ of error or to take an appeal is an infant, insane person, or imprisoned, such writ of error may be prosecuted, or such appeal may be taken within two years after the judgment, decree, or order, exclusive of the term of such disability."[2] A

in prize causes shall be made within thirty days after the rendering of the decree appealed from, unless the court below previously extends the time for cause shown in the particular case: Provided, that the Supreme Court may, if in its judgment the purposes of justice require it, allow an appeal in any prize cause, if it appears that any notice of appeal, or of intention to appeal, was filed with the clerk of the District Court within thirty days next after the rendition of the final decree therein." See The Nuestra Senora De Regia, 17 Wall. 29, 21 L. ed. 596.

No appeal from, or a writ of error to, a judgment or decree of a District Court in a suit upon a claim against the United States was allowed on behalf of the plaintiff after ninety days from the entry of the same. U. S. R. S., § 708; 26 St. at L. 505, § 9; U. S. v. Davis, 131 U. S. 36, 39, 33 L. ed. 93, 94; nor on behalf of the United States after six months therefrom, Ibid., 26 St. at L., § 505; Butt v. U. S., 126 Fed. 794; Lewis v. Sittel, 165 Fed. 157. "All appeals from the Court of Claims shall be taken within ninety days after the judgment is rendered." Jud. Code, § 243, 36 St. at L. 1087, re-enacting U. S. R. S., § 708. But see U. S. v. Davis, 131 U. S. 36, 39, 33 L. ed. 93, 94. Formerly no appeal could be taken or writ of error sued out to review a decision of a Circuit Court of Appeals, *cf.* 39 St. at L. 727, § 6, 26 St. at L. 828, § 6; U. S. Fidelity & Guaranty Co. v. Bray, 225 U. S. 205, 56 L. ed. 1055; or the Court of Appeals of the District of Columbia, Jud. Code, § 250, 36 St. at L. 1087. An appeal from the Supreme Court, to the Court of Appeals of the District of Columbia, must be taken within 20 days after the entry of the order, judgment, or decree appealed from, C. C. A., D. C., Rule 10. *Supra*, § 69. It is not extended by the death of a party. *Ex parte* Dante, 228 U. S. 429, 57 L. ed. —; unless within one year after the entry of the order, judgment, or decree sought to be reviewed. The same limitation applies to applications to review such decisions by *certiorari;* The Conqueror, 166 U. S. 110, 41 L. ed. 937. *Cf.* Panama R. Co. v. Napier Shipping Co., 166 U. S. 280, 41 L. ed. 1004. No such writ of error shall be sued out or granted unless a petition therefor shall be filed with the clerk of the court in which the trial shall have been had during the same term or within such time, not exceeding sixty days next after the expiration of the term of the court at which trial shall have been had, as the court may for cause allow by order entered of record." 25 St. at L. 656, § 6.

[2] U. S. R. S., § 1008, Comp. St., § 1649. Where the imprisonment or other disability had not begun till after the statute had begun to run, the operation of the statute was not

writ of error on behalf of the United States to review a judgment in a criminal case must be taken within thirty days after the decision or judgment has been rendered.[3] "No appeal or writ of error by which any order, judgment, or decree may be reviewed in the Circuit Courts of Appeals under the provisions of this act shall be taken or sued out except within six months after the entry of the order, judgment, or decree sought to be reviewed; *provided, however,* that in all cases in which a lesser time is now by law limited for appeals or writs of error, such limits of time shall apply to appeals or writs of error in such cases taken to or sued out from the Circuit Courts of Appeals."[4] An appeal from an interlocutory order or decree granting or continuing or referring or dissolving or refusing

suspended pending such disability. McDonald v. Hovey, 110 U. S. 619, 28 L. ed. 269.

[3] 34 St. at L. 1246; § 536, *supra.*

[4] 26 St. at L. 829, § 11; Union Pac. Ry. Co. v. Colorado E. Ry Co., C. C. A., 54 Fed. 22; White v. Iowa Nat. Bank, C. C. A., 71 Fed. 91; Condon v. Central L. & Tr. Co., C. C. A., 73 Fed. 907; Coe v. East & Ir. Co. of Ala., C. C. A., 85 Fed. 489; Old Nick Williams Co. v. U. S., C. C. A., 152 Fed. 925; Painter v. Union Trust Co., C. C. A., 246 Fed. 240. A district court rule fixing the time for taking appeals in admiralty is not such a law; Robins Dry Dock & Repair Co. v. Chesbrough, 216 Fed. 121. Where a writ of error from the Supreme Court had been dismissed after the six months had expired, it was held that a writ of error from the Circuit Court of Appeals, sued out within six months after the filing of the mandate of the Supreme Court in the court of first instance, brought up for review only the proceedings subsequent to such mandate; and since it appeared that the proceedings subsequent thereto could not affect the plaintiff in error, the writ was dismissed. Hubbard v. Worcester Art Museum, C. C. A., 196 Fed. 871; Blaffer v. New Orleans Water Supply Co., C. C. A., 160 Fed. 389. "Appeals and writs of error from and to the District Court of the United States for the District of Porto Rico, and from the Supreme Court of the District of Porto Rico whenever by law they can be taken, shall be taken within six calendar months from the time when the right to such an appeal or writ of error accrues, and not afterwards, by filing a claim for the appeal in the registry of the court appealed from, or by suing out a writ of error from the Court of Appeals, or from the court or judge in Porto Rico, as the case may be." C. C. A., 1st Ct. Rule 37. An appeal to the Circuit Court of Appeals of the Ninth Circuit from the final order, judgment, or decree of the District Court of Alaska, may be taken within one year from the entry thereof. Alaska Code Civ. Proc., § 506, 30 St. at L. 253; Sutherland v. Pearce, C. C. A., 186 Fed. 787.

to dissolve an injunction, or appointing a receiver, must be taken within thirty days from the entry of such order or decree.[5] Appeals to the Circuit Courts of Appeals and the Supreme Courts of the Territories from judgments of the Courts of Bankruptcy adjudging or refusing to adjudge the defendants a bankrupt or allowing or rejecting a debt, or claim, must be taken within ten days after the judgment appealed from has been rendered.[6] Petitions for a revision of the orders of the courts of bankruptcy must be filed within six months from the making of such orders,[7] unless the rules of the Circuit Court of Appeals otherwise provide.[8] Appeals to the Supreme Court from decrees in suits by the United States under the Interstate Commerce law, or the act to protect trade and commerce against unlawful restraints and monopolies,[9] and from the decisions of the Board of General Appraisers to the Court of Customs Appeals,[10] must be taken within sixty days after the entry of the decree or judgment. In Alaska and in the insular and other outside possessions of the United States ninety days shall be allowed for making such applications to the Court of Customs Appeals.[11]

[5] Jud. Code, § 129, re-enacting 26 St. at L. 828, § 7; 31 St. at L. 660; *supra*, §§ 300, 304. This rule applies to a decree after a hearing for an injunction and an accounting; Raymond v. Royal B. S. Co., C. C. A., 76 Fed. 465; Morey Linotyping Co. v. Chicago Lino-Tabler Co., C. C. A., No. 2660, 258 Fed. 888. Although it directs the surrender of property for destruction, Puritan Cordage Mills v. Sampson Cordage Works, C. C. A., 232 Fed. 138; Morey Linotyping Co. v. Chicago Lino-Tabler Co., 258 Fed. 888; but where a decree denies an injunction and dismisses the bill, it is final; Shaffer v. Carter, 252 U. S. 37; *supra*, § 695. It was held: that an order making permanent a temporary injunction restraining a city from adopting a resolution affecting a party's rights "pending further order in the action" was a final order, appealable in six months; Gas & El. Securities Co. v. Manhattan & Queens Trac. Corp., C. C. A., 266 Fed. 625.

[6] 30 St. at L. 544, 553, § 2. In other cases in bankruptcy six months is allowed. Steele v. Buel, C. C. A., 104 Fed. 968; *supra*, §§ 666, 667.

[7] *Re* Worcester County, C. C. A., 102 Fed. 808; *supra*, § 668. But see *Re* Anderson, 23 Fed. 482.

[8] See § 668, *supra*. Jarowski v. Hamburg-American Packet Co., 186 Fed. 332.

[9] 32 St. at. L. 823.

[10] Jud. Code, § 198, 36 St. at L. 1087, *supra*, § 77.

[11] 36 St. at L. 91, 105, Comp. St. § 1189.

These limitations do not apply to writs of error *coram nobis*.[12] The State statutes as to the time of taking appeals and suing out writs of error do not affect the jurisdiction of the Federal courts.[13] The time does not begin to run till the judgment, decree, or order is actually entered, or filed, and when the judge's signature is required, not till it is signed,[14] although it is dated

[12] Strode v. The Stafford Justices, 1 Brock, 162. See *supra*, § 481.

[13] Logan v. Goodwin, C. C. A., 101 Fed. 654; s. c., C. C. A., 104 Fed. 490; Siegelschiffer v. Penn Mut. Life Ins. Co., C. C. A., 248 Fed. 226. It has been held: that the clerk may refuse to enter a decree until his fees are paid; and that although left in the clerk's office, it is not effective until such payment. Ommen v. Talcott, 180 Fed. 925.

[14] Rubber Co. v. Goodyear, 6 Wall. 153, 18 L. ed. 762; Del Valle v. Harrison, 93 U. S. 233, 23 L. ed. 892; Polleys v. Black River Imp. Co., 113 U. S. 81, 28 L. ed. 938; Radford v. Folsom, 123 U. S. 725, 31 L. ed. 292; Notley v. Brown, 208 U. S. 429, 52 L. ed. 559. When a decree is entered dismissing a bill with costs, the time to appeal begins to run, although a judgment for costs is subsequently entered. Fowler v. Hamill, 139 U. S. 549, 35 L. ed. 266. When one defendant charged with joint misconduct had demurred and obtained a decree dismissing the bill as to him, and the other defendant had answered, and subsequently obtained a decree dismissing the bill, an appeal taken within two years after the second, but more than two years after the first decree, was held to be in time to bring up both decrees for review. Mendenhall v. Hall, 134 U. S. 559, 33 L. ed. 1012. Where a decree dismissed a bill as to all matters except one which was severable from the rest, as to which a subsequent decree was entered, it was held that the right to appeal from the first dismissal began to run from the entry of the first decree and that this was appealable. Hill v. Chicago & E. R. Co., 140 U. S. 52, 35 L. ed. 331. See also Central Tr. Co. v. Grant L. Works, 135 U. S. 207, 34 L. ed. 97; Richardson v. Green, 130 U. S. 104, 32 L. ed. 872; *supra*, § 697. The right to appeal from a decree dismissing a cross-bill does not ordinarily exist, nor the time begin to run until the entry of a final decree disposing of the whole matter in litigation. Winters v. Ethell, 132 U. S. 207, 33 L. ed. 339; *supra*, § 397. The time of an intervenor to appeal does not begin to run until he is allowed to intervene. Louisville, E. St. L. R. Co. v. Wilson, 138 U. S. 501, 34 L. ed. 1023. Where a decree directed that unless a party paid the amount awarded within a specified time, the surety should be required to show cause why it should not be held liable, the surety's time to appeal did not begin to run until a second decree entered upon such order to show cause, Am. Surety Co. v. Jones, C. C. A., 224 Fed. 673. Cross-appeals may be taken and allowed below after an appeal has been taken and the cause removed to the appellate court, provided the original time to appeal has not expired. Farrar v. Churchill, 135 U. S. 609, 34 L. ed. 246.

as of a prior day.[15] A decision containing directions for a decree is not considered as a decree.[16] When the order of judgment or decree is amended, it seems that the time begins to run anew from the date of the amendment.[17] If a petition for a rehearing is duly filed or a motion for a new trial duly made, or a motion to set aside the judgment made during the term, the time does not begin to run until the petition or motion has been denied;[18] and an appeal allowed before the petition or motion is made, but not perfected till afterwards, is considered as not pending till it is perfected.[19] The day on which the order, judgment, or decree was entered is excluded from the computation of the time.[20] It has been held that when the last day of the limited time falls on a Sunday, the writ or appeal cannot be taken on a subsequent day.[21] The time to appeal or to sue out

[15] Rubber Co. v. Goodyear, 6 Wall. 153, 18 L. ed. 762. But see Credit Co. v. Arkansas Cent. Ry. Co., 128 U. S. 258, 32 L. ed. 448.

[16] U. S. v. Gomez, 1 Wall. 690, 17 L. ed. 677; *Re* McCall, C. C. A., 145 Fed. 898. *Cf.* Marks v. No. Pac. R. Co., C. C. A., 76 Fed. R. 941. But see Silsby v. Foote, 20 How. 290, 15 L. ed. 822; Fairbanks v. Amoskeag Nat. Bank, 32 Fed. 572.

[17] U. S. v. Gomez, 1 Wall. 690, 17 L. ed. 677. But see U. S. v. Grant, 110 U. S. 225, 28 L. ed. 127; Standley v. Roberts, C. C. A., 59 Fed. 836, 8 C. C. A. 305.

[18] Texas & Pac. Ry. Co. v. Murphy, 111 U. S. 488, 28 L. ed. 492; Brockett v. Brockett, 2 How. 238, 11 L. ed. 251; Memphis v. Brown, 94 U. S. 715, 24 L. ed. 244; Aspen M. S. S. Co. v. Billings, 150 U. S. 31, 37 L. ed. 986; Alexander v. U. S., 57 Fed. 828; *Re* McCall, C. C. A., 145 Fed. 898; Wm. W. Bierce, Ltd. v. Waterhouse, 219 U. S. 320, 55 L. ed. 237; Citizens Bank v. Opperman, 249 U. S. 448; where a statute enacted pending the motion for a rehearing was held to regulate the appeal.

[19] Voorhees v. John T. Noye Co., 151 U. S. 135, 38 L. ed. 101. The appellate court, if the record does not show when the petition for a rehearing, which has been denied, was filed, will presume that it was filed in time; Texas & Pac. Ry. Co. v. Murphy, 111 U. S. 488, 28 L. ed. 492. The time of the pendency of prior appellate proceedings dismissed for want of jurisdiction is not excluded. Darnell v. Illinois Cent. R. Co., C. C. A., 206 Fed. 445. Where there is doubt about the validity of an appeal, the second appeal can be taken before the dismissal of the former; and when the former is dismissed, the second appeal becomes effective. Sutherland v. Pearce, C. C. A., 186 Fed. 787. See Hubbard v. Worcester Art Museum, C. C. A., 196 Fed. 871.

[20] Smith v. Gale, 137 U. S. 577, 34 L. ed. 792.

[21] Johnson v. Meyers, C. C. A., 54 Fed. 417; Meyer v. Hot Springs Imp. Co., C. C. A., 169 Fed. 628;

a writ of error cannot be extended by the court by an order permitting it to be filed *nunc pro tunc* or otherwise.[22]

The writ of error is not brought till it is filed in the office of the clerk of the court to which it is addressed.[23] When it is tested, allowed and issued within the time, but not filed till afterwards, it is brought too late.[24] An appeal is taken when it is prayed,[25] or when it is allowed and its allowance is brought

Siegelschiffer v. Penn Mut. Life Ins. Co., C. C. A., 248 Fed. 226.

[22] Credit Co. v. Arkansas Cent. Ry. Co., 128 U. S. 258, 32 L. ed. 448; Judson v. Courier Co., 25 Fed. 705; Camden Iron Works Co. v. City of Cincinnati, 241 Fed. 846. But see *Re* Wright, 96 Fed. 820. It has been held that a rehearing may be allowed at the same term, after the time to appeal has expired, in order to revive the appellant's right of review. *Re* Wright, 96 Fed. 820, aff'd *Re* Worcester County, C. C. A., 102 Fed. 808. *Cf.* Stickney v. Wilt, 23 Wallace, 150, 23 L. ed. 50. But see Beaumont v. Prieto, 249 U. S. 554. *Cf.* § 667, *supra*. U. S. ex. rel. Schauffler v. Fidelity & Deposit Co. of Maryland, C. C. A., 155 Fed. 117. An extension of time to prepare and procure the allowance of a bill of exceptions does not enlarge the time to sue out a writ of error. Kentucky Coal, Timber, Oil & Land Co. v. Howes, C. C. A., 153 Fed. 163; Camden Iron Works Co. v. City of Cincinnati, C. C. A., 241 Fed. 846. An order granting a stay pending an application for the writ of *certiorari* does not stop the time to appeal from running. Title Guaranty Co. v. General El. Co., 222 U. S. 401, 56 L. ed. 248. It cannot be extended by consent. Clark v. Doerr, C. C. A., 143 Fed. 960. It has been held that respondents or defendants in error cannot waive the objection that the time has expired. Stevens v. Clark, C. C. A., 62 Fed. 321. An appeal cannot be taken from a decree or order before the decision is pronounced. Brown v. Evans, 18 Fed. 56. As to the right of appeal after the announcement of a decision, but before the entry of an order or decree thereupon, see Fairbanks v. Amoskeag Nat. Bank, 32 Fed. 572; Credit Co. v. Arkansas C. Ry. Co., 128 U. S. 258, 32 L. ed. 448; *Ex parte* Whitton, 13 Ch. D. 881.

[23] Brooks v. Norris, 11 How. 204, 13 L. ed. 665; Scarborough v. Pargoud, 108 U. S. 567, 7 L. ed. 824; U. S. v. Baxter, C. C. A., 51 Fed. 624; Kentucky Coal, Timber, Oil & Land Co. v. Howes, C. C. A., 153 Fed. 163; Camden Iron Works Co. v. City of Cincinnati, C. C. A., 241 Fed. 846; Siegelschiffer v. Penn. Mut. Life Ins. Co., C. C. A., 248 Fed. 226. The failure of the clerk to mark it filed makes no difference when it is left in his office. Mutual L. Ins. Co. v. Phinney, 178 U. S. 327, 336, 44 L. ed. 1088.

[24] Brooks v. Norris, 11 How. 204, 13 L. ed. 665; Mussina v. Cavazos, 6 Wall. 355, 360, 18 L. ed. 810, 812; Scarborough v. Pargoud, 108 U. S. 567, 27 L. ed. 824; 51 Fed. 624; Collins v. Huffman, C. C. A., 245 Fed. 554. See Rutan v. Johnson, C. C. A., 130 Fed. 109.

[25] Cardona v. Quiñones, 240 U. S. 83; J. D. Randall Co. v. Foghsong

to the attention of the court below, either by filing in the clerk's office the petition and the allowance of the appeal, or where there is no formal allowance thereof, when the bond or appeal is approved and filed, either with or without the citation.[26] The fact that the bond is filed,[27] or the citation not issued until, after the statutory time, does not cut off the right to appeal if the petition and its allowance were duly filed.[28] Where the transcript does not show when a paper was filed, there is no presumption that the appeal was taken within the statutory time.[29]

§ 699. Writs of error. A writ of error is a matter of right to which a party is entitled in cases where it is authorized by statute.[1] It is the usual practice to have it allowed by a judge of the court to which it is addressed, or by a judge of the court

Mach. Co., C. C. A., 200 Fed. 744; Toledo Metal Wheel Co. v. Foyer Bros. & Co., C. C. A., 223 Fed. 350. "An application for a writ of certiorari will be deemed in time when the petition therefor, accompanied by the printed record and brief, is filed within the period prescribed by law: Provided, this is followed by submitting the petition in open court on some motion day not later than the first one which follows a period of four weeks after such filing. Notice of the date of submission and copies of the petition and brief must be filed as required by Section 3 of this rule." S. C. Rule, 37 Sub. Sec. a; *supra*, § 689a.

[26] The Dos Hermanos, 10 Wheat, 306, 6 L. ed. 328; Brandies v. Cochrane, 105 U. S. 262, 26 L. ed. 989; Credit Co., Ld. v. Arkansas C. Ry. Co., 128 U. S. 258, 261, 32 L. ed. 448, 449. It has been held that, where the record or the bond shows that a formal appeal was allowed, the filing of the bond with its approval within the time is insufficient; Norcross v. Nave & McCord Mfg. Co., C. C. A., 101 Fed. 796. See Credit Co. v. Arkansas Cent. R. Co., 128 U. S. 258, 32 L. ed. 448; but that where there was no formal appeal the filing of the bond with its approval is sufficient; Brandies v. Cochrane, 105 U. S. 262, 20 L. ed. 989. Where the allowance of an appeal or writ of error is upon condition that the petitioner give a bond, the writ of error is not brought, nor the appeal taken, until the bond is filed. Simpson v. First Nat. Bank, C. C. A., 129 Fed. 257; Kentucky Coal, Timber, Oil & Land Co. v. Howes, C. C. A., 153 Fed. 163.

[27] The Dos Hermanos, 10 Wheat. 306.

[28] Evans v. State Bank, 134 U. S. 330, 33 L. ed. 917. But see Hudson v. Limstone Natural Gas Co., C. C. A., 144 Fed. 952.

[29] William Bros. v. Savage, C. C. A., 120 Fed. 497.

§ 699. [1] Davidson v. Lanier, 4 Wall. 447, 18 L. ed. 377. *Ex parte* Virginia Com'rs, 112 U. S. 177, 28 L. ed. 691; Ireland v. Woods, 246 U. S. 323, 38 Sup. Ct. 319, 62 L. ed. 745.

of review,[2] or by such court.[3] A cross writ of error should issue in a proper case.[4] By the common law a writ of error issues from the clerk's office of the court of review to which it is returned. "Writs of error returnable to the Supreme Court or a Circuit Court of Appeals may be issued as well by the clerks of the District Courts, under the seal thereof, as by the clerk of the Supreme Court or of a Circuit Court of Appeals."[5] It has been held that where a writ of error from the Supreme Court has been allowed by a judge of the Circuit Court of Appeals to review a decision of the latter court, it should be issued by a clerk of one of those two courts and not by the clerk of the District Court.[6] It is not the duty of the clerk to issue a writ of error after one has been allowed by the court, unless the

[2] This is required by statute in the case of writs of error of State courts. Twitchell v. Commonwealth, 7 Wall. 321, 19 L. ed. 223; Spies v. Illinois, 123 U. S. 131, 143, 31 L. ed. 80; N. W. Mut. Union Packet Co. v. Home Ins. Co., 154 U. S. 588, 20 L. ed. 463; *supra*, § 692c. Before the Evarts Act of March 3, 1891, it was not required for writs of error to the Circuit and District Courts, Davidson v. Lanier, 4 Wall. 447, 18 L. ed. 377; *Ex parte* Virginia Com'rs, 112 U. S. 177, 28 L. ed. 691; except to review convictions of capital crimes. 25 St. at L. 656, § 6. S. C. Rules 35 and 36, and C. C. A. Rule 11, seem now to require the allowance of the writ in all cases. Tuskaloosa No. Ry. Co. v. Gude, 141 U. S. 244, 35 L. ed. 742. But see Gorham v. Broad River Tp., 113 Fed. 83. It is the better practice for the judge to indorse his allowance upon both the petition and the writ; but his indorsement on either is sufficient. Where the judge's indorsement of his allowance by mistake is wrongly dated the clerk has no power to correct the date, but it is not improper for him to add a memorandum stating the facts. Wagner v. Texas & P. Ry. Co., C. C. A., 54 Fed. 920. The signature of a citation and the approval of a bill of exceptions were held to be equivalent to the allowance of a writ of error. Louisville Tr. Co. v. Stockton, C. C. A., 72 Fed. 1. But see Tuskaloosa No. Ry. Co. v. Gude, 141 U. S. 244, 35 L. ed. 742. It has been said that the court of first instance should leave to the appellate court the determination of the latter's jurisdiction and should not refuse to allow an appeal for want of jurisdiction thereof in the Circuit Court of Appeals. *Re* Kyle, 185 Fed. 219. But see *infra*, §§ 705, 705f.

[3] Twitchell v. Commonwealth, 7 Wall. 321, 19 L. ed. 223; Spies v. Illinois, 123 U. S. 131, 143, 31 L. ed. 80; *Re* Kemmler, 136 U. S. 436, 437, 34 L. ed. 519.

[4] Billings v. U. S., 232 U. S. 261, 277.

[5] Act of Jan'y 22, 1912, 37 St. at L. 54.

[6] *Re* Issuing Writs of Error, C. C. A., 199 Fed. 115.

plaintiff in error requests him so to do.[7] It is the duty of the plaintiff in error to apply for the writ and to deposit it for filing when issued.[8] The State practice is not followed.[9] The writ issues in the name of the President of the United States,[10] is tested of the date of issue [11] in the name of the Chief Justice of the United States, or, when that office is vacant, in the name of the associate Justice next in precedence,[12]—that is, with the oldest commission,[13]—and bears the seal of the court whose clerk issues it, and is signed by such clerk.[14] The writ is directed to the court whose proceedings it is intended to review, and directs such court to send up under its seal to the court of review the record and process for inspection.[15] A writ of error should be accompanied by a citation.[16] This is not jurisdictional, but is merely a notice, and an error in the date of its return is not fatal; [17] but the time for the return of the writ must be therein specified.[18]

7 Kentucky Coal, Timber, Oil & Land Co. v. Howes, C. C. A., 153 Fed. 163.

8 Ibid.

9 Western Dredging Co. v. Heldmaier, 116 Fed. 179; Western Union Tel. Co. v. Aldridge, 219 Fed. 836; *supra*, § 453, *Cf.*, Rederiaktiebolaget Amie v. Universal Transp. Co., Inc., C. C. A., 245 Fed. 182.

10 S. C. Rule 5; Long v. Farmers' State Bank, C. C. A., 9 L. R. A. (N. S.) 585, 147 Fed. 360.

11 U. S. R. S., § 912; Atherton v. Fowler, 91 U. S. 143, 23 L. ed. 265. A mistake in the date will not vitiate a writ of error which is duly issued and served. O'Dowd v. Russell, 14 Wall. 402, 28 L. ed. 857.

12 U. S. R. S., § 911; Germain v. Mason, 154 U. S. 587, and 20 L. ed. 689; § 455, *supra*.

13 U. S. R. S., § 674.

14 U. S. R. S., §§ 911, 1004; Miller v. Texas, 153 U. S. 535, 38 L. ed. 812; Long v. Farmers' State Bank, C. C. A., 9 L. R. A. (N. S.) 585, 147 Fed. 360.

15 A writ of error to review a judgment of a Circuit Court of Appeals should be addressed thereto although the mandate thereof has been sent to the District Court which has entered judgment thereupon. Thomsen v. Cayser, 243 U. S. 66. A writ of error to review the decision of a State court should be directed to the trial court when the State court of review has sent the record back thereto. Sioux Remedy Company v. Cope, 235 U. S. 197.

16 C. C. A. Rule 14; Nome & Sinook Co. v. Ames Mercantile Co., C. C. A., 187 Fed. 928; Betts v. Gahagan, C. C. A., 205 Fed. 890; *infra*, § 700a.

17 C. C. A. Rule 14; Nome & Sinook Co. v. Ames Mercantile Co., C. C. A., 187 Fed. 928; Rederiaktiebolget Amie v. Universal Transp. Co., C. C. A., 245 Fed. 282; *infra*, § 700a.

18 Betts v. Gahagan, C. C. A., 205

In the Supreme Court the return-day of a writ of error or appeal must be not more than thirty days from the day of signing the citation, whether the return-day fall in vacation or in term time;[19] except in case of writs of error or appeal from the Supreme Court to review the decisions of the courts of the United States in California, Oregon, Nevada, Washington, New Mexico, Utah, Arizona, Montana, Wyoming, North Dakota, South Dakota, Alaska, Hawaii and Porto Rico, when the return day must be no more than sixty days from the time of signing the citation, and when the judgment or decree sought to be reviewed was rendered in the Philippine Islands one hundred and twenty days.[20] In the Circuit Courts of Appeals the return days are fixed by the rules and are usually thirty days.[21] In the Court of Customs Appeals, thirty days. The writ cannot properly be issued before the entry of the judgment, which it brings up for review.[22]

The writ is a writ of the court of review, although issued from the clerk's office of the District Court.[23] A writ of error must set out the names of all the parties, plaintiff and defendant in error.[24] The court of review may, at any time, in its discretion

Fed. 890. A writ of error will not be dismissed because no return-day is named when it is by its terms returnable within thirty days, Seaboard Air Line Railway v. Horton, 233 U. S. 492, although the order allowing it made it returnable in sixty days. Texas & P. R. Co. v. Bloom, C. C. A., 60 Fed. 979. See Love v. Busch, C. C. A., 142 Fed. 429.

[19] S. C. Rule 8, C. C. A. Rule 14. The writ will not be dismissed because returned a few days after the return-day. Altenberg v. Grant, C. C. A., 83 Fed. 980. See *infra*, §§ 700a, 705. As to the place of the return in the Ninth Circuit, see McFadden v. Mountain V. & M. M. Co., C. C. A., 97 Fed. 670.

[20] S. C. Rule 8; Williams v. City Bank & Trust Co., C. C. A., 186 Fed. 419.

[21] See Appendix V. In the *Fourth* Circuit 40 days, 193 Fed. VIII. In the *Eighth* Circuit 60 days, 188 Fed. xl. In the *First Circuit*, appeals from and writs of error to the decisions of the courts of Porto Rico are returnable in two calendar months. Order of March 19, 1915.

[22] Notley v. Brown, 208 U. S. 429, 52 L. ed. 559.

[23] Mussina v. Cavazos, 6 Wall. 355, 18 L. ed. 810.

[24] Smyth v. Strader, 12 How. 327, 13 L. ed. 1008; Davenport v. Fletcher, 16 How. 142, 14 L. ed. 879. The inclusion, as plaintiffs in error, of persons who are not parties to the action does not vitiate the writ if the proper parties are joined, and the names of the former can be stricken out and the writ dismissed as to them. Thomas v. Green Coun-

and with or without terms, allow an amendment of a writ of error, when there is a mistake in the teste, or a seal is wanting, or the writ is made returnable on a wrong day, or when the statement of the title or the parties is defective, if such defect can be remedied by reference to the accompanying record, and

ty, C. C. A., 146 Fed. 969. A writ is insufficient which names but one of the plaintiffs or defendants in error, and describes the rest on the same side as "and others," De Neale v. Archer, 8 Pet. 526, 8 L. ed. 1033; Miller v. McKenzie, 10 Wall. 582, 19 L. ed. 1043; or which describes parties by their firm name instead of their individual names, The Protector, 11 Wall. 82, 20 L. ed. 47; Moore v. Simonds, 100 U. S. 145, 25 L. ed. 590; Godbe v. Tootle, 154 U. S. 576, and 19 L. ed. 831; unless the record shows the partners' names, Estis v. Trabue, 128 U. S. 225, 32 L. ed. 437; or, which describes parties as "the heirs of Nicholas Wilson," Wilson v. Life & Fire Ins. Co., 12 Pet. 140, 9 L. ed. 1032; or as "the ship Protector and owners," The Protector, 11 Wall. 82, 20 L. ed. 47. An appeal by "William L. Heminway, Treasurer of the State of Mississippi, and Sylvester Gwinn, Auditor of said State, and *ex officio* the Levee Board of Mississippi District Number One," was held sufficient to bring up for review a decree against the Levee Board, although a statute had been passed, entitled "An act to abolish the Levee Board of District Number One, and to pay the debts of said Board," which abolished the offices of the members of such board, and substituted the officers who took the appeal in their place to settle up the unfinished business and pay the debts of the board. Hemingway v. Stansell, 106 U. S. 399, 27 L. ed. 245. An incorrect designation of the parties as plaintiff and defendant, when it follows the title of the cause in the court below, is not a fatal defect in the writ. H. Hackfeld & Co. v. U. S., C. C. A., 141 Fed. 9. It is the better practice to include in the writ of error a description of the position of the parties as plaintiffs and defendants below, as well of their positions in the court of review; but if the latter statement is made, the omission of the former will not avoid the writ. Missina v. Cavazos, 6 Wall. 355, 361, 18 L. ed. 810, 812. Where the writ of error contains the names of all the parties who appear on the record, the court of review cannot presume that there are other parties, and for that reason dismiss the writ. Gumbel v. Pitkin, 113 U. S. 545, 28 L. ed. 1128. Where the writ of error omitted parties named in the citation, the court dismissed the writ. Kail v. Wetmore, 6 Wall. 451, 18 L. ed. 862. Where two actions had been consolidated for trial, tried before the same jury, which returned separate verdicts, and separate judgments entered, although, by consent, a single bill of exceptions was allowed; it required two separate writs of error were necessary. Waters-Pierce Oil Co. v. Van Elderen, C. C. A., 137 Fed. 557. A writ of error which does not name any return-day may be amended by the insertion of a return-day. Evans v. Brown, 109 U.

in all other particulars of form, provided the defect has not prejudiced, and the amendment will not injure, the defendant in error.[25] A high authority has said of the statute authorizing such amendments: "It is difficult to see, in reading it, what defect cannot now be amended in the discretion of the court."[26]

S. 180, 27 L. ed. 898. But where there was no application for an amendment the writ was dismissed. Lea v. Conn. Mut. L. I. Co., 154 U. S. 659, and 25 L. ed. 882. Where the writ was in the name of the President of the United States, but bore the teste of the Chief Justice of the State court, with his signature and that of the clerk of such court, and the seal of such court, an amendment of the writ was allowed. Texas & Pac. Ry. Co. v. Kirk, 111 U. S. 486, 28 L. ed. 481.

A writ of error to a State court need not contain a recital that it is directed to the final judgment of such court, nor that the court is the highest court of law or equity in the State. Buell v. Van Ness, 8 Wheat. 312, 5 L. ed. 624. The appeal, citation, and assignment of errors may be amended by correcting an error in the date of the order which the appellant seeks to review. Lovell McConnell Mfg. Co. v. International Automobile League, C. C. A., 199 Fed. 989.

[25] U. S. R. S., § 1005; Cotter v. Ala. G. S. R. Co., C. C. A., 61 Fed. 747.

[26] Curtis, Jurisdiction of U. S. Courts, 87. Where the paper purporting to be a writ of error was in the name and bore the *test* of the Chief Justice of a State court, and was signed by the clerk and sealed with the seal of such court, it was held that there was no writ to amend, and that consequently the defect could not be cured. Bondurant v. Watson, 103 U. S. 278, 26 L. ed. 447. The *teste* of the District Judge and of the clerk of the District Court in a writ of error to review the judgment of such court is a defect, which can be cured by amendment. Long v. Farmers' State Bank, C. C. A., 9 L. R. A. (N. S.) 585, 147 Fed. 360. The writ may be amended to bring in new parties, Knickerbocker Life Ins. Co. v. Pendleton, 115 U. S. 339, 29 L. ed. 432; Gilbert v. Hopkins, C. C. A., 198 Fed. 849, 851; Rininger v. Puget Sound Electric Ry., C. C. A., 220 Fed. 419; and such an amendment may be allowed, even after argument, Knickerbocker Life Ins. Co. v. Pendleton, 115 U. S. 339, 29 L. ed. 432; but in all such cases notice must be duly served upon the new parties, Gilbert v. Hopkins, C. C. A., 198 Fed. 849, 851; and, if after argument, a reargument will be ordered, Knickerbocker Life Ins. Co. v. Pendleton, 115 U. S. 339, 29 L. ed. 432. A substitution of a plaintiff in error was made where the person substituted sued out the writ in the name of the original plaintiff in error, each claiming to be the personal representative of a decedent. Walton v. Marietta Chair Co., 157 U. S. 342, 39 L. ed. 725; Green County, Kentucky v. Thomas' Executor, 211 U. S. 598, 53 L. ed. 343. An error in the title of the writ and of the petition and order therefor and assignments by entitling these in the wrong court may be cor-

An appeal cannot, by amendment, be changed to a writ of error.[27]

It is the proper practice to file a petition for the writ, and to have it allowed by a judge of the court to which it is addressed, or a judge of the court of review.[28] The petition should be accompanied with an assignment of errors, which should be set out separately and particularly each error asserted and intended to be urged. No writ of error to a District Court is allowed till such an assignment of errors is filed. When the error alleged is to the admission or to the rejection of evidence, the assignment of errors should quote the full substance of the evidence. When the error alleged is to the charge of the court, the asignment of errors should set out the part referred to in the words of the charge, whether it be in instructions given or instructions refused. When the error alleged is to the ruling upon the report of a master, the specification should state the exception to the report and action of the court upon it.[29] Where the defendant in error had opposed a motion for leave to withdraw a writ of error, issued before an assignment of errors had been filed; it was held that he thereby waived his right to move to dismiss the writ because prematurely issued.[30] There should be annexed to and returned with every writ of

rected. Billings v. U. S., 232 U. S. 261, 277; Moss v. Gulf Compress Co., 202 Fed. 657. A writ of error directed to a judgment of the Circuit Court of Appeals was treated as a cross writ of error directed to a judgment of the District Court. Billings v. U. S., 232 U. S. 261, 277. A general appearance in the court of review for a term without a motion to dismiss is a waiver of a defect in the names of the defendants in error or respondents, U. S. v. Hopewell, C. C. A., 51 Fed. 798; or in the return-day, Shute v. Keyser, 149 U. S. 649, 37 L. ed. 884; but not a waiver of a motion to dismiss the case upon another ground which is not a mere informality, except the lapse of time. Goodwin v. Fox, 120 U. S. 775, 30 L. ed. 815; *infra*, § 705. Where the original writ of error had been destroyed before the return-day, without the fault of the plaintiff in error, the court allowed a copy to be returned. Mussina v. Cavazos, 6 Wall. 355, 18 L. ed. 810.

[27] Carter County v. Schmalstig, C. C. A., 127 Fed. 126.

[28] See authorities cited in note 2 *supra;* and § 692c, *supra.*

[29] U. S. R. S., § 997; S. C. Rule 35; C. C. A. Rule 14, 24. See *infra*, §§ 701, 705e, 707. As to the practice upon appeals from the taxation of costs, see Campbell Pr. P. & Mfg. Co. v. Duplex Pr. P. Co., C. C. A., 101 Fed. 282.

[30] Alaska Un. Gold Min. Co. v. Muset, C. C. A., 114 Fed. 66.

error, an authenticated transcript of the record, an assignment of errors, and a prayer for reversal, with a citation to the adverse party.[31]

The writ of error does not take effect until it is filed or lodged in the office of the clerk of the court, the proceedings of which are brought up for review or in case such court has been abolished with its successor.[32] A writ of error is served by lodging a copy with the clerk of the court to which it is directed.[33] It must be thus served before its return-day.[34]

Under the old practice it was held that no mandamus would issue to compel the allowance of a writ of error by a Circuit or District Court.[35] No mandamus will issue to compel a judge of a Circuit or District Court to sign a citation or approve security upon writ of error or appeal, until an application for such signature or approval has been made to the judge of the court of review.[36] Where the first writ of error has expired because of the failure to file the return or transcript in due time, a second writ may issue if the time for review has not expired.[37]

§ 700. Appeals. An appeal must be allowed by a judge who has power to sign a citation, namely, by a judge of the court appealed from or from the appellate court.[1] A bond is not

[31] U. S. R. S., § 997. See *infra*, §§ 700a, 701, 704, 707. A prayer that the writ may issue "for the correction of errors so complained of" is sufficient. Springfield S. D. & Tr. Co. v. Attica, C. C. A., 85 Fed. 387. The failure to attach the writ of error to the transcript is not a fatal defect, but the attachment may be made in the court of review. Cotter v. Ala. G. S. R. Co., C. C. A., 61 Fed. 747.

[32] United States v. Alamogordo Lumber Co., C. C. A., 202 Fed. 200.

[33] Davidson v. Lanier, 4 Wall. 447, 18 L. ed. 377. See U. S. v. Alamogordo Lumber Co., C. C. A., 202 Fed. 700.

[34] Wood v. Lide, 4 Cranch, 180, 2 L. ed. 588; Pickett v. Legerwood, 7 Pet. 144, 8 L. ed. 638. *Cf.* Mendenhall v. Hall, 134 U. S. 559, 33 L. ed. 1012. See *Ex parte* Parker, 120 U. S. 737, 30 L. ed. 818. But see U. S. R. S., § 799; Trip v. Santa Rosa St. Rr. Co., 144 U. S. 126, 36 L. ed. 371.

[35] *Ex parte* Virginia Com'rs, 112 U. S. 177, 28 L. ed. 691.

[36] *Ex parte* Virginia Com'rs, 112 U. S. 177, 28 L. ed. 691.

[37] Gould v. U. S., C. C. A., 205 Fed. 883.

§ 700. [1] Barrel v. Transp. Co., 3 Wall. 424, 10 L. ed. 168; Pierce v. Cox, 9 Wall, 786, 19 L. ed. 786; Sage v. Railroad Co., 96 U. S. 712, 24 L. ed. 641; *supra*, § 699. A formal order allowing an appeal is not essential. Railroad Co. v. Bradleys, 7 Wall. 575, 19 L. ed. 274; Sage v. Railroad Co., 96 U. S. 712,

essential to the validity of an appeal, although a bond must subsequently be filed.[2] A mandamus will be granted to compel a judge to allow an appeal in a proper case.[3] The allowance of an appeal is not conclusive, and does not even imply that the judge who authorizes the appeal has made up his own mind that the party is legally entitled to it.[4] It has been said that it is

24 L. ed. 641; Brandies v. Cochrane, 105 U. S. 262, 26 L. ed. 989; Chamberlain Transportation Co. v. South Pier Coal Co., C. C. A., 126 Fed. 165. An approval of a bond upon an appeal is equivalent to the allowance of the appeal. Killian v. Clark, 111 U. S. 784, 28 L. ed. 599. Not, however, when the time to appeal has previously elapsed. Ibid. It has been held that a district judge cannot allow an appeal to the Circuit Court of Appeals from the order of another district judge in another district of the same circuit. U. S. v. Moy Yee Tai, C. C. A., 109 Fed. 1. It has been said that he cannot allow an appeal from a District Court in another district. Ibid. A member of the Circuit Court of Appeals for the Ninth Circuit has power to allow an appeal from the District Court of Alaska, under the general rules governing such procedure, which are made applicable by the Code of Alaska. Copper River Min. Co. v. McClellan, C. C. A., 138 Fed. 333.

Appeals from the Court of Claims must be allowed by the court if in session; in vacation by the chief justice of that court. The limitation of time for granting such an appeal ceases to run from the time an application is made for its allowance. App. Ct. Cl., Rule 3. The Court of Claims has power to revoke an order allowing an appeal at the request of the appellant, while the record remains therein at the term when the order was granted. *Ex parte* Roberts, 15 Wall. 384, 21 L. ed. 131; *supra*, §§ 686, 690.

It has been said that a District Court has no power after an appeal has been perfected and the transcript filed to set aside an allowance of an appeal. Keyser v. Farr, 105 U. S. 265, 26 L. ed. 1025; Rector v. Lipscomb, 141 U. S. 557, 35 L. ed. 857. But a Circuit Court was allowed, at the term when it allowed an appeal to the Supreme Court, which had not been perfected, to set aside such allowance and grant an appeal to the Circuit Court of Appeals. Aspen Min. Co. v. Billings, 150 U. S. 31, 35, 37 L. ed. 986, 987. And a Circuit Court, when the allowance was made under a mistake of fact, revoked the same. Farmers' L. & Tr. Co. v. McClure, C. C. A., 78 Fed. 211. An omission of the names of the appellees from the order of allowance is waived by naming them in the appeal bond. Richardson v. Green, 130 U. S. 104, 32 L. ed. 872.

[2] Edmondson v. Bloomshire, 7 Wall. 306, 311, 19 L. ed. 91, 92.

[3] U. S. v. Adams, 6 Wall. 101, 18 L. ed. 792; U. S. v. Gomez, 3 Wall. 752, 18 L. ed. 212; *Ex parte* Railroad Co., 95 U. S. 221, 24 L. ed. 355.

[4] Taney, C. J., in Callan v. May, 2 Black, 541, 543, 17 L. ed. 281, 282. Ordinarily a judge has no right to refuse to allow an appeal for which application is duly made. Pullman's P. C. Co. v. Central Transp. Co., 71

the duty of a judge to allow an appeal in every appealable case,[5] but a special statute regulates the practice concerning appeals from the final decisions in proceedings for *habeas corpus*, where the prisoner is held by virtue of process issued from a State court.[6] An order allowing an appeal has relation back to the date of the application therefor, and is considered as made on that day.[7] Where an appeal is allowed in open court, and perfected during the term at which the decree or judgment appealed from was rendered, no citation is necessary.[8] Where an appeal is allowed in open court, it is presumed that it was allowed by a judge authorized to hold the court; and, it has been held that the record cannot be changed or corrected in that respect by affidavits filed in the court of review.[9]

Cross-appeals are taken and prosecuted in the same manner as other appeals;[10] but are heard at the same time as the orig-

Fed. 809. It has been said that where there is some uncertainty as to the appealability of an order, as one denying an application for leave to intervene, it is the duty of the judge of the court of first instance to allow the appeal. U. S. v. Phillips, C. C. A., 17 Fed. 824. But, upon a denial of an application for the writ of *habeas corpus*, when all the questions raised had been decided by the Supreme Court, an appeal was not allowed. *Re* Durrant, 84 Fed. 317. See *supra*, § 467.

[5] Southern Bldg. & L. Ass'n v. Carey, 117 Fed. 325, 327. But see *infra* § 705f. Where the court below had no jurisdiction to allow an appeal, such an appeal will be dismissed. U. S. v. Alamogordo Lumber Co., C. C. A., 202 Fed. 700.

[6] 35 St. at L. 40; *supra*, § 467.

[7] Latham's Appeal, 9 Wall. 145, 19 L. ed. 771. Where an appeal was allowed on the filing of a bond "with security to be approved by the court," it was held that the appeal was perfected when the bond with its approval was filed. Farmers' L. & Tr. Co. v. Chicago & N. P. R. Co., C. C. A., 73 Fed. 314. An appeal is not taken until the petition and the order for its allowance, and bond, or some one of these papers, is filed in the court below. Brandies v. Cochrane, 105 U. S. 262, 26 L. ed. 989; Credit Co. Ld. v. Arkansas C. Ry. Co., 128 U. S. 258, 261, 32 L. ed. 448, 449.

[8] Reily v. Lamar, 2 Cranch, 344, 2 L. ed. 300; Brockett v. Brockett, 2 How. 238, 11 L. ed. 251; Jacobs v. George, 150 U. S. 415, 416, 37 L. ed. 1127, 1128.

In such a case an entry of the allowance of the appeal should be made in the minutes, Vansant v. Gaslight Co., 99 U. S. 213, 25 L. ed. 265; or recited in the decree. Miltenberger v. Logansport Ry. Co., 106 U. S. 286, 27 L. ed. 117.

[9] Columbus Chain Co. v. Standard Chain Co., C. C. A., 145 Fed. 186.

[10] Farrar v. Churchill, 135 U. S.

inal appeal.[11] It has been held that there can be no cross-appeal from an interlocutory order or decree granting an injunction or appointing a receiver.[12]

When the term at which an appeal was returnable has passed without the filing of the record, a second appeal may be allowed if the original time to appeal has not expired.[13]

Otherwise, appeals are subject to the same rules, regulations, and restrictions as are prescribed in cases of writs of error.[14] The entry of the appeal in the clerk's office is analogous to the issue of a writ of error.[15]

§ 700a. Citations. A writ of error should be accompanied by a citation, directing the defendant in error to appear in the court of review upon the return day and show cause why the judgment therein mentioned should not be corrected.[1] Unless an appeal is taken and allowed in open court and perfected

610, 34 L. ed. 248; Building & L. Ass'n of Dakota v. Logan, 66 Fed. 827, 828.

11 S. C. Rule 22; C. C. A., Rule 75.

12 *Re* National Enameling & Stamping Co., 201 U. S. 156, 50 L. ed. 707; Marden v. Campbell Printing Press & Mfg. Co., C. C. A., 67 Fed. 809; *supra*, § 695.

13 Evans v. State Bank, 134 U. S. 330, 33 L. ed. 917.

14 U. S. R. S., § 1012; *supra*, § 699. Upon an appeal taken by the district attorney in the name of the collector, the record may be amended so as to show that the appeal was taken by the application of the Attorney-General and by substituting for the original signature to the petition for appeal and the assignment of errors the signature of the Attorney-General. "When any question is made as to the allowance of such an amendment, the usual and proper practice is to remand the case to the District Court to deal with that question. But when, as in this case, the parties agree to the amendment and to the facts which justify and require it, the amendment may be made in the appellate court." U. S. v. Hopewell, C. C. A., 51 Fed. R. 798, 800, per Gray, J. An error in giving the date of the decree appealed from may be corrected. Nashville Syrup Co. v. Coca Cola Co., C. C. A., 215 Fed. 527. Where the appeal named the date of an interlocutory decree it was sustained as an appeal from a subsequent decree making the former final, although prayed and allowed before the latter decree was finally entered. Ibid. See Omaha Electric Light & Power Co. v. City of Omaha, C. C. A., 216 Fed. 848; Painter v. Union Trust Co., C. C. A., 246 Fed. 240; Brown v. Kossove, C. C. A., 255 Fed. 806.

15 Villabolos v. U. S., 6 How. 81, 12 L. ed. 352.

§ 700a. 1 U. S. R. S. § 997. C. C. A. Rule 14; Nome & Sinook Co. v. Ames Mercantile Co., C. C. A., 187 Fed. 928.

during the term of the entry of the decree when this is not required,[2] a citation is a necessary accompaniment thereof.[3] The better practice is to issue the citation and the writ of error at the same time.[4] A citation is one of the necessary elements of an appeal taken after the term,[5] and if it is not issued and served before the end of the next ensuing term of the appellate court, and not waived, the writ of error or appeal becomes inoperative.[6] The citation should be addressed to the respond-

[2] Reily v. Lamar, 2 Cranch. 344, 2 L. ed. 300; Brockett v. Brockett, 2 How. 238, 11 L. ed. 251; Jacobs v. George, 150 U. S. 415, 416, 37 L. ed. 1127, 1128. In such a case an entry of the allowance of the appeal should be made in the minutes. Vansant v. Gaslight Co., 99 U. S. 213, 25 L. ed. 265; or recited in the decree. Miltenberg v. Logansport Ry. Co., 106 U. S. 286, 27 L. ed. 117. Where an appeal is allowed in open court, it is presumed that it was allowed by a judge authorized to hold the court; and, it has been held that the record cannot be changed or corrected in that respect by affidavits filed in the court of review. Columbus Chain Co. v. Standard Chain Co., C. C. A., 145 Fed. 186. Where the appeal is allowed at the term of the decree or judgment, but not perfected until after the term, a citation is necessary to bring in the parties; Jacobs v. George, 150 U. S. 415, 37 L. ed. 1127; but if the appeal be docketed at the next ensuing term, or the record reaches the clerk's hands seasonably for that term, and legal excuse exists for lack of docketing, a citation may be issued by leave of the appellate court, although the time for taking the appeal has lapsed. Ibid. When the appeal is taken in open court at a term subsequent to that at which the decree was entered, or when the bond is not approved till a subsequent term, the service of a citation is necessary, although the attorney of the appellee was then present in court on other business. Castro v. U. S., 3 Wall. 46, 18 L. ed. 163; Sage v. Railroad Co., 96 U. S. 712, 24 L. ed. 641. A failure to serve the citation before the writ of error is returnable is a ground for dismissing the case. Hewitt v. Filbert, 116 U. S. 142, 29 L. ed. 581; Radford v. Folsom, 123 U. S. 725, 31 L. ed. 292. See *infra*, § 705a. Notice in open court of a writ of error given at the term when the judgment is rendered is not the equivalent of a citation. U. S. v. Phillips, 121 U. S., 254, 30 L. ed. 914. See *supra*, § 699.

[3] Where the appeal is taken at a term subsequent to that of the decree or judgment, a citation is necessary, but may be issued properly returnable, even after the expiration of the time for taking the appeal, if the allowance of the appeal was before. Jacobs v. George, 150 U. S. 415, 37 L. ed. 1127.

[4] Betts v. Gahagan, C. C. A., 205 Fed. 890; *supra*, § 699.

[5] Jacobs v. George, 150 U. S. 415, 416, 37 L. ed. 1127, 1128.

[6] Ibid. Service by mail is insufficient unless the objection is waived. Tripp v. Santa Rosa St. Ry. Co., 144 U. S. 126, 36 L. ed. 371; Martin v.

ents or defendants in error,[7] and signed by a judge of the court, the decree or judgment of which is to be reviewed, or any justice or judge of the appellate court,[8] and must be served upon them before the return-day.[9] The return-day of a citation may be ex-

Burford, 176 Fed. 554. Service of the citation may be made upon the attorney of the defendants in error in the suit below. Bacon v. Hart, 1 Black, 38, 17 L. ed. 52; Bigler v. Waller, 12 Wall, 142, 20 L. ed. 260. An amendment showing his relation to the defendant in error may be subsequently allowed. McClellan v. Pyeatt, C. C. A., 49 Fed. 259. Where an attorney appeared on the record as representing several respondents, it was held that his admission as solicitor for some of them bound them all. Ibid. Even though he had been paid his fee and discharged from all further duty. U. S. v. Curry, 6 How. 106, 12 L. ed. 363. Service made on the partner, Railroad Co. v. Blair, 100 U. S. 661, 25 L. ed. 587; or executrix of the attorney of record is insufficient. Bacon v. Hart, 1 Black. 38, 17 L. ed. 52. Service on one of two joint parties is sufficient, even if the other is dead. Waters v. Barrill, 131 U. S. lxxxiv, and 25 L. ed. 606; Nome & Sinook Co. v. Ames Mercantile Co., C. C. A., 187 Fed. 928. In a State where the common law as regards the relations of husband and wife was unchanged, service on the husband of a woman who had married since the judgment was held sufficient. Fairfax v. Fairfax, 5 Cranch. 19, 3 L. ed. 24. Upon a writ of error to a judgment in favor of the Treasurer of a State, the citation must be served on the Treasurer, not on the Governor and the Attorney-General of such State. Poydras de La Laude v. Treas. of Louisiana, 17 How. 1, 15 L. ed. 83. Where the defendant in error has since the judgment moved into another State or district, it seems that an order for service upon him by publication, or by the marshal of the district where he is found, may be granted. Nations v. Johnson, 24 How. 195, 16 L. ed. 628; Renaud v. Abbott, 116 U. S. 277, 128 L. ed. 629. Service by mail is insufficient. Tripp v. Santa Rosa St. R. Co., 144 U. S. 126, 36 L. ed. 371.

[7] Peale v. Phipps, 8 How. 256, 12 L. ed. 1070; Bigler v. Waller, 12 Wall. 142, 20 L. ed. 260.

[8] Sage v. Railroad Co., 96 U. S. 712, 24 L. ed. 641; Richards v. Mackall, 113 U. S. 539, 28 L. ed. 1132; Exploration Mercantile Co. v. Pacific Hardware & Steel Co., C. C. A., 177 Fed. 825. It may be signed by a different judge from the one who approved the bond. Farmers' L. & Tr. Co. v. Chicago & N. P. R. Co., C. C. A., 73 Fed. 314. The signature of the clerk is insufficient. Brown v. McConnell, 124 U. S. 489, 31 L. ed. 495; Freeman v. Clay, C. C. A., 48 Fed. 849.

[9] See S. C. Rule 8; U. S. R. S., §§ 997, 999; National Bank v. Bank of Commerce, 99 U. S. 608, 25 L. ed. 362. As to the return day, see *supra*, § 699. The object of service of a citation is notice; and where sufficient notice has been given by a stipulation and motion, U. S. v. Gomez, 1 Wall. 690, 17 L. ed. 677; or by an order of the appellate court

tended by a District Judge before the original time for a return has expired,[10] and perhaps at any time before the expiration of the time to take out a writ of error or appeal.[11] It may be extended by the court of review at any time during the term to which the writ of error is made returnable.[12] The failure to serve a citation does not deprive the court of jurisdiction of the appeal.[13] Service of the citation may be waived.[14] A general appearance in the court of review for a term without moving to dismiss, is a waiver of service of the citation.[15]

§ 701. Assignment of errors. The Revised Statutes require: that there shall be annexed to and returned with every writ of error, an authenticated transcript of the record, an assignment of errors, and a prayer for reversal, with a citation to the adverse party.[1] By the Court Rules, "The plaintiff in error

served upon the appellee, directing him to appear and argue the cause, Dodge v. Knowles, 114 U. S. 430, 39 L. ed. 144; a citation is unnecessary. When a writ of error has been duly issued and returned, the court of review may allow an *alias* citation to be issued and served subsequently upon some of the defendants in error. Altenberg v. Grant, C. C. A., 83 Fed. 980; Knickerbocker L. I. Co. v. Pendleton, 115 U. S. 339, 29 L. ed. 432.

10 Chamberlain Transportation Co. v. South Pier Coal Co., C. C. A., 126 Fed. 165., C. C. A. Rule, 6th Ct. 18, subd. 2, 202 Fed. xii.

11 Shea v. U. S., C. C. A., 224 Fed. 426.

12 Evans v. State Bank, 134 U. S. 330, 331, 10 Sup. Ct. 493, 33 L. ed. 917; Green v. Elbert, 137 U. S. 615, 11 Sup. Ct. 188, 34 L. ed. 792; Pender v. Brown, C. C. A., 120 Fed. 496; Gould v. U. S., C. C. A., 205 Fed. 883; Shea v. U. S., C. C. A., 224 Fed. 426. A participation by the appellee in the settlement of the statement of evidence and of the record estops him from the having the appeal dismissed because of a delay in the return. Grafton v. Meikleham, C. C. A., 246 Fed. 737; certiorari denied Meikleham v. Grafton, 246 U. S. 665, 38 Sup. Ct. 334, 62 L. ed. 929.

13 Nome & Sinook Co. v. Ames Mercantile Co., C. C. A., 187 Fed. 928.

14 An indorsement by the counsel for the defendant in error on a bond given as security for the costs on the writ of error is a waiver of service of a citation. Pierce v. Cox, 9 Wall. 786, 19 L. ed. 786.

15 U. S. v. Armejo, 131 U. S. App. lxxxii, and 18 L. ed. 247; Pierce v. Cox, 9 Wall. 786, 19 L. ed. 786; Buckingham v. McLean, 13 How. 150, 14 L. ed. 90; Radford v. Folsom, 123 U. S. 725, 31 L. ed. 292.

§ 701. 1 U. S. R. S. § 997. By Rule No. 8 of the Court of Customs Appeals. "The appellant shall, within 14 days from the filing of such return, or within such further time as may be allowed by the court or a judge thereof at chambers, deposit with the clerk a sum

sufficient to meet the cost of printing the record. As soon as the record is printed the clerk shall retain at least 16 copies for the use of the court and furnish not less than 10 copies to the appellant, who shall serve not less than 3 copies on the appellee or his counsel.

"Within 30 days after receipt of the printed record appellant shall serve on the appellee, or his counsel, not less than 3 printed copies of his brief, and within 30 days thereafter the appellee shall serve not less than 3 printed copies of his brief on the appellant, or his counsel: *Provided*, That if the importer resides west of the Rocky Mountains each side shall have 40 days in which to serve briefs. Both sides shall promptly file not less than 16 copies of their briefs with the clerk. Extension of the time for filing briefs for a period not exceeding 15 days may be made by stipulation, which shall become effective when filed with the clerk.

"All records and briefs printed for the use of this court shall have a suitable cover containing the title of the court and causes. Records shall be properly indexed and printed under the direction of the clerk of the court. The size of the pages of the records and briefs shall be 9¼ inches by 6⅛ inches." Green County, Kentucky v. Thomas' Executor, 211 U. S. 598. See *supra*, § 699, and *infra*, §§ 704, 707.

Where the party aggrieved, out of abundant caution, both appealed and sued out a writ of error, and there was but one assignment of errors duly filed, which referred only to the writ of error; this was sufficient for the appeal. Lockman v. Lang (C. C. A.), 132 Fed. 1.

Where the party aggrieved, out of abundant caution, both appealed and sued out a writ of error, and there was but one assignment of errors duly filed, which referred only to the writ of error; this was sufficient for the appeal. Lockman v. Lang, C. C. A., 132 Fed. 1. Errors cannot be assigned to the opinion of the court. Childs v. Williams, C. C. A., 212 Fed. 151; Mason v. U. S., C. C. A., 219 Fed. 547; Smart v. Wright, C. C. A., 227 Fed. 84. In a suit for the infringement of a patent a general assignment is ordinarily held to be *sufficient* when it avers that the court erred in holding the patent valid or invalid, or in holding that the patent had been infringed or not infringed as the case may be. Lord Baltimore Press v. Labombarde, C. C. A., 197 Fed. 739, 741; Backstay Machine & Leather Co. v. Hamilton, C. C. A., 262 Fed. 411. The Circuit Court of Appeals has also taken judicial notice of its own records in the same litigation, where no reference thereto was made in the assignment of errors. Wilson v. Calculagraph Co., C. C. A., 153 Fed. 961. See *supra*, § 329a. The following assignments have been held to be *sufficient*. That the court erred in overruling a motion for the direction of a verdict, Metropolitan Life Ins. Co. v. Hartman, C. C. A., 174 Fed. 801. Although the grounds of the motion were not recited. Casey-Hedges Co. v. Oliphant, C. C. A., 228 Fed. 636; Ramsay v. Crevlin, C. C. A., 254 Fed. 813. An exception to a motion for a direction of a verdict, upon the ground that the plaintiff had no cause of action, was held sufficient to support an assignment of error that a removed case should have been continued in equity instead

or appellant shall file with the clerk of the court below, with his petition for the writ of error or appeal,[2] an assignment of

of on the common law side of the court. Daniel v. Goodyear Shoe Mach. Co., C. C. A., 119 Fed. 692, in which the author was counsel. But see Isbell v. U. S., C. C. A., 227 Fed. 788. That the court erred in not rendering judgment for the plaintiff on the pleadings, Jackson v. Mutual Life Ins. Co., C. C. A., 186 Fed. 447. That the court erred in rendering judgment on the pleadings, Klink v. Chicago, R. I. & P. Ry. Co., 219 Fed. 457. That the court erred in overruling a demurrer to a pleading, Mitsui v. St. Paul F. & M. Ins. Co., C. C. A., 202 Fed. 26. But see Proctor Coal Co. v. U. S. Fidelity & Guaranty Co., C. C. A., 236 Fed. 960. It was held that an assignment of error in the language of the finding claimed to be erroneous was sufficiently specific. Doan v. Am. Book Co., C. C. A., 105 Fed. 772. "The court below sustained the motion to dismiss solely upon the ground that the appeal had not been taken within the statutory time of sixty days after the assessment, deciding that the time commenced to run from the day when the commissioners met and viewed the land, and not from the date of the return of the assessment." Clinton v. Missouri Pac. Ry. Co., 122 U. S. 469. That "the court erred in charging the jury in the following words," then quoting the objectionable language without any statement of the reasons for the objection of the same. Best v. Kessler, C. C. A., 130 Fed. 24. See Acme Food Co. v. Meier, C. C. A., 153 Fed. 74. Where the case was tried without a jury, that the court erred in rendering judgment for the plaintiff on the "facts found." Felker v. First Nat. Bank, C. C. A., 196 Fed. 200, holding that the omission of the words quoted made the assignment bad. Upon an appeal from the Board of General Appraisers, an assignment that the Board erred "in overruling the protest" and another assignment that the Board erred "in not sustaining the protest," without specifying the points upon which reliance was placed, which, however, the protests set forth. U. S. v. J. Loewenthal & Co., C. C. A., 175 Fed. 777. That the court erred in granting the injunction. Doan v. Am. Book Co., C. C. A., 105 Fed. 772. It was held that assignments that the court erred in entering an order adjudging a petitioner guilty of contempt and erred in refusing to deny such an order were sufficient to justify the inspection of the record to ascertain whether there was any apparent error. *Re* Grove, C. C. A., 180 Fed. 62.

[2] Assignments of error filed after the writ of error has been sued out or the appeal taken will be *disregarded;* Frame v. Portland Gold Mining Co., C. C. A., 108 Fed. 750; Webber v. Mihills, C. C. A., 124 Fed. 64, and citations; Lockman v. Lang, C. C. A., 128 Fed. 279; Simpson v. First Nat. Bank, C. C. A., 129 Fed. 257; Lockman v. Lang, C. C. A., 132 Fed. 1; Stillwagon v. Baltimore & O. R. Co., C. C. A., 159 Fed. 97; Burchett v. U. S., C. C. A., 194 Fed. 821; Pittsburgh C., C. & St. L. Ry. Co. v. Glinn, 219 Fed. 148; Reed v. Anderson, C. C. A., 236 Fed. 345; even when filed within additional

errors, which shall set out separately[3] and particularly each

time granted by the court when the appeal was allowed; Mutual Life Ins. Co. v. Conoley, C. C. A., 63 Fed. 180; Contra, Bernard v. Lea, C. C. A., 210 Fed. 583; but an assignment, to which reference is made in the writ of error or appeal, will be considered to have been filed therewith, although it bears a subsequent file mark. Tyee Consol. Min. Co. v. Langstedt, C. C. A., 121 Fed. 709; Moore v. Moore, C. C. A., 121 Fed. 737. Additional assignments of error, filed after an appeal has been perfected by the service of a citation, are also disregarded; P. P. Mast & Co. v. Superior Drill Co., C. C. A., 154 Fed. 45; Fraina v. U. S., C. C. A., 255 Fed. 28; but, the court of review may allow a general assignment to be subsequently amended, so as to comply with the rule by specifically alleging errors. O'Connell v. U. S., 253 U. S. 142; Flickinger v. First Nat. Bank, C. C. A., 145 Fed. 162. The assignment of errors cannot be limited nor enlarged by statements made in a motion for a new trial. Owen v. Giles, C. C. A., 157 Fed. 825. But see Krentzer v. U. S., C. C. A., 254 Fed. 34. It has been held: that the writ of error Frame v. Portland Gold Min. Co., C. C. A., 108 Fed. 750; Webber v. Milhills, C. C. A., 124 Fed. 64, and citations; or appeal, Webber v. Milhills, C. C. A., 124 Fed. 64; and citations, Simpson v. First Nat. Bank, C. C. A., 129 Fed. 257; Lockman v. Lang, C. C. A., 132 Fed. 1; will be dismissed if brought or taken before an assignment of errors is filed, although such assignment is filed subsequently; but the grant takes effect when the order for the allowance is filed, and if the petition and assignment are then filed, they are in due time; Copper River Min. Co. v. McClellan, C. C. A., 138 Fed. 333; and that a reference to an assignment of errors in the petition for a writ of error or appeal, which is duly filed, makes the time of filing the assignment sufficient, although the clerk's file mark gives it a later date. Tyee Consol. Min. Co. v. Langstedt, C. C. A., 121 Fed. 709; Moore v. Moore, C. C. A., 121 Fed. 737. It is no defect in a writ of error that the petition prayed for an appeal. Wilmington v. Ricaud, C. C. A., 90 Fed. 212. The petition need not mention each order and judgment complained of. That is the function of the assignments of error. So. held under C. C. A., Rule 11 of the Seventh Circuit. Tefft v. Stern, C. C. A., 74 Fed. 755. The petition may be amended *nunc pro tunc* with the permission of the court below, by changing the description of the petitioner from plaintiff to defendant. Gorham v. Broad River T'p, 113 Fed. 83.

[3] Henna v. Sauri & Subira, C. C. A., 237 Fed. 146. An assignment must be single and may be disregarded for duplicity. Pickett v. U. S., 216 U. S. 456, 461, 54 L. ed. 566, 569, the joinder in the same error of an averment of error in overruling an objection to being tried at a certain specified place and for denying a continuance. Each error must be set forth in a separate assignment, although they are usually joined in the same paper. Pickett v. U. S., 216 U. S. 456, 461, 54 L. ed. 566, 569. The

error asserted and intended to be urged.[4] No writ of error or

Supreme Court has disapproved the practice of filing a large number of assignments. Central Vermont Railway Co. v. White, 238 U. S. 507. Assignments were not bad for duplicitous when they alleged that the court erred "in sustaining the demurrers of the respective defendants to the declaration," Judge v. Pullman Co., C. C. A., 209 Fed. 103; that the court erred in finding upon the issues for the plaintiff in finding certain deeds procured by undue influence and the grantors incompetent. Ludwig v. Bressler, C. C. A., 253 Fed. 8.

[4] As to the form of the assignments of error, see Chapin v. Fye, 179 U. S. 127, 45 L. ed. 119; Collins v. U. S., 219 U. S. 670; Columbus Const. Co. v. Crane Co., C. C. A., 101 Fed. 55; Farnsworth v. Nevada Co., C. C. A., 102 Fed. 578; No. Chicago St. Ry. Co. v. Burnham, C. C. A., 102 Fed. 669; Burt v. C. Gotzian & Co., C. C. A., 102 Fed. 937; Deering Harvester Co. v. Kelly, C. C. A., 103 Fed. 261; Adams v. Shirk, C. C. A., 104 Fed. 54; Hale v. Tyler, 104 Fed. 757; Cass County v. Gibson, C. C. A., 107 Fed. 363; Hutchinson Cooperage Co. v. Snider, C. C. A., 107 Fed. 633; *infra*, § 707. The following assignments have been held to be too general to be considered, and to be *insufficient*. That a judgment or decree or verdict is contrary to law, Smith v. Hopkins, C. C. A., 120 Fed. 921; Craig v. Dorr, C. C. A., 145 Fed. 307; Ireton v. Pennsylvania Co., C. C. A., 185 Fed. 84; see U. S. v. Stone & Downer Co., C. C. A., 175 Fed. 33; Western Union Tel. Co. v. Winland, C. C. A., 182 Fed. 493; Felker v. First Nat. Bank, C. C. A., 196 Fed. 200; or manifest error, Smith v. Hopkins, C. C. A., 120 Fed. 921; Flickinger v. First Nat. Bank, C. C. A., 145 Fed. 162; The Myrtie M. Ross, C. C. A., 160 Fed. 19; or contrary to evidence, Ibid. Smith v. Hopkins, C. C. A., 120 Fed. 921; Flickinger v. First Nat. Bank, C. C. A., 145 Fed. 162; Philadelphia Casualty Co. v. Fechheimer, C. C. A., 220 Fed. 401; Vandeventer v. Traders' Nat. Bank of Kansas City, C. C. A., 241 Fed. 584; or contrary to the preponderance of evidence, Smith v. Hopkins, C. C. A., 120 Fed. 921. That the court erred in sustaining a judgment of another court and entering judgment against the plaintiffs in error. Choctaw, O. & G. R. Co. v. Jackson, C. C. A., 192 Fed. 792. That the court erred in impaneling and swearing the jury, Burchett v. U. S., C. C. A., 194 Fed. 821. That a verdict is contrary to law, Chicago Terminal Transfer R. Co. v. Bomberger, C. C. A., 130 Fed. 884; Ireton v. Pennsylvania Co., C. C. A., 185 Fed. 84. That the court erred in overruling a motion for a new trial, Western Union Tel. Co. v. Winland, C. C. A., 182 Fed. 493. That the court erred in not sustaining a cross-bill, The Myrtie M. Ross, C. C. A., 160 Fed. 19. That the court erred in sustaining the report of a master, or in overruling the exceptions thereto when there were numerous exceptions, or in awarding any substantial damages thereupon, P. P. Mast & Co. v. Superior Drill Co., C. C. A., 154 Fed. 45. That the court erred in excluding certain testimony, which included several pages of questions propounded to a wit-

appeal shall be allowed until such assignment of errors shall have been filed. When the error alleged is to the admission or

ness, Smith v. Hopkins, C. C. A., 120 Fed. 921. In Davidson C. S. Co. v. U. S., C. C. A., 142 Fed. 315, affirmed 205 U. S. 187, 51 L. ed. 764. Where an injunction was modified it was held that the assignment of errors must include the order as modified. Williams v. Mitchell, C. C. A., 106 Fed. 168. That the trial court erred in refusing plaintiff's request for a peremptory instruction and in refusing to charge, at the plaintiff's request, instructions numbered one to thirteen inclusive, Empire State Cattle Co. v. Atchison, T. & S. F. Ry. Co., C. C. A., 147 Fed. 457. An assignment, that the court erred in refusing plaintiff's request for the direction of a verdict, and that it erred in directing a verdict at the request of the defendant, present a single question for review, namely, whether the court erred in directing a verdict for the defendant, instead of for the plaintiff, and does not justify the consideration of a complaint by the plaintiff that he should be allowed to go to the jury, after his request for a direction had been denied. Empire State Cattle Co. v. Atchison, T. & S. F. Ry. Co., C. C. A., 147 Fed. 457. An assignment complaining of the refusal of a request to charge, conceded to be incorrect, does not raise the question whether the judge charged correctly concerning the subject matter thereof. Fall v. Bennett, C. C. A., 248 Fed. 491. An assignment that recovery should have been allowed only in so far as the owner of a vessel was not insured does not raise the contention that the person charged was liable only for negligence. Kennelly v. Frederick Starr Contracting Co., C. C. A., 250 Fed. 229. An assignment that the court erred in denying a motion to strike out a petition and in overruling a demurrer to the same and in denying a motion for the judgment upon the pleadings, without any specification of the grounds of the motion or demurrer, was held to be insufficient to bring up technical objections to the verification of a claim presented to an administrator under a statute, to a variance between the claim presented to an administrator and that presented to the court, and a defect in parties. Esterly v. Rua, C. C. A., 122 Fed. 609. The following assignments of error have been held too vague and indefinite to be considered: (1) "The court erred in admitting any evidence in the case." (2) "The court erred in submitting the case to the jury, and entering up a judgment upon the verdict." (3) "The court erred in refusing to sustain the demurrer to the evidence offered by the plaintiff in error." (4) "The court erred in overruling the motion for a new trial asked by plaintiff in error." (5) "The court erred in overruling the motion in arrest of judgment asked by plaintiff in error." (6) "The court erred in entering up judgment recognizing and enforcing a mechanic's lien." (7) "The court erred in construing 'Exhibit A' (which is letter of Van Stone of Schupp, found at page 76 of printed record) to be a waiver of the time in which the mill was to be completed." (8) "The court erred in overruling the demurrer to the evidence." Van

to the rejection of evidence, the assignment of errors shall quote the full substance of the evidence admitted or rejected.[5] When the error alleged is to the charge of the court, the assignment of errors shall set out the part referred to *totidem verbis*, whether it be in instructions given or in instructions refused.[6] Such assignment of errors shall form part of the transcript of the record, and be printed with it. When this is not done, counsel will not be heard, except at the request of the court; and errors not assigned according to this rule will be disregarded, but the court, at its option, may notice a plain error not assigned."[7] The rules of the Circuit Court of Appeals in this

Stone v. Stillwell & Bierce Mfg. Co., 142 U. S. 128. See also Stevenson v. Barbour, 140 U. S. 48; Branch v. Texas Lumber Mfg. Co., C. C. A., 53 Fed. 849; City of Lincoln v. Sun V. St. L. Co., 59 Fed. 756; Rowe v. Phelps, 152 U. S. 87; Lloyd v. Chapman, C. C. A., 93 Fed. 599; Ry. Officials & Emp. Acc. Ass'n v. Wilson, C. C. A., 100 Fed. 368; and a valuable note in 90 Fed. cxlix, cliii, S. C., Rule 21; C. C. A., Rule 24.

[5] Garrett v. Pope Motor Car Co., C. C. A., 168 Fed. 905; Northwestern S. B. & Mfg. Co. v. Great Lakes C. Works, 181 Fed. 38; H. E. Winterton Gum Co. v. Autosales Gum & C. Co., C. C. A., 211 Fed. 617; Cisco v. Looper, C. C. A., 236 Fed. 336; R. D. Cole Mfg. Co. v. Mendenhall, C. C. A., 240 Fed. 641; City of Grafton v. Gentry Bros.' Shows, C. C. A., 240 Fed. 647; Bandy v. U. S., C. C. A., 245 Fed. 98. An exhibit specified only by the number by which it is marked upon the trial may be disregarded. Hodge v. U. S., C. C. A., 191 Fed. 165; Burchett v. U. S., C. C. A., 194 Fed. 821; Gaunt v. Ralston Purina Co., C. C. A., 198 Fed. 60.

[6] Garrett v. Pope Motor Car Co., C. C. A., 168 Fed. 905; Burchett v. U. S., C. C. A., 194 Fed. 821; Commercial T. & S. Bank v. Busch-Grace Produce Co., C. C. A., 228 Fed. 300; Vandeventer v. Traders' Nat. Bank, C. C. A., 241 Fed. 584; Graboyes v. United States, C. C. A., 250 Fed. 93. Where an assignment of error included objections to several distinct instructions of the court it was disregarded, although separate exceptions were taken to each instruction. Atchison, T. & S. F. R. Co. v. Mulligan, C. C. A., 67 Fed. 569.

[7] C. C. A., Rule 11. To the same effect is S. C., Rule 21, subd. 4. Clinton E. Warden Co. v. California F. S. Co., C. C. A., 102 Fed. 334; George v. Wallace, C. C. A., 135 Fed. 286; Jones v. U. S. *ex rel.* Tompkins County Nat. Bank, C. C. A., 135 Fed. 518; Moline Trust & Sav. Bank v. Wylie, C. C. A., 149 Fed. 734; Norfolk & W. Ry. Co. v. Gardner, C. C. A., 162 Fed. 114, cited. For the practice in the Court of Customs Appeals, see Rule 5, Ct. of Customs Appeals. By the Act of Feb'y 26, 1919, 40 St. at L. 1181, upon appeals and writ of error, "In any case, civil or criminal, the court shall give judgment after an examination of the entire record be-

fore the court, without regard to technical errors, defects, or exceptions which do not effect the substantial rights of the party.'' See *supra*, § 536a; *infra*, §§ 711g, 711j, Atchison, Topeka & Santa Fe Ry. Co. v. U. S., 232 U. S. 199.

The court of review will, without mention thereof in the assignment of errors, consider an error that is jurisdictional, Rogers v. Penobscot Min. Co., C. C. A., 154 Fed. 606; Morrison v. Burnette, C. C. A., 154 Fed. 617; Toledo Newspaper Co. v. U. S., C. C. A., 237 Fed. 986. In Lowenstein v. Levy, C. C. A., 212 Fed. 383, it was so held although the defect might have been waived, when no waiver appeared on the record. Mullins Lumber Co. v. Williamson & Brown Land & L. Co., C. C. A., 246 Fed. 232. Where the objection is based upon a fraudulent averment as to the amount of damages this must clearly appear upon the record. An error that lies at the threshold of the case and shows that the plaintiff below had no cause of action, A. Santaella & Co. v. Otto F. Lange Co., C. C. A., 155 Fed. 719; U. S. v. Bernays, C. C. A., 158 Fed. 792; but see Behn Meyer & Co. v. Campbell & Go Tauco, 205 U. S. 403, 51 L. ed. 857; or a fundamental error, such as that the special findings of fact are insufficient to support the judgment, Chicago, R. I. & P. Ry. Co. v. Barrett, C. C. A., 190 Fed. 118. *Contra*, Wm. Edwards Co. v. La Dow, C. C. A., 230 Fed. 378, 384. For cases where the courts took notice of errors that were not assigned, see Columbia Heights Realty Co. v. Rudolph, 217 U. S. 547, 54 L. ed. 877; Briscoe v. Dist. of Columbia, 221 U. S. 547, 55 L. ed. 848; New York Life Ins. Co. v. Rankin, C. C. A., 162 Fed. 103; Baltimore & O. R. Co. v. McCune, C. C. A., 174 Fed. 991; City of Memphis v. St. Louis & S. F. R. Co., C. C. A., 183 Fed. 529; Central Imp. Co. v. Cambria Steel Co., C. C. A., 201 Fed. 811; White v. U. S., C. C. A., 202 Fed. 501; Hultberg v. Anderson, C. C. A., 203 Fed. 853; Bassett v. Utah Copper Co., C. C. A., 219 Fed. 811; Pennsylvania Co. v. Sheeley, C. C. A., 221 Fed. 901; Hall v. Butler, C. C. A., 224 Fed. 709; Ohio Motor Car Co. v. Eiseman Magneto Co., C. C. A., 230 Fed. 370; Philadelphia & R. Ry. Co. v. Marland, C. C. A., 239 Fed. 1; Mergenthaler Linotype Co. v. Hull, C. C. A., 239 Fed. 26; Swiss Bankverein v. Zimmerman, C. C. A., 240 Fed. 87; Bandy v. U. S., C. C. A., 245 Fed. 98; Jones v. Pettingill, C. C. A., 245 Fed. 269. That a contract was against public policy, Grafton v. Meikleham, C. C. A., 246 Fed. 737, *certiorari* denied, Letterman v. U. S., C. C. A., 246 Fed. 940; Meikleham v. Grafton, 246 U. S. 665, 38 Sup. Ct. 334, 62 L. ed. 929; Central Stamping Co. v. M'Keon, C. C. A., 255 Fed. 8; Hodges v. Erie R. Co., C. C. A., 257 Fed. 495, (a failure to permit an amendment to a pleading after a demurrer had been sustained); but see, Winter v. Bostwick, C. C. A., 212 Fed. 884. Upon a writ of error in a criminal case, the Supreme Court considered an objection that a cruel and unusual punishment was imposed, although this was not specified in the assignments of error. Weems v. U. S., 217 U. S. 349, 54 L. ed. 793. For recent cases where errors not assigned were not considered, see Myers v. U. S., C. C. A., 223 Fed. 919.; Brennan v. Tillinghast, C. C. A., 201 Fed. 609; *Re* Federal Contracting Co., 212 Fed.

respect apply to appeals in bankruptcy.[8] The assignment of errors cannot supply an omitted exception.[9] A party who has not appealed nor sued out a writ of error cannot assign cross-errors.[10] An error may be waived after its assignment.[11]

692, (action upon a petition of intervention); Republic Iron & Steel Co. v. Porter, C. C. A., 228 Fed. 188; Maryland Casualty Co. v. Orchard Land & Timber Co., C. C. A., 240 Fed. 364; Hart v. Adair, C. C. A., 244 Fed. 897; Davis v. Carnegie Steel Co., C. C. A., 244 Fed. 931; Painter v. Union Trust Co., C. C. A., 246 Fed. 240; Parish v. U. S., C. C. A., 247 Fed. 40; Fall v. Bennett, C. C. A., 248 Fed. 491; Buckeye Cotton Oil Co. v. Sloan, C. C. A., 250 Fed. 712; Wight v. Washoe County Bank, C. C. A., 251 Fed. 819; F. W. Rauskolb Co. v. Anthony Mfg. Co., C. C. A., 253 Fed. 650; Louie Share Gan v. White, C. C. A., 258 Fed. 798; Individual Drinking Cup Co. v. Public Service Cup Corporation, 263 Fed. 98.

When the court of review concludes to notice a manifest error not specified in accordance with the rules, there is no implication that it has undertaken the task of going through the record and examining other errors not specified. Coco-Cola Co. v. Moore, C. C. A., 256 Fed. 640.

[8] Flickinger v. First Nat. Bank, C. C. A., 145 Fed. 162.

[9] Louisville & N. R. Co. v. McClish, C. C. A., 115 Fed. 268; Smith v. Hopkins, C. C. A., 120 Fed. 921; Vernon v. U. S., C. C. A., 146 Fed. 121; Fernwood & G. R. Co. v. Bessemer Coal, Iron & Land Co., C. C. A., 213 Fed. 33; McBride v. Neal, C. C. A., 214 Fed. 966; Itow v. U. S., C. C. A., 223 Fed. 25; Pennsylvania v. Fanger, C. C. A., 231 Fed. 851; Mound Coal Co. v. Jeffrey Mfg. Co., C. C. A., 233 Fed. 913; May v. U. S., C. C. A., 236 Fed. 495; Proctor Coal Co. v. U. S. Fidelity & Guaranty Co., C. C. A., 236 Fed. 910; Maryland Casualty Co. of Baltimore, Md., v. Orchard Land & Timber Co., C. C. A., 240 Fed. 364; Buckeye Cotton Oil Co. v. Sloan, C. C. A., 250 Fed. 712; Roberts Cone Mfg. Co. v. Bruckman, C. C. A., 255 Fed. 957; Goldfarb v. Keener, C. C. A., 263 Fed. 350. An assignment of error to a charge will not be considered unless duly taken at the trial. Tinsman v. F. R. Patch Mfg. Co., C. C. A., 101 Fed. 373; Waters-Pierce Oil Co. v. State of Texas, 212 U. S. 112, 53 L. ed. 431; Ireton v. Pennsylvania Co., C. C. A., 185 Fed. 84; Carlisle v. U. S., C. C. A., 194 Fed. 827. A writ of error is a sufficient exception to a judgment. Fellman v. Royal Ins. Co., C. C. A., 185 Fed. 689.

[10] Landram v. Jordan, 203 U. S. 56, 51 L. ed. 88; Southern Pine Co. v. Ward, 208 U. S. 126, 52 L. ed. 420; Denver v. Denver Union Water Co., 246 U. S. 178; U. S. v. Goodrich, C. C. A., 54 Fed. 21; Union Pac. Ry. Co. v. Colorado Eastern Ry. Co., C. C. A., 54 Fed. 22; Guarantee Co. of North American v. Phenix Ins. Co., C. C. A., 124 Fed. 170; Rogers v. Penobscot Min. Co., C. C. A., 154 Fed. 606; Texas Co. v. Central Fuel Oil Co., C. C. A., 194 Fed. 1.

[11] Taylor v. Easton, C. C. A., 180 Fed. 363.

§ 702. Security on writ of error or appeal. The Revised Statutes provide that every judge or justice signing a citation on any writ of error or appeal shall, except in cases brought up by the United States or by direction of any department of the government, in which case none is required, take good and sufficient security that the plaintiff in error shall prosecute his writ or appeal to effect, and if he fail to make his plea good shall answer all costs.[1] This provision is merely directory, and an omission to take a bond does not avoid the writ of error or appeal;[2] but on a motion to dismiss the case on that ground an opportunity to file a bond will be allowed the plaintiff in error,[3] or appellant,[4] even after his time to appeal or sue out a new writ of error has expired; except in the case of gross laches.[5] But an appeal is not perfected until the bond is approved and filed.[6] The judge cannot delegate the approval of the bond to the

§ 702. [1] U. S. R. S., §§ 1000, 1012. This has been held to include liability for the costs of the court of original jurisdiction as well as for those of the trial court. Expanded Metal Co. v. Bradford, 177 Fed. 604; Fidelity & Deposit Co. of Maryland v. Expanded Metal Co., C. C. A., 183 Fed. 568; Young v. Daley, 185 Fed. 209. Trustees in bankruptcy are excepted. 30 St. at L. 544, 554, § 25. Where, before the signature of the citation, another judge has approved the bond, the signature of the citation is equivalent to a new approval thereof. Farmers' L. & Tr. Co. v. Chicago & N. P. R. Co., C. C. A., 73 Fed. 314. The bond is not defective for failing to specify the term at which the decree appealed from was rendered. New Orleans Ins. Co. v. Albro Co., 112 U. S. 506, 28 L. ed. 809. The bond rendered need not be for the whole amount of the judgment unless a *supersedeas* is asked for. Wheeling Br. & T. R. Co. v. Cochran, C. C. A., 68 Fed. 141; *infra*, § 703.

[2] Davidson v. Lanier, 4 Wall. 447, 18 L. ed. 377; Seymour v. Freer, 5 Wall. 822, 18 L. ed. 564; Edmonson v. Bloomshire, 7 Wall. 306, 311, 19 L. ed. 91, 92.

[3] Davidson v. Lanier, 4 Wall. 477, 18 L. ed. 377; Seymour v. Freer, 5 Wall. 822, 18 L. ed. 564; Edmonson v. Bloomshire, 7 Wall. 306, 311, 19 L. ed. 91, 92; Stewart v. Masterson, 124 U. S. 493, 31 L. ed. 507; Schenck v. Diamond Match Co., C. C. A., 73 Fed. 22; Herr v. St. Louis & S. F. R. Co., C. C. A., 174 Fed. 938. The plaintiff in error may be allowed to file his bond *nunc pro tunc* Shepherd v. Pepper, 133 U. S. 626, 644, 33 L. ed. 706, 713.

[4] Wickelman v. A. B. Dick Co., C. C. A., 85 Fed. 851; Walker v. Houghteling, C. C. A., 104 Fed. 513; Corcoran v. Kostrometinoff, C. C. A., 164 Fed. 685.

[5] Beardsley v. Arkansas & L. Ry. Co., 158 U. S. 123, 39 L. ed. 919.

[6] Ibid.

clerk,[7] nor to a commissioner.[8] The judge may approve the bond out of court.[9] His failure to approve the bond is an irregularity that does not make the appeal void.[10] All the appellants or plaintiffs in error need not join in the bond.[11] The bond must be payable to the defendants in error or appellees.[12] No security is required upon a writ of error to the judgment of conviction of a crime in a court of the United States.[13] No bond is required on a writ of error or appeal by direction of the Comptroller of the Currency in a suit against a receiver of a national bank.[14] An error in the names of the parties,[15] or an omission of some who should be obligees,[16] or an error in the

7 O'Reilly v. Edrington, 96 U. S. 724, 24 L. ed. 659; National Bank v. Omaha, 96 U. S. 737, 24 L. ed. 881; Freeman v. Clay, C. C. A., 48 Fed. 849. In such a case, leave to file a new bond will usually be given. Chicago Dollar Director Co. v. Chicago D. Co., C. C. A., 65 Fed. 463.

8 Haskins v. St. Louis & S. E. Ry. Co., 109 U. S. 106, 27 L. ed. 873.

9 Hudgins v. Hemp, 18 How. 530, 15 L. ed. 511. A corporation will not be accepted as a surety when there is doubt as to its power under its charter so to act. Black v. Black, 53 Fed. 985.

10 Amadeo v. No. Assurance Co., 201 U. S. 194, 50 L. ed. 722.

11 Brockett v. Brockett, 2 How. 238, 11 L. ed. 251. The bond is not defective because the court refused to entertain a motion for the withdrawal of its approval to a surety after a month's delay. National Harrow Co. v. Hench, 81 Fed. 1005.

12 Bigler v. Waller, 12 Wall. 142; Swan v. Hill, 155 U. S. 394. An omission in this respect may be cured by amendment in the appellate court. Farmers' L. & Tr. Co. v. Chicago & N. P. R. Co., C. C. A., 73 Fed. 314. Gilbert v. Hopkins, C. C. A., 198 Fed. 849. A writ is not defective because other parties are also joined as obligees. Hill v. Chicago & E. Ry. Co., 129 U. S. 170, 32 L. ed. 651. If the sole payee is a person not a defendant in error or appellee, the appeal will be dismissed. Davenport v. Fletcher, 16 How. 142, 14 L. ed. 879. Where the proceeding is in the name of a State at the relation of an individual, the bond may be payable in the alternative to either the State or the relator, and either may enforce it. Spalding v. People, 2 How. 66, 11 L. ed. 181.

13 25 St. at L., ch. 113, § 6, p. 656; *Re* Claasen, 140 U. S. 200, 208, 35 L. ed. 409, 412. See 20 St. at L., ch. 176, § 2, p. 354.

14 Pacific Bank v. Mixter, 114 U. S. 463, 29 L. ed. 221; Robinson v. Southern Bank, 94 Fed. 22. A bond for costs was required upon an appeal by an individual to the Circuit Court from a ruling of the Board of General Appraisers. In *re* Certain Merchandise, 64 Fed. 576.

15 Knox County v. U. S., 131 U. S. clxvi, 25 L. ed. 191.

16 Farmers' L. & Tr. Co. v. Chicago & N. P. R. Co., C. C. A., 73

description of the decree,[17] in an appeal or *supersedeas* bond, may be cured by an amendment. In a proper case a party may be allowed to take an appeal or to sue out a writ of error *in forma pauperis* without a bond;[18] but it has been held that leave to do this by a party unable to pay the fees or to give the bond is not a matter of course,[19] and may be denied when his assignment of errors is clearly frivolous.[20] An appeal bond, given on an appeal from a judgment at law in a Federal court, which was a nullity and ineffective to stay execution or for any purpose, is without consideration, will not support an action and cannot be enforced against the obligors.[21]

§ 703. Supersedeas. A *supersedeas* is a stay of proceedings upon a judgment or decree to which a writ of error is issued or from which an appeal is taken.[1] The English rule that a writ of error removes the record to the court of review and prevents, during its pendency, further proceedings below, is not the law in the courts of the United States.[2]

Fed. 314; Blaffer v. New Orleans Water Supply Co., C. C. A., 160 Fed. 389.

17 New Orleans Ins. Co. v. Albro Co., 112 U. S. 506, 28 L. ed. 809; Western Union Tel. Co. v. Wright, 168 Fed. 558; Louisville & N. R. Co. v. Siler, 186 Fed. 176; Omaha & Council Bluffs Street Ry. Co. v. Interstate Commerce Commission, 222 U. S. 582, 56 L. ed. 324. So was a description of the court as a Circuit instead of a District Court. Moss v. Gulf Compress Co., C. C. A., 202 Fed. 657. Where an injunction forbidding the infringement of a patent was stayed pending an appeal, the appellate court enjoined the defendant from transferring its property until after the appeal had been decided. United Wireless Co. v. Nat. El. Signaling Co., C. C. A., 198 Fed. 385.

18 Volk v. B. F. Sturtevant Co., C. C. A., 99 Fed. 532; Fuller v. Montague, 53 Fed. 204; *supra*, § 413.

19 The Presto, C. C. A., 93 Fed. 522; Brinkley v. Louisville & N. R. Co., 95 Fed. 345.

20 Ibid.

21 U. S. v. Morris' Heirs, 153 Fed. 240. When after judgment in favor of the defendant, plaintiff by writ of error obtained a second trial which had a similar result and was reversed by the Circuit Court of Appeals upon a second writ of error, followed by a third trial resulting in judgment for the plaintiff which after affirmance by the Circuit Court of Appeals was reversed by the Supreme Court upon *certiorari;* it was held that the defendant who finally succeeded could not collect his costs from the sureties upon either of the bonds given by the plaintiff upon the first two writs of error. Anderson v. Messenger, 208 Fed. 75. Summary proceedings upon appeal bonds are discussed, *infra*, § 703.

§ 703. 1 U. S. R. S., § 1007.

2 Hubbard v. Worcester Art Museum, C. C. A., 196 Fed. 871, 873. It

To secure a *supersedeas* in a civil case, the writ of error or appeal, and the security required to be given upon the issue of a citation, must be lodged in the clerk's office for the use of the defendant in error or appellee within sixty days, Sundays exclusive, after the rendering of the judgment. Security must also be given that the plaintiff in error, if he fail to make his plea good; will answer all damages and costs.[3] The latter

has been said that upon the perfection of an appeal, the trial court loses jurisdiction to set aside the decree for error which appears on the record. Ensminger v. Powers, 108 U. S. 292, 27 L. ed. 732; Firestone Tire & Rubber Co. v. Seberling, C. C. A., 235 Fed. 891. *Cf.* McSherry Mfg. Co. v. Dowagiac Mfg. Co., C. C. A., 160 Fed. 948, 966. See *supra*, §§ 443, 444. The court may postpone a sale till after the determination of the appeal although there has been no *supersedeas*. Bound v. South Carolina Ry. Co., 55 Fed. 186; *supra*, § 394.

[3] U. S. R. S., §§ 1000, 1007. A receiver may be relieved from filing a bond to secure a *supersedeas*. Central Tr. Co. v. St. Louis & T. Ry. Co., 41 Fed. 551. *Cf.* Ferguson v. Dent, 29 Fed. 1. As to trustees in bankruptcy, see 30 St. at L. 544, 554, § 25; *supra*, § 494. A bond conditioned that the appellants "shall duly prosecute their appeal with effect, and moreover pay the amount of costs and damages rendered and to be rendered in case the decree shall be affirmed" by the Supreme Court, was held sufficient. Knox County v. U. S., 109 U. S. 229, 27 L. ed. 914. But see Peace R. Ph. Co. v. Edwards, C. C. A., 70 Fed. R. 728. A bond conditioned that the plaintiff in error "shall prosecute its writ of error to effect, and answer all damages and costs if it shall fail to make the plea good," was held sufficient. Chateaugay Ore & Iron Co. v. Blake, 35 Fed. 804.

As to the form of a *supersedeas* bond, see In *re* Woerishoffer, C. C. A., 74 Fed. 915. It has been held to be immaterial that it is only signed by one of the plaintiffs in error. McClellan v. Pyeatt, C. C. A., 49 Fed. 259. Where a policy of insurance against an employer's liability for injuries to its employees provided that the insured should not assume any liability nor incur any expense except at its own cost without the written consent of defendant; it was held to be the duty of the insurer to furnish a *supersedeas* bond; Pacific Coast Casualty Co. v. General Bonding & Casualty Ins. Co., C. C. A., 240 Fed. 36; but, the insured was not allowed to recover interest which accrued between the entry of the judgment and its affirmance. Ibid. Nor to grant a rehearing, First Nat. Bank v. State Nat. Bank, C. C. A., 131 Fed. 430; nor to allow the answer to be amended and the case opened for further proof. Western Wheel Scraper Co. v. Drenner, 79 Fed. 820. A party who has appealed from a decree may be restrained from enforcing any part of it, although there is a cross-appeal by his opponent, and no *supersedeas* has been obtained; Bronson v. La Crosse & M. R. Co.,

security, if filed concurrently with the issue of the citation and the lodging of the writ of error in the clerk's office, or at any time within the said sixty days, Sundays exclusive, may be approved by the judge or justice who signs the citation, and operates as a stay as a matter of right.[4] Otherwise, it can only operate as a stay by the permission of a judge or justice of the court of review,[5] and then only if the writ of error was sued out and served within the sixty days.[6]

1 Wall. 405, 409, 17 L. ed. 616; but a motion for a new trial may be made in the Court of Claims while an appeal is pending in the Supreme Court. U. S. v. Ayres, 9 Wall. 608, 19 L. ed. 625. Pending an appeal, the court below may settle the transcript of the evidence in a case in equity, *Re* General Equity Rule 75, C. C. A., 222 Fed. 884; or carry out a sale in the decree directed; Gay v. Hudson River El. Power Co., C. C. A., 191 Fed. 828; nor to order an increase of the bond required of defendant to suspend the injunction. Byrd Mfg. Co. v. Colman, C. C. A., 205 Fed. 905. An appeal from an order of deportation suspends execution until after the determination thereof. U. S. v. Lee, 184 Fed. 651. *Cf.* § 694, *supra;* Martin v. Hunter, 1 Wheat. 304, 4 L. ed. 97; Stewart v. Oneal, C. C. A., 237 Fed. 897. Where no *supersedeas* has been obtained, the court below may be compelled by mandamus to enforce its decree, if it refuses to proceed pending an appeal. Stafford v. Union Bank, 17 How. 275, 15 L. ed. 101.

4 U. S. R. S., § 1007; Kitchen v. Randolph, 93 U. S. 86, 23 L. ed. 810; Danville v. Brown, 128 U. S. 503, 32 L. ed. 507. Where the dates upon the papers are within the sixty days, it is incumbent upon the appellee to show that the bond was approved *nunc pro tunc.* The Colonel McLeod, 112 U. S. 710, 28 L. ed. 825.

5 Peugh v. Davis, 110 U. S. 227, 4 Sup. Ct. 17, 28 L. ed. 127; Rederiaktiebolaget Amie v. Universal Transp. Co., C. C. A., 245 Fed. 282.

6 U. S. R. S., § 1007; Kitchen v. Randolph, 93 U. S. 86, 23 L. ed. 810; Sage v. Central R. Co. of Iowa, 93 U. S. 412, 23 L. ed. 933; Peugh v. Davis, 110 U. S. 227, 28 L. ed. 127; Covington S. Y. Co. v. Keith, 121 U. S. 248, 30 L. ed. 914; New England R. Co. v. Hyde, C. C. A., 101 Fed. 397; Logan v. Goodwin, C. C. A., 101 Fed. 654; Robinson v. Furber, 189 Fed. 918; Roberts v. Kendrick, C. C. A., 211 Fed. 970; Roberts v. Kendrick, C. C. A., 211 Fed. 1024; Moore v. Am. Fidelity Co., 247 Fed. 609. It was held otherwise as regards the time for filing a bill of exceptions. Sena v. U. S., C. C. A., 195 Fed. 244. Where a motion for a new trial has been duly made, the time does not expire until sixty days after the decision of the motion, although no stay of execution has been obtained. Sanborn v. Bay, C. C. A., 194 Fed. 37. A stay pending an application for the writ of *certiorari* does not extend the time. Title Guaranty & Surety Co. v. U. S., 222 U. S. 401, 56 L. ed. 248; *supra,* § 689d. If a petition for a rehearing is duly filed,

The application for a *supersedeas* should not be made to the court of review.[7] A *supersedeas* bond is not defective because executed before the entry of the decree from which the appeal was taken, if approved and delivered after such entry;[8] but it was said that a *supersedeas* approved after a writ of error had been allowed but not issued is a nullity.[9] The *supersedeas* to a judgment of a State court does not operate until the time when the writ of error, or a copy of the same, is lodged in the clerk's office of the court where the judgment which is to be reviewed was entered.[10] The bond must be approved by the

or a motion for a new trial duly made, or a motion to set aside the judgment made during the term, the time does not begin to run until the petition or motion has been denied. Brockett v. Brockett, 2 How. 238, 11 L. ed. 251; Memphis v. Brown, 94 U. S. 715, 24 L. ed. 244; Texas & Pac. Ry. Co. v. Murphy, 111 U. S. 488, 28 L. ed. 492; Nevada Bank of San Francisco v. Steinmetz, 65 Cal. 219. Where an appeal had been dismissed because of the fault of the clerk of the trial court to send up the transcript in due time, the appellant was permitted to take a second appeal, and it was held that his time to file a *supersedeas* began to run anew. Sutherland v. Pearce, C. C. A., 186 Fed. 787. The court in which a judgment was entered has power at the same term to set such judgment aside, and reenter it so as to give effect to the *supersedeas*. Sage v. Central R. Co. of Iowa, 93 U. S. 412, 23 L. ed. 933; Memphis v. Brown, 94 U. S. 715, 24 L. ed. 244. Where through a mistake of law an appeal instead of a writ of error was taken within the sixty days, it was held that a *supersedeas* could not be obtained, although a writ of error was subsequently sued out; Saltmarsh v. Tuthill, 12 How. 387, 13 L. ed. 1034; nor was such a bond enforced against the sureties. Jabine v. Oates, 115 Fed. 861.

[7] Covington S. Y. Co. v. Keith, 121 U. S. 248, 30 L. ed. 914.

[8] Chateaugay Ore & Iron Co. v. Blake, 35 Fed. 804. The *supersedeas* was allowed when the bond was approved before the writ of error was sued out. McClelan v. Pyeatt, C. C. A., 49 Fed. 259.

[9] *Ex parte* Ralston, 119 U. S. 613, 30 L. ed. 506.

[10] Foster v. Kansas, 112 U. S. 201, 28 L. ed. 629. As to Circuit Courts of Appeal, see McCarley v. McGhee, 108 Fed. 494. It was said that the bond is executed in the State where it is filed, although signed elsewhere. Howard Ins. Co. v. Silverberg; C. C. A., 94 Fed. R. 921. In case of an appeal from the District Court of Alaska, it was held that filing in the clerk's office below certified copies of the order of a judge of the Circuit Court of Appeals allowing an appeal, of the assignment of errors and of the *supersedeas* bond, together with the original writ of *supersedeas*, was sufficient. Tornanses v. Melsing, C. C. A., 106 Fed. 775, 786; *Re* McKenzie, 180 U. S. 536, 45 L. ed. 657.

judge who signs the citation; and when the citation is signed by a judge of the appellate court, neither the judge nor the clerk of the court below has the power to give such approval.[11] The

11 Gay v. Hudson River El. Power Co., 190 Fed. 812.

Except in case of a gross abuse of discretion, the action of the judge in approving the amount and sufficiency of the sureties to a *supersedeas* bond will not be reviewed. Jerome v. McCarter, 21 Wall. 17, 22 L. ed. 515; *Ex parte* French, 100 U. S. 1, 25 L. ed. 529; Martin v. Hazard P. Co., 93 U. S. 302, 23 L. ed. 885; Rederiaktiebolaget Amie v. Universal Transp. Co., C. C. A., 245 Fed. 282. But see Stafford v. Union Bank, 16 How. 135, 14 L. ed. 876; S. C., 17 How. 275, 15 L. ed. 101. The judge may allow the sureties each to bind himself for a part of the penal sum and not to make themselves jointly and severally liable for the whole amount. New Orleans Ins. Co. v. E. D. Albro & Co., 112 U. S. 506, 28 L. ed. 809. *Cf.* Mexican Nat. Const. Co. v. Rensens, 118 U. S. 49, 30 L. ed. 77. After the *supersedeas* bond has been approved and filed with the transcript in the appellate court, the court below cannot vacate the bond or the allowance thereof; Keyser v. Farr, 105 U. S. 265, 26 L. ed. 1025; Kendrick v. Roberts, 214 Fed. 268; nor direct that its amount be increased. Clark v. Eureka County Bank, 131 Fed. 145. A motion to increase the *supersedeas* bond must be addressed to the court of review. The proper remedy is a motion to vacate the *supersedeas* if the *supersedeas* is irregular; Knox County v. U. S. 131 U. S. clxvi, 25 L. ed. 191; and a proceeding to enforce the judgment or decree below, if the *supersedeas* is void. *Ex parte* Ralston, 119 U. S. 613, 30 L. ed. 506; Western A. L. Const. Co. v. M'Gillis, 127 U. S. 776, 32 L. ed. 324, *supra*, § 703. Where a defective *supersedeas* bond has been filed and approved, or a defective writ of error issued, the proper remedy is a motion to vacate the *supersedeas*, Power v. Baker, 112 U. S. 710, 28 L. ed. 825; *Ex parte* French, 100 U. S. 1, 25 L. ed. 529; or to dismiss the writ of error, *Ex parte* French, 100 U. S. 1, 25 L. ed. 529; as the case may be; not an application for a mandamus to compel the inferior court to enforce the judgment. Power v. Baker, 112 U. S. 710, 28 L. ed. 825. Upon a motion to vacate a *supersedeas*, so much of the record must be printed as to enable the court to understand the case, unless the parties agree on the facts. Wood v. Richards, 131 U. S. xcviii, 19 L. ed. 831. Notice of the motion must be given to the appellant or plaintiff in error. *Ibid.* In the absence of fraud, on a motion to vacate a *supersedeas* for an amendable defect in the bond, the appellate court will usually order that the *supersedeas* be vacated, unless the appellant or plaintiff in error files a new bond in such a sum and within such a time as may be allowed by the court. Knox County v. U. S., 131 U. S., clxvi, 25 L. ed. 191. Where the bond failed to name any penal sum permission was given to file a new bond *nunc pro tunc*. Union Pac. R. Co. v. Callaghan, 161 U. S. 91, 40 L. ed. 628. When the *supersedeas* bond is a nullity because filed or allowed

approval of the bond need not be in writing.[12] It has been held that the bond does not operate as a *supersedeas* unless it is so expressly specified in the order of approval.[13]

The security upon a *supersedeas*, where the judgment or decree is for the recovery of money not otherwise secured,[14] must equal the whole amount of the judgment or decree, including just damages for delay, and costs and interest on the appeal.[15]

too late or too soon, *Ex* parte Ralston, 119 U. S. 613, 30 L. ed. 506, or because the writ of error was not sued out or served in time, Western A. L. Cons. Co. v. McGillis, 127 U. S. 776, 32 L. ed. 324, a motion to vacate the *supersedeas* will be denied as useless. Upon a writ of error to a final order in a condemnation proceeding instituted in a State and removed to a Federal court, the Supreme Court entered an order modifying the *supersedeas*, by directing that it have no greater extent than the State statute allowed in case of an appeal to a State court of review. East Tenn., V. & G. R. Co. v. Southern Tel. Co., 112 U. S. 306, 28 L. ed, 746. The appellate court may vacate a *supersedeas*, when the approval of the bond was obtained by fraud and perjury; in such a case it may refuse to accept a new bond, Railroad Co. v. Schutte, 100 U. S. 644, 25 L. ed. 605; and it may order new security when the circumstances of the sureties or of the parties or of the case have so changed since the bond was approved as to make the security originally given insufficient. Jerome v. McCarter, 21 Wall. 17, 22 L. ed. 515; Williams v. Claflin, 103 U. S. 753, 26 L. ed. 606; Martin v. Hazard P. Co., 93 U. S. 302, 23 L. ed. 885. See Harwood v. Diecker-hoff, 117 U. S. 200, 29 L. ed. 887.

[12] Davidson v. Lanier, 4 Wall. 447, 18 L. ed. 377. Where the judge who signed the citation took the oath of the sureties to their sufficiency, his approval of the bond was presumed. Silver v. Ladd, 6 Wall. 440, 18 L. ed. 828. The condition of the obligation, that the appellant shall prosecute his appeal to effect, is substantially equivalent to prosecuting his appeal with success: to make substantial and prevailing the appellant's attempt to reverse the decree or judgment awarded against him. Crane v. Buckley, 203 U. S. 441, 447, 51 L. ed. 260, 263.

[13] Aetna Life Ins. Co. v. Ryan, 253 Fed. 457; Orchard v. Hughes, 1 Wall. 73, 17 L. ed. 560.

[14] S. C., Rule 29; C. C. A., 13; Fuller v. Aylesworth, C. C. A., 75 Fed. 694.

[15] S. C., Rule 29; C. C. A., Rule 13. A judgment against a county for the payment of drainage warrants, although it contains a provision for a mandamus, is one for money not otherwise secured. Fuller v. Aylesworth, C. C. A., 75 Fed. 694. But see U. S. v. New Orleans, 8 Fed. 112. It has been held: that a decree declaring a lien for a sum of money upon certain property, and directing that the defendant pay the same within sixty days, and, in default of such payment, that plaintiff have leave to apply to the court for further order, is not. Louisville, N. A. & C. Ry. Co. v. Pope, C. C. A., 74 Fed. 1. *Cf.* Johnson v. Waters,

In suits where the property in controversy necessarily follows the event of the suit, as in real actions, replevin, and suits on mortgages; or where the property is in the custody of the marshal under admiralty process, as in the case of a capture or seizure; or where the proceeds thereof, or a bond for the value thereof, is in the custody or control of the court,—indemnity is only required in an amount sufficient to secure the sum recovered for the use and detention of the property, and the costs of the suit, and just damages for delay and costs and interest on the appeal.[16]

108 U. S. 4, 27 L. ed. 630. That the *supersedeas* bond upon appeal from a decree upon a creditor's bill subjecting property to the payment of a judgment must be for the whole amount of the judgment. *Re* Holladay, 28 Fed. 117. For an estoppel to enforce against the sureties part of the amount covered by the bond, see Harrison v. Richards, C. C. A., 226 Fed. 196.

[16] S. C., Rule 29, C. C. A., Rule 13. It includes costs in the lower court although subsequently taxed. Pacific Coast Casualty Co. v. Harvey, C. C. A., 250 Fed. 952, 955. See Fidelity & Deposit Co. v. Expanded Metal Co., C. C. A., 183 Fed. 568; and also the costs of the appeal. Am. Surety Co. v. North Packing Co., C. C. A., 178 Fed. 810. It has been held that the *supersedeas* bond on an appeal from a decree of foreclosure and sale where no payment by defendant was directed, does not secure payment of the amount of the decree, nor of the interest thereon, nor of a deficiency, which may arise upon a sale, Kountze v. Omaha Hotel Co., 107 U. S. 378, 27 L. ed. 609; but where the bond postponed a sale, the court allowed as damages, interest which accrued during the time of delay upon the amount for which the property sold together with the cost of advertising. Graysonia - Nashville Lumber Co. v. Goldman, C. C. A., 260 Fed. 600. See Pacific Coast Casualty Co. v. Harvey, C. C. A., 260 Fed. 952. Where the decree adjudged that plaintiff recover a specified sum of money and also directed a sale the sureties were liable the deficiency. Pease v. Rathbun-Jones Engineering Co., C. C. A., 228 Fed. 273. See Richards v. Harrison, 218 Fed. 134; reversed in C. C. A., 226 Fed. 196. It does not cover a loss by the mortgagee of an opportunity to buy the property at a reduced price on the sale, and make a profit by a subsequent rise of value, Jerome v. McCarter, 21 Wall. 17, 22 L. ed. 515; but ordinarily merely the costs, deterioration by waste, and for want of repairs, accumulation of taxes, and loss by fire not covered by reasonable insurance. *Ibid.* It is doubtful whether it secures against loss by a deterioration of the market value of the property; and that an addition to the statutory condition of a provision that the appellant "shall pay for the use and detention of the property covered by the mortgage during the pendency of the appeal," is nugatory, and does not enlarge the

Upon an appeal from an interlocutory order or decree granting or continuing or refusing or dissolving or refusing to dissolve an injunction or appointing a receiver, "the proceedings in other respects in the court below shall not be stayed unless otherwise ordered by that court or by the appellate court or judge thereof during the pendency of such appeal: Provided, however, that the court may require, as a condition of the appeal,

liability of the sureties. Kountze v. Omaha Hotel Co., 107 U. S. 378, 27 L. ed. 609. Where the decree in a foreclosure suit directed the defendant to account for rents and profits and waste, an additional amount equal to the sum found due from him was added to the amount of the *supersedeas* bond. National Bank v. McGahan, 45 Fed. 280. Upon an appeal to the Supreme Court from a decree for the delivery of coupon bonds, the amount of the *supersedeas* bond was fixed at interest at seven per cent. upon the aggregate of the coupons already due, and which would accrue in four years and ten per cent. damages on the aggregate of interest besides costs. Massachusetts & S. Const. Co. v. Tp. of Cherokee, 42 Fed. 750. On a writ of error to a judgment of ejectment, with nominal damages, the *supersedeas* need not be sufficient to cover the damages which might be recovered in an action for mesne profits, nor, it seems, other similar damages which might be sustained by want of possession. Roberts v. Cooper, 19 How. 373, 15 L. ed. 687. It has been said: that just damages for delay may include any loss arising from the insolvency of stipulators in admiralty. The Sydney, 17 Fed. 260, 263. But see Leary v. Murray, C. C. A., 178 Fed. 209. That where proceedings for the limitation of liability are subsequently instituted with success the liability of the sureties is limited accordingly. Monongahela River Consol. Coal & Coke Co. v. Hurst, C. C. A., 200 Fed. 711.

That the sureties on a *supersedeas* bond in equity are liable for the amount of the decree from which the appeal is taken and for compensation for the delay; but not for any compensation for the delay not imposed upon the principal in the decree of affirmance. It was held that they are not liable for interest upon a fund in the hands of a receiver when the decree of affirmance is silent as to the interest on the same. Rosenstein v. Tarr, 51 Fed. 368; s. c. affirmed in error as Tarr v. Rosenstein, C. C. A., 53 Fed. 112. That, in the absence of misconduct or unreasonable delay by the appellant, there is no liability for interest upon a fund that has been deposited in court, when the actual accumulations on the deposit are paid to the respondents. Pike v. Gregory, C. C. A., 118 Fed. 128. The obligee of a bond, superseding an order confirming a sale of land, can recover upon the affirmance, the value of the use and occupation or the rents and profits during the time the purchaser was kept out of possession by the appeal. Woodworth v. Northwestern Mut. L. Ins. Co., 185 U. S. 354, 46 L. ed. 945. Where after a decree of the foreclosure of a chattel mortgage, the appellant by giving a *supersc-*

an additional bond." [17] "On all appeals from any interlocutory order or decree granting or continuing an injunction in a District Court, the appellant shall, at the time of the allowance of the said appeal, file with the clerk of such District Court a bond to the opposite party in such sum as such court shall direct, to answer all costs if he shall fail to sustain his appeal." [18] "When an appeal from a final decree, in an equity suit, granting

deas bond, conditioned that he would hold the property "subject to the proper order and decree that may be entered finally in said cause," obtained possession thereof, and pending the appeal the property was destroyed by fire; it was held that the obligors were liable for the whole value of the property. Perry v. Tacoma Mill Co., C. C. A., 152 Fed. 115.

The claim, that a decree of foreclosure erroneously adjudicated that certain property was not covered by the mortgage, cannot be set up as a defense to an action upon the *supersedeas* bond. *Ibid.*

Where there was no order staying the operation of an injunction, damages for its violation, pending an appeal, are not covered by the *supersedeas*, although both parties supposed that the effect thereof was to suspend the injunction. Green Bay & M. Canal Co. v. Norrie, C. C. A., 128 Fed. 896, affirming 118 Fed. 923. Upon an appeal from a decree for the delivery of the possession of real estate on or before a certain date, the Circuit Court of Appeals postponed the date of the delivery of possession. It was held that the sureties were not liable for the value of the use of the property and waste of the same during the extended time. Crane v. Buckley, 203 U. S. 441, 51 L. ed. 260, affirming, C. C. A., 138 Fed. 22. Upon the affirmance of a decree dissolving a partnership and directing the defendant to pay a specified sum to the complainant and the equal division of the surplus, it was held that the complainant was not entitled to a proportionate share in the profits made by a receiver pending the appeal, although a *supersedeas* had been granted. Ruggles v. Buckley, C. C. A., 192 Fed. 907. For a case where it was held that the surety was not liable for a loss caused by the insolvency of an insurance company pending an appeal, see Leary v. Murray, C. C. A., 178 Fed. 209, 216.

[17] Jud. Code, § 129, 26 St. at L. 826; 31 St. at L. 660; 36 St. at L. 1087. The stay is discretionary, not a matter of right, *In re* Haberman Mfg. Co., 147 U. S. 525, 37 L. ed. 266. *Cf.* Wakelee v. Davis, 48 Fed. 612. See §§ 300, 325, *supra*. In Cotting v. Kansas City Stockyards Co., 82 Fed. 850, a decree was entered dismissing the bill, but an injunction was continued pending an appeal. Where an injunction was continued pending an appeal to the Circuit Court of Appeals from an order for its dissolution, it was held that it still continued after an affirmance by the Circuit Court of Appeals pending a *certiorari* from the Supreme Court. Stafford v. King, C. C. A., 90 Fed. 136; Hitz v. Jenks, 185 U. S. 155, 46 L. ed. 851.

[18] C. C. A., Rule 13.

or dissolving an injunction, is allowed by a justice or a judge who took part in the decision of the cause, he may, in his discretion, at the time of such allowance, make an order suspending, modifying or restoring the injunction during the pendency of the appeal, upon such terms, as to bond or otherwise, as he may consider proper for the security of the rights of the opposite party."[19] Otherwise a *supersedeas* upon an appeal from a decree dissolving an injunction does not continue the injunction in force,[20] and a *supersedeas* upon an appeal from a decree granting or continuing an injunction does not suspend the operation of the injunction.[21]

[19] Eq. Rule 74. It has been held that such an order may be made by the appellate court. Omaha & Council Bluffs Street Ry. Co. v. Interstate Commerce Commission, 222 U. S. 582, or it has been held by a judge thereof, Masses Pub. Co., C. C. A., 245 Fed. 102. Where an order allowing an appeal from an order dissolving an injunction ordered that a *supersedeas* to the order appealed from be granted upon the filing of a bond to be approved; held that, upon the approval and filing of the bond, the injunction was continued in force. New River Mineral Co. v. Seeley, 117 Fed. 981. Where the court of first instance, after ordering an injunction, had granted the defendant's motion for a stay pending an appeal, the Circuit Court of Appeals denied the complainant's application to require a bond when no request for the same had been made to the former court and no new matters affecting the motion had arisen or been discovered by the complainant since. Pneumatic Scale Corporation v. Automatic Weighing Mach. Co., C. C. A., 200 Fed. 572. An injunction enforcing an order of the Interstate Commerce Commission may thus be stayed. Upon an appeal from an order appointing a receiver, a writ of *supersedeas* may order the receiver to return the property to the appellant. *Re* Noyes, C. C. A., 121 Fed. 209; *supra*, § 428. But will not be unless it appears that the damage to defendants from the enforcement of the decree will be greater than that which would result to shippers from its suspension. Interstate Commerce Commission v. Southern Pac. Co., 137 Fed. 606. Where, in a suit to enjoin the infringement of a patent, it appeared that before a hearing could be had on an appeal the patent would have expired, a *supersedeas* was denied. Timolat v. Philadelphia Pneumatic Tool Co., 130 Fed. 903. Where an order denying an injunction was affirmed, the appellate court denied a motion for a restraining order pending an application to the Supreme Court for a *certiorari*. Hall v. Ames, C. C. A., 190 Fed. 138.

[20] Hovey v. McDonald, 109 U. S. 150, 161, 27 L. ed. 888, 891. Slaughter-House Cases, 10 Wall. 273, 19 L. ed. 915.

[21] Knox County v. Harshman, 132 U. S. 14, 33 L. ed. 249; Ozark Land Co. v. Leonard, 24 Fed. 658; s. c. Leonard v. Ozark Land Co., 115 U.

A writ of error to a judgment of conviction of a capital crime in a court of the United States operates as a stay of proceedings without the filing of any bond or other security.[22] A *supersedeas* to a judgment of conviction of another crime is obtained by the service of the writ of error before the return-day, without any security, provided the judge who signs the citation directs that the writ of error operate as a *supersedeas*.[23] Such judge may require security as a condition of the *supersedeas*.[24] An appearance bond in addition to a *supersedeas* bond is required to secure the enlargement of the prisoner.[25] It has been held: that, after his time to sue out a *supersedeas* has expired, the plaintiff in error may be admitted to bail; that, in case the trial court refuses his application for this, the court of review may release him upon bail.[26] Where the crime is not capital, bail upon a writ of error is usually accepted until a reasonable time for the filing of the transcript has been allowed.[27] In case of a conviction of a capital crime the Supreme Court rules provide that the District Court, or any justice or judge thereof, may, after the citation is served, admit the accused to bail in such an amount as may be fixed.[28] A special rule regulates stays upon appeals in *habeas corpus* proceedings.[29]

S. 465, 29 L. ed. 445; Interstate Comm. Com'n v. Louisville & N. R. Co., 101 Fed. 146; Green Bay & M. Canal Co. v. Norrie, C. C. A., 128 Fed. 896. But a sale made pending the *supersedeas* may, as between the parties, be set aside upon a reversal. Hitz v. Jenks, 185 U. S. 155, 46 L. ed. 851.

[22] 25 St. at L., ch. 113, § 6, p. 656.

[23] *Re* Claasen, 140 U. S. 200, 208, 35 L. ed. 409, 412.

[24] *Ibid.* Where the writ or error was not issued and filed within the statutory time. U. S. v. Pollak, 230 Fed. 533.

[25] Hardesty v. U. S., C. C. A., 184 Fed. 269; *supra*, § 493. A bond conditioned that the defendant, should abide by and obey all orders made by the appellate court, and "surrender himself in execution of the judgment and sentence appealed from as said court may direct, if the judgment and sentence of said District Court against him shall be affirmed," held not to render sureties liable for his failure to appear in the District Court for retrial after reversal. U. S. v. Murphy, C. C. A., 261 Fed. 751.

[26] McKnight v. U. S., C. C. A., 113 Fed. 451; *supra*, § 493.

[27] *Ibid.*

[28] S. C. Rule 36; Hudson v. Parker, 156 U. S. 277, 39 L. ed. 424. *Cf.* U. S. v. Hudson, 65 Fed. 68.

[29] S. C. Rule 34; C. C. A. Rule 33; *supra*, § 467.

A *supersedeas* operates only in favor of those defendants who have applied for and obtained it.[30] The judgment may be enforced against the rest, although they have joined in the writ of error.[31] A *supersedeas* operates as a stay of proceedings; it does not invalidate proceedings perfected before it took effect.[32]

[30] *Ex parte* French, 100 U. S. 1, 25 L. ed. 529. An equitable part-owner of real estate was allowed on his appeal a *supersedeas* against a writ of possession against the land, although the holder of the legal title, who was the joint equitable owner, had not appealed. Hunt v. Oliver, 109 U. S. 177, 27 L. ed. 897.

[31] *Ex parte* French, 100 U. S. 1, 25 L. ed. 529.

[32] Boise County v. Gorman, 19 Wall. 661, 22 L. ed. 226, S. C., 131 U. S. cxxv, 22 L. ed. 148; Hovey v. McDonald, 109 U. S. 150, 159, 27 L. ed. 888, 891. A judgment of ouster in *quo warranto* takes effect upon its rendition and the *status quo* is not reinstated by the *supersedeas*. Olmstead v. Distilling & C. F. Co., 73 Fed. 44. A sale of poles and wires pending a *supersedeas* upon an appeal from an order directing their removal gives the purchaser no right to contest this removal after an affirmance. Puget Sound Traction, L. & P. Co. v. City of Tacoma, 217 Fed. 265. Where a writ of error was issued from the Supreme Court to the judgment of a State court removing a State officer, and before the *supersedeas* took effect a successor to such officer was appointed, it was held that such successor was not guilty of contempt by continuing to discharge the duties of his office subsequent to the *supersedeas*. Foster v. Kansas, 112 U. S. 201, 28 L. ed. 629. A *supersedeas* does not discharge a garnishee process. Lee v. Jackson Light & Traction Co., C. C. A., 261 Fed. 721. Nor prevent the institution of proceedings to limit the liability of the owner of a ship who has obtained the writ, Monongahela River Consol. Coal & Coke v. Hurst, C. C. A., 200 Fed. 711. Nor deprive of its effect as *res adjudicata* the judgment or decree of which it stays the execution.

Slaughter House Cases, 10 Wall. 273, 19 L. ed. 915; Draper v. Davis, 102 U. S. 370, 26 L. ed. 121. An appeal in admiralty, with a *supersedeas* stays an execution against the stipulators as well as against the principal. The Belgenland, 108 U. S. 153, 27 L. ed. 685. The judge who grants the *supersedeas* has the jurisdiction to grant an order that, pending the appeal from an order appointing him, a receiver surrender possession of certain property, and he must obey such direction unless it is vacated. Tornanses v. Melsing, C. C. A., 106 Fed. 775, 788; *Re* Mackenzie, 180 U. S. 536, 45 L. ed. 657. Where there is no *supersedeas* a receiver who makes a payment in obedience to a decree or order pending an appeal therefrom incurs no liability in case of a reversal. Hovey v. McDonald, 109 U. S. 150, 27 L. ed. 888. Eq. Rule 93. It seems that, notwithstanding a *supersedeas*, the court in which the decree or judgment was entered may, at the same term, correct a clerical error or otherwise perfect the judgment or decree; "since those things

It stays further proceedings under an execution previously issued, but it does not set aside a levy previously made.[33] Where the inferior court proceeds in violation of the *supersedeas*, the appellate court, after the return is filed there, may issue a writ appropriate to the case to stay the proceedings below,[34] or may

which are amenable before error brought are amendable afterwards, so long as diminution may be alleged and *certiorari* awarded; provided, of course, that the time for amendment has not passed by." Hovey v. McDonald, 109 U. S. 150, 157, 27 L. ed. 888, 890, per Bradley, J. But it has been held: that by the allowance of a writ of error and the approval of a *supersedeas*, the trial court lost jurisdiction to correct an error in the judgment apparent on the face of the record, McKay v. Neussler, C. C. A., 148 Fed. 86. After an appeal in a proceeding *in rem*, or for the foreclosure of a mortgage, has been perfected, the court in which the decree was entered may sell the property in its custody, when perishable, and invest the proceeds, Jennings v. Carson, 4 Cranch, 2, 2 L. ed. 531; Spring v. South Carolina Ins. Co., 6 Wheat. 519, 5 L. ed. 320; Bronson v. La Crosse & M. R. Co., 1 Wall. 405, 17 L. ed. 616, and may allow a receiver to manage it; if a railroad, to operate it. Bronson v. La Crosse & M. R. Co., 1 Wall. 405, 17 L. ed. 616, and to keep it in repair. *Ibid.*; Grant v. Phœnix M. L. I. Co., 121 U. S. 118, 30 L. ed. 909. The attorneys of record have authority, where an appeal from a decree of sale has been taken but no *supersedeas* obtained, to stipulate that the property may be sold and the proceeds paid into court to abide the determination of the appeal; and the purchaser whose purchase-money has been thus paid into court may retain the property, although the decree is reversed. Holladay v. Stuart, 151 U. S. 229, 38 L. ed. 141. Beyond this, the court below should not interfere with the property or its revenue. Bronson v. La Crosse & M. R. Co., 1 Wall. 405, 17 L. ed. 616. The court below should not, after an appeal, at least pending a *supersedeas*, deliver the property in its custody to a third person not a receiver of the same court. *Ibid.* But see Union Mut. L. Ins. Co. v. Windett, 36 Fed. 838. After a writ of error to a judgment of a District Court, that court may issue an injunction to stay proceedings on the judgment. Parker v. The Judges, 12 Wheat. 561, 6 L. ed. 729.

A *supersedeas* upon an appeal from a decree enjoining the infringement of a patent does not prevent the complainant from suing those who have purchased from defendant the infringing articles, Wagner v. Meccano, C. C. A., 239 Fed. 901; Meccano v. John Wanamaker, 241 Fed. 133.

[33] Boise County v. Gorman, 19 Wall. 661, 22 L. ed. 226. Loy v. Alston, C. C. A., 172 Fed. 90, 97, holding that an order setting aside such a levy was erroneous. Kansom v. City of Pierre, C. C. A., 101 Fed. 665.

[34] Green v. Van Buskirk, 3 Wall. 448, 18 L. ed. 245; *Ex parte* Milwaukee R. Co., 5 Wall. 188, 18 L. ed. 676; Slaughter House Cases, 10

punish for contempt the judge who thus proceeds, as well as the attorney and party to the proceeding.[35]

The issue of an execution against a judgment debtor is not a prerequisite to a proceeding against the sureties on a *supersedeas* bond.[36] It seems that the Federal courts sitting in

Wall. 273, 19 L. ed. 915; Goddard v. Ordway, 94 U. S. 672, 24 L. ed. 237; Stockton v. Bishop, 2 How. 74, 11 ed. 184. But see Bronson v. La Crosse & M. R. Co., 1 Wall. 405, 17 L. ed. 616.

[35] *Re* Noyes, C. C. A., 121 Fed. 209; *supra*, § 428.

[36] Babbitt v. Finn, 101 U. S. 7, 25 L. ed. 820. The liability of the sureties upon a *supersedeas* bond to secure loss by the deterioration of attached property is not affected by the omission to enter a personal judgment against the defendant when after the sale there is a deficiency in the amount found to be due the plaintiff. Dexter, H. & Co. v. Sayward, 84 Fed. 296. *Cf.* s. c., 79 Fed. 237. Nor are they relieved because the plaintiff in error failed to state what was necessary to give jurisdiction to the Circuit Court of Appeals. Ibid. Nor can they raise any other objection to the liability of their principal to pay the judgment. Simonitsch v. Bruce, C. C. A., 258 Fed. 331. A suit may be brought against the sureties upon the filing of the mandate below without waiting for the entry of judgment upon that mandate. Davis v. Patrick, C. C. A., 57 Fed. 909. It has been said that the liability to pay unliquidated damages under a *supersedeas* bond does not accrue until they have been assessed in a proper proceeding. Dashley v. Daniel, C. C. A., 202 Fed. 426, 430. An allegation of a demand and refusal to pay is not required, Montana Min. Co. v. St. Louis Min. & Mill Co., 19 Mont. 313, 48 Pac. 305. The judgment debtor is not a necessary party to a suit by his surety to enjoin the prosecution of an action upon the *supersedeas* bond. Maryland Casualty Co. v. Repass, C. C. A., 253 Fed. 328. An attachment or trustee process from a State court against the sureties to a *supersedeas* bond in a suit against the obligee is no defense to a suit in the Federal court on the *supersedeas* bond. Rosenstein v. Tarr, 51 Fed. 368, s. c. as Tarr v. Rosenstein, C. C. A., 53 Fed. 112. Where there are two obligees, both must join in the suit for the enforcement of the bond, unless one of them is dead; but if, although joint in form it creates separate obligations in favor of each, one may sue alone. Dashley v. Daniel, C. C. A., 202 Fed. 426. A failure to demur is a waiver of the objection that the complaint fails to allege that the damages have not been paid. *Ibid.* It has been said that the sureties are estopped from collaterally attacking the decree, Pacific Coast Casualty Co. v. Harvey, C. C. A., 250 Fed. 952; Simonitsch v. Bruce, C. C. A., 258 Fed. 331. The right to sue to enforce a *supersedeas* bond does not exclude any right that may otherwise exist to sue to recover the damages thereby secured. Missouri Pacific Ry. Co. v. Larabee, 234 U. S. 459.

equity [37] and in admiralty [38] can give summary judgments against sureties upon appeal and *supersedeas* bonds, upon the entry of a decree of affirmance. In the Fifth Circuit it is the practice for the trial court,[39] but not the Circuit Court of Appeals, to enter such a summary judgment.[40] In the Third Circuit, upon compliance with the conditions of the bond, the surety is entitled to a writ of *fieri facias* against his principals.[41]

[37] Pease v. Rathbun-Jones Eng. Co., 243 U. S. 273, 37 Sup. Ct. 283, 61 L. ed. 715; Richards v. Harrison, 218 Fed. 134.

[38] This is the practice in admiralty, in the Second Circuit, The Sydney, 47 Fed. 260, 262; The Wanata, 95 U. S. 600, 24 L. ed. 461; The Belgenland, 108 U. S. 153, 27 L. ed. 685; See also Hiriart v. Ballon, 9 Pet. 156, 9 L. ed. 85; Beall v. New Mexico, 16 Wall. 535, 21 L. ed. 292; Marchand v. Frellsen, 105 U. S. 423, 26 L. ed. 1057; *Ex parte* Sawyer, 21 Wall. 235, 22 L. ed. 617; Babbitt v. Shields, 101 U. S. 7, 25 L. ed. 820; and in all cases in Alabama where the State practice permits this; Gordon v. Third Nat. Bank, C. C. A., 56 Fed. 790; s. c., Third Nat. Bank v. Gordon, 53 Fed. 471. See Humes v. Third Nat. Bank, 54 Fed. 917; s. c., *Re* Humes, 149 U. S. 192, 37 L. ed. 698. In the Fifth Circuit, and it seems in the Eighth Circuit, in cases from Nebraska, where the State practice also permits this; Brown v. Northwestern Mutual L. Ins. Co., C. C. A., 119 Fed. 148; and in the Ninth Circuit, in cases from Washington; Perry v. Tacoma Mill Co., C. C. A., 152 Fed. 115. An order denying a motion for a summary judgment against the sureties was held, in the district of Washington, to be no bar to a subsequent suit against them. Dexter, H. & Co. v. Sayward, 84 Fed. 296. For questions which were certified to the Supreme Court, see Woodworth v. Northwestern Mut. L. Ins. Co., 185 U. S. 354, 46 L. ed. 945. But see Lamaster v. Keeler, 123 U. S. 376, 31 L. ed. 238.

[39] Gordon v. Third National Bank, C. C. A., 56 Fed. 790. *Contra*, Universal Transportation Co. v. Rederiaktiebolaget Amie, U. S. D. C., S. D. N. Y. August, 1917. It has been held that the proceeding may be by a *scire facias*. Universal Transp. Co. v. National Surety Co., 252 Fed. 293, aff'd C. C. A., 256 Fed. 450.

[40] City of Clarksdale v. Williamson, C. C. A., 194 Fed. 412.

[41] Leary v. Murray, C. C. A., 178 Fed. 209, a proceeding *in rem* in admiralty, ordinarily upon payment the surety is entitled to an assignment of the judgment. But see Maryland Casualty Co. v. Repass, C. C. A., 253 Fed. 328. Where the surety company paid, after affirmance and notice by the government of the Territory that, unless payment was made forthwith or a sufficient excuse shown, the company would forfeit its right to transact business in the Territory; this was held not to be a voluntary payment, even if the government had no power to revoke the license, and that a subsequent appeal to the Supreme Court did not diminish the company's right to reimbursement. U.

Upon the discharge of the liability upon a *supersedeas* bond, the court may order that it be cancelled,[42] or that the sureties be discharged.[43]

§ 704. Return to writ of error or appeal. A writ of error should be returned to the appellate court on or before the return-day thereof, together with an authenticated transcript of the record, an assignment of errors, a prayer for a reversal, and the original citation to the adverse party, all of which should be annexed thereto.[1] If, however, the writ is served before the

S. Fidelity & Guaranty Co. v. Sandoval, 223 U. S. 227, 56 L. ed. —. Where appellant became insolvent pending the appeal, but no levy upon its property had been made under the judgment appealed from, and it did not appear that it could not have paid the judgment out of its current receipts, the claim of the surety company to a preference over those secured by a mortgage was denied. Gay v. Hudson River El. Power Co., 182 Fed. 904; Love v. North American Co., C. C. A., 229 Fed. 103; Towle v. Great Shoshone & Twin Falls Water Power Co., 232 Fed. 733; *supra*, § 305.

[42] Persons v. Wirgman, 140 Fed. 207.

[43] McRae v. David, C. C. A., 184 Fed. 989.

§ 704. [1] U. S. R. S., § 997; Wilson v. Daniel, 3 Dall. 401, 1 L. ed. 655; S. C. Rule 35. By Rule 6 of the Rules of the Court of Customs Appeals, upon the filing of an application for review, "a mandate shall issue to said Board of General Appraisers directing said board to transmit to said court the records and evidence taken by them, together with a certified statement of the facts involved in the case and the decision thereon, together with all samples and exhibits used before them." The transmission of an original document, instead of a copy thereof, does not affect the validity of a writ of error or appeal. Jewett v. U. S., C. C. A., 100 Fed. 832. The copy of the record is sufficiently authenticated if there is attached thereto signed by the clerk or his deputy, and under the seal of the court a certificate stating that the writing attached is a true transcript of the record. Garneau v. Dozier, 100 U. S. 7, 25 L. ed. 536; Missouri, K. & T. Ry. Co. v. Dinsmore, 108 U. S. 30, 27 L. ed. 640; S. C. Rule 8; C. C. A. Rule 14. It has been held that a certificate that the "foregoing is a true, full and complete record in the above entitled cause" is sufficient, Pennsylvania Co. v. Jacksonville, T. & K. W. Ry. Co., C. C. A., 55 Fed. 131; but not a certificate that the papers contained in the transcript are correct copies without a statement that the transcript is complete, Meyer v. Mansur & T. I. Co., C. C. A., 85 Fed. 874; but see Burnham v. No. Chicago St. R. Co., C. C. A., 87 Fed. 168. Nor a certificate to the correctness of the copies of the pleadings which is silent as to the copies of the orders and decrees. Ruby v. Atkinson, C. C. A., 93 Fed. 577. When

return-day, the appellate court may allow the writ or the transcript to be filed at any time during the term in which the return-day falls.[2] The destruction of the writ without the fault of the plaintiff in error will excuse a return of the original paper, provided a copy of the writ and the transcript and other papers are duly filed.[3] The return-day of an appeal is the day named in the citation.[4] The record must be complete, and contain in itself without references *aliunde* all the papers, exhibits, depositions, and other proceedings which are necessary to the hearing.[5] The transcript should state the date when each paper,

the transcript is not a full and complete transcript of all the proceedings, the clerk should make some appropriate mention of the fact in his certificate, stating the reasons for the omissions and that the transcript as prepared is a full and complete transcript of such proceedings in the case as it purports to contain. Farmers' Loan & Trust Co. v. Eaton, C. C. A., 114 Fed. 14, 18. See *infra*, note 5. Where the transcript stated: that, on a certain date, the court rendered a judgment, therein copied; the writ of error and the petition therefor referred to the rendition of judgment; and the clerk certified that the transcript was a full, true and correct copy of the records and proceedings, as the same remained of record on file in his office; it was held that the transcript showed that the judgment was entered of record. Mackey v. Fox, C. C. A., 121 Fed. 487. When the transcript is sent to the Circuit Court of Appeals, a statement in the certificate that it is made for the Supreme Court is immaterial. McClellan v. Pyeatt, C. C. A., 49 Fed. 259.

The seal and signature are both requisite. S. C. Rule 8; C. C. A. Rule 14. Leave has been given to withdraw the record and file the same *nunc pro tunc* with the clerk's signature added thereto, when the seal was affixed to the record and a motion to dismiss for the want of the clerk's signature was made after the time to appeal had expired. Idaho & Oregon L. Imp. Co. v. Bradbury, 132 U. S. 509, 513, 33 L. ed. 433, 436. *Cf.* Burnham v. No. Chicago St. Ry. Co., C. C. A., 87 Fed. 168. Where the seal and signature were both wanting, the court dismissed the writ of error, but allowed the plaintiff in error to withdraw the record and sue out a new writ, since his time had not expired. Blitz v. Brown, 7 Wall. 693.

[2] Mussina v. Cavazos, 6 Wall. 355, 359, 18 L. ed. 810; Wood v. Lide, 4 Cranch, 180, 2 L. ed. 588; Pickett v. Legerwood, 7 Pet. 144, 8 L. ed. 638.

[3] Mussina v. Cavazos, 6 Wall. 355, 18 L. ed. 810.

[4] See *supra*, § 699.

[5] S. C. Rule 8; C. C. A. Rule 14; Redfield v. Parks, 130 U. S. 623, 32 L. ed. 1053. See Hoe v. Kahler, 27 Fed. 145. In a criminal case, the transcript should contain all recognizances, processes and proceedings in the case. U. S. R. S.,

Sec. 1037; Jewett v. U. S., C. C. A., 100 Fed. 832. Any oral concessions made in the court below should be set forth in the certificate of the trial judge. *Re* L. W. Day & Co., C. C. A., 175 Fed. 1022. But it has been held that this is not conclusive; Guerini Stone Co. v. Carlin Constr. Co., 248 U. S. 341; *Re* Veler, C. C. A., 249 Fed. 633. The original pleadings which have been amended need not be included in the transcript when the amended pleadings are included. Union Pacific Ry. Co. v. U. S., 116 U. S. 402, 29 L. ed. 677. On a second appeal from the Court of Claims, findings of fact on the first hearing in a decision reversed upon the former appeal need not be included in the transcript. Union Pac. Ry. Co. v. U. S., 116 U. S. 402, 29 L. ed. 677. See *supra*, § 686; *infra*, § 706. The transcript need not contain the names of the jurors. Owens v. Hanney, 9 Cranch, 180, 3 L. ed. 697. It should not contain affidavits on a motion for a continuance. Campbell v. Rankin, 99 U. S. 261, 25 L. ed. 435. Nor, it has been said, the papers upon a motion to permit a party to introduce further evidence after his time had expired, which was denied, since this was considered to be discretionary and not reviewable. Baglin v. Cusenier Co., 156 Fed. 1019. Nor affidavits considered upon a motion for a new trial. Evans v. Stettnisch, 149 U. S. 605, 37 L. ed. 866. Nor any affidavits not admitted in evidence on a trial or hearing. Baltimore & P. R. Co. v. Sixth Presbyterian Church, 91 U. S. 127, 23 L. ed. 260; England v. Gebhardt, 112 U. S. 502, 28 L. ed. 811; Craig v. Smith, 100 U. S. 226, 25 L. ed. 577; Thomson v. Wooster, 114 U. S. 104, 29 L. ed. 105; Travelers' Protective Ass'n v. Gilbert, C. C. A., 101 Fed. 46. Affidavits can only be considered upon a writ of error when they are included in the bill of exceptions. Evans v. Stettnisch, 149 U. S. 605, 37 L. ed. 866; Stewart v. Wyoming C. R. Co., 128 U. S. 383, 390, 32 L. ed. 439, 442. Motions based upon matters beyond the record should not ordinarily be included unless recited with the evidence or affidavits pro and con in the bill of exceptions. Eldorado Coal & Mining Co. v. Mariotti, C. C. A., 215 Fed. 51; Griggs v. Nadeau, C. C. A., 250 Fed. 781; Panama R. R. Co. v. Curran, C. C. A., 256 Fed. 768; *supra*, § 479. Nor any letters or other papers not contained or referred to in the bill of exceptions or incorporated in a pleading. San Pedro & Canon A. A. Co. v. U. S., 146 U. S. 120, 36 L. ed. 912; Whitten v. Tomlinson, 160 U. S. 231, 40 L. ed. 406; Travelers' Protective Ass'n v. Gilbert, C. C. A., 101 Fed. 46. All such papers will be disregarded by the court of review. *Ibid.*; Suydam v. Williamson, 20 How. 427, 15 L. ed. 978; Duncan v. Atchison, T. & S. F. R. Co., C. C. A., 72 Fed. 808. See Dalton v. Hazelet, C. C. A., 182 Fed. 561. Where there is an assignment of error that the court never acquired jurisdiction over the appellant's person, the transcript must show either that the objection was raised below and overruled or that he did not voluntarily appear. Taylor v. Easton, C. C. A., 180 Fed. 363. It has been held: that where leave to file a pleading has been refused or documentary evidence excluded, such papers

a copy of which is therein included, was filed.[6] A copy of the opinion or opinions filed in the case must be annexed to and transmitted with the record.[7] If the transcript contains matter

should not be included in the transcript; but that the court below may order the clerk to certify these with the transcript. Southern B'g & L. Ass'n v. Carey, 117 Fed. 325, 326. Upon an appeal from an order refusing leave to file a petition or other paper, a copy of the rejected paper should be included in the transcript, although not filed. Southern B'g & Loan Ass'n v. Carey, 117 Fed. 325. The fact that a paper is on the files of the clerk's office with other papers in a case does not make it part of the record, if it is neither a pleading nor a process, nor made a part of the record by the action of the court. England v. Gebhardt, 112 U. S. 502, 28 L. ed. 811. The transcript filed by complainant must contain the proceedings upon a cross-bill which has been dismissed when the complainant to the cross-bill has appealed, even though the complainant has not named him as appellee. Gregory v. Pike, 64 Fed. 415. Where there has been a previous appeal, matters which preceded the mandate thereupon and which do not tend to explain it should ordinarily be omitted. Nashua & L. R. Corp. v. Boston & L. R. Corp., C. C. A., 61 Fed. 237. Proceedings upon an application for a rehearing which tend to explain the original decree may be included. Hoe v. Kahler, 27 Fed. 145. Where several distinct proceedings are pending about the same matter below, nothing should be included in the record which does not have some relation to that in which was entered the order from which the appeal is taken. Burnham v. North-Chicago Ry. Co., C. C. A., 87 Fed. 168. But see Fitzgerald v. Evans, C. C. A., 49 Fed. 426. It is proper to omit parts of depositions which neither party offered in evidence. Blanks v. Klein, C. C. A., 49 Fed. 1. Where parts of the record are omitted the transcript should indicate the fact and the nature of the omission. Nashua & L. R. Corp. v. Boston & L. R. Corp., C. C. A., 61 Fed. 237. Where part of the records of the court below had been destroyed by fire without the fault of either party, the Circuit Court of Appeals heard an appeal on a transcript of what remained. Cutting v. Tavares, O. & A. R. Co., 61 Fed. 150. It has been said: that it is the duty of the plaintiff to furnish the court with all the exhibits, which are contained in the bill of exceptions, unless his opponent stipulates waiving the production of the same; and that his failure in this respect is a sufficient cause for censure; but, unless these are necessary for the decision of the questions of law involved, such a failure is not a ground for dismissing the writ of error. Dalton v. Moore, C. C. A., 141 Fed. 311, 314. In two or more circuits the rules regulate what the transcript shall contain, *e. g.*, Ft. Worth, *Cf.* 223 Fed. XXIV. See Appendix V., *infra*.

[6] Williams Bros. v. Savage, C. C. A., 120 Fed. 497; *Re* Friedman, C. C. A., 161 Fed. 260.

[7] S. C. Rule 8; C. C. A. Rule 14. The statement of facts in the opin-

improperly there, the remedy is upon the adjustment of costs by the appellate court;[8] but not by a motion to dismiss the appeal or writ of error,[9] nor is it ground for a reversal.[10]

The equity rules direct in case of appeal: in equity, "(a) It shall be the duty of the appellant or his solicitor to file with the clerk of the court from which the appeal is prosecuted, together with proof or acknowledgment of service of a copy on the appellee or his solicitor, a præcipe which shall indicate the portions of the record to be incorporated into the transcript on such appeal. Should the appellee or his solicitor desire additional portions of the record incorporated into the transcript, he shall file with the clerk of the court his præcipe also within ten days thereafter, unless the time shall be enlarged by the court or a judge thereof, indicating such additional portions of the record desired by him.[11] (b) The evidence to be included in the record shall not be set forth in full, but shall be stated in simple and condensed form, all parts not essential to the decision of the questions presented by the appeal being omitted and the testimony of witnesses being stated only in narrative form, save that if either party desires it, and the court or judge so directs, any part of the testimony shall be reproduced in the exact words of the witness.[12] The duty of so condensing and

ion cannot supply their omission from the transcript, Townsend v. Beatrice Cemetery Ass'n, C. C. A., 138 Fed. 381; unless the opinion has been made, by the court below, a part of the record; *supra*, § 667, but it may be examined to ascertain whether a right under the Constitution or laws of the United States was claimed and denied below. Memphis v. Cumberland Tel. & T. Co., 218 U. S. 624, 54 L. ed. 1185.

[8] Eq. Rule 75; Ball & S. F. Co. v. Kratzer, 150 U. S. 111, 37 L. ed. 1019; Coxe v. Peck-Williamson Heating & Ventilating Co., C. C. A., 208 Fed. 409; Garland v. Quinn, C. C. A., 242 Fed. 267; Buckeye Cotton Oil Co. v. Sloan, C. C. A., 250 Fed. 712; *supra*, §§ 409, 412, 419b. But see Edenborn v. Sim, C. C. A., 204 Fed. 781.

[9] *Re* General Eq. Rule 75, C. C. A., 222 Fed. 894.

[10] West v. East Coast Cedar Co., C. C. A., 113 Fed. 737, 741.

[11] The time can be enlarged at a subsequent term provided that the time for the return has not expired, *Re* General Equity Rule 75, C. C. A., 222 Fed. 884.

[12] Upon an appeal the transcript should contain an abstract of the evidence affecting questions, which were not considered by the court below but which will be material in case the appellate court disapproves the rulings of the former. Linde

stating the evidence shall rest primarily on the appellant, who shall prepare his statement thereof and lodge the same in the clerk's office for the examination of the other parties at or before the time of filing his præcipe under paragraph (a) of this rule.[13] He shall also notify the other parties or their solicitors of such lodgment and shall name a time and place when he will ask the court or judge to approve the statement, the time so named to be at least ten days after such notice. At the expiration of the time named or such further time as the court or judge may allow, the statement, together with any objections made or amendments proposed by any party, shall be presented to the court or the judge, and if the statement be true, complete and properly prepared, it shall be approved by the court or judge, and if it be not true, complete or properly prepared, it shall be made so under the direction of the court or judge and shall then be approved. When approved, it shall be filed in the clerk's office and become a part of the record for the purposes of the appeal. (c) If any difference arise between the parties concerning directions as to the general contents of the record to be prepared on the appeal, such difference shall be submitted to the court or judge in conformity with the provisions of paragraph (b) of this rule and shall be covered by the directions which the court or judge may give on the subject."[14]

Air Products Co. v. Morse Dry Dock & Repair Co., C. C. A., 246 Fed. 834.

[13] Eq. Rule 75. Rodgers v. U. S. ex rel. Elsberg, C. C. A., 152 Fed. 426. It has been held that, in such a case, where the record is voluminous, a certificate will be sufficient which states that the transcript is a full and correct copy of everything specified in the *præcipe*, Burnham v. North Chicago Ry. Co., C. C. A., 87 Fed. 168. The failure of the appellant to comply with this rule does not affect his appeal where it otherwise appears that the transcript is complete and accurate; even if the testimony is not reduced to narrative form; although it is a reason for imposing costs upon him. *Re* General Equity Rule 75, C. C. A., 222 Fed. 884; Garland v. Quinn, C. C. A., 242 Fed. 267. Where the parties failed to comply with this rule, it is the duty of the clerk and of the trial court, Bond v. U. S., C. C. A., 252 Fed. 804; to see that the transcript is not redundant, *Re* General Equity Rule 75, C. C. A., 222 Fed. 884. The Supreme Court upon the review of an order of the Interstate Commerce Commission approved the practice of omitting the testimony and relying upon the objection that the findings were insufficient; Louisville & N. R. R. Co. v. U. S., 238 U. S. 1.

[14] Eq. Rule 75. *Cf.* Hoe v. Kohler,

"In preparing the transcript on an appeal, especial care shall be taken to avoid the inclusion of more than one copy of the same paper and to exclude the formal and immaterial parts of all exhibits, documents and other papers included therein; and for any infraction of this or any kindred rule the appellate court may withhold or impose costs as the circumstances of the case and the discouragement of like infractions in the future may require. Costs for such an infraction may be imposed upon offending solicitors as well as parties.[15] If, in the transcript, anything material to either party be omitted by accident or error, the appellate court, on a proper suggestion or its own motion, may direct that the omission be corrected by a supplemental transcript."[16] "When the questions presented by

27 Fed. 145; Smith v. McIntyre, 84 Fed. 721. It was previously held that the trial court had no power to determine what shall be included. Eq. Rule 77; U. S. D. C. S. D. N. Y., Rule 26. It has been held: That the appellate court cannot amend the transcript by directing to be filed therewith a transcript on its own files in a former appeal in the same case, that has been dismissed, without any certificate by the court below that same was a part of the proceedings brought up for review; Merriman v. Chicago, D. & V. R. Co., C. C. A., 120 Fed. 240. But a certified copy of the record, used upon a previous application to the court of review may be allowed to stand as the return and new matter may be included by a supplemental transcript. Guardian Assurance v. Quintana, 227 U. S. 100. See Am. Sugar Ref. Co. v. New Orleans, 181 U. S. 277, 283, 45 L. ed. 859, 862; Farrell v. O'Brien, 199 U. S. 89, 101, 50 L. ed. 101, 1071, *supra*, § 689d. Upon a motion to dismiss an appeal from the District Court, the Supreme Court may take judicial notice of an application for a *certiorari* previously filed there which shows that the case had been taken to the Circuit Court of Appeals by a prior appeal. Aspen Min. & Smelting Co. v. Billings, 150 U. S. 31, 38, 37 L. ed. 986, 989.

15 See cases in Note 8.

16 Eq. Rule 76 Guardian Assurance Co. v. Quintana, 227 U. S. 101. When there was no approval by the court of the statement of the evidence and no statement therein that it contained all the evidence or the substance thereof; it was presumed that the finding was supported by other evidence not therein contained, although counsel had certified that the statement was correct. Carson v. Hurt, C. C. A., 250 Fed. 30. The appellate court may grant the writ of its own motion at any time. Morgan v. Curtenius, 19 How. 8, 15 L. ed. 576; Sweeney v. Lomme, 22 Wall. 208, 22 L. ed. 727. Pending such a writ, the hearing of the cause is usually adjourned, Morgan v. Curtenius, 19 How. 8, 15 L. ed. 576; but see Bein v. Heath, 142 U. S. 704, 35 L. ed. 1174. But not if the application has been unreasonably delayed, Bein v. Heath, 142 U. S. 704, 35 L. ed.

an appeal can be determined by the appellate court without an examination of all the pleadings and evidence, the parties, with the approval of the district court or the judge thereof, may prepare and sign a statement of the case showing how the questions arose and were decided in the district court and setting forth so much only of the facts alleged and proved, or sought to be proved, as is essential to a decision of such questions by the appellate court. Such statement, when filed in the office of the clerk of the district court, shall be treated as superseding, for the purposes of the appeal, all parts of the record other than the decree from which the appeal is taken, and, together with such decree, shall be copied and certified to the appellate court as the record on appeal."[17] A bill of exceptions may be treated as a statement of the evidence under the Equity Rules;[18] but it has been held that, even by the consent of the parties[19] a transcript of the stenographer's minutes cannot be treated as a bill of exceptions,[20] and where there is no bill of exceptions, a writ of error cannot be remanded with a direction that the trial court include in the transcript a condensed statement of the evidence upon the trial.[21] The practice as to transcripts of the record in admiralty[22] and upon appeals from the Court of Claims[23] has been previously described. When in the opinion

1174. This was done when the proceedings upon a previous writ of error from the Circuit Court of Appeals were omitted. Union Tr. Co. v. Westhus, 228 U. S. 519, 521, 57 L. ed. —.

17 Eq. Rule 77. It has been held that this does not authorize a stipulation that the case be heard upon a transcript of all the evidence printed for the use of the trial court. U. S. v. Motion Picture Patents Co., C. C. A., 230 Fed. 541. A consent that a bill of exceptions be settled may be construed as a written stipulation that the document contains a sufficient transcript of the evidence and proceedings below. Dodge v. Norlin, C. C. A., 133 Fed. 363.

18 L. A. Westermann Co. v. Dispatch Printing Co., C. C. A., 233 Fed. R. 609.

19 Fraina v. U. S., C. C. A., 255 Fed. 28.

20 Buessel v. U. S., C. C. A., 258 Fed. 811; *supra*, § 479.

21 Mound Coal Co. v. Jeffrey Mfg. Co., C. C. A., 233 Fed. 913. See *supra*, § 479.

22 *Supra*, § 592. See C. C. A. Rule 14; Adm. Rule 52; S. C. Rule 8; Adm. Rules, 2d Ct., 4, 5.

23 *Supra*, § 686. See Old Settlers v. U. S., 148 U. S. 427, 463, 464, 37 L. ed. 509, 522, 523.

of the presiding judge in any District Court it is necessary or proper that original papers of any kind be inspected in the appellate court on appeal or writ of error, such presiding judge may make such rule or order for the safe-keeping, transport, and return of such papers as he deems proper, and the Supreme Court will receive and consider such original papers in connection with the transcript and proceedings.[24] Whenever any record contains any document, paper, testimony, or other proceeding in a foreign language, the record must also contain a translation thereof made under the authority of the inferior court or admitted to be correct.[25] Otherwise, on the report of the clerk, the court of review will remand the case to the inferior court in order that such a translation may be there supplied and inserted in the record.[26]

"1. Models, diagrams, and exhibits of material forming part of the evidence taken in the court below, in any case pending in this court, on writ of error or appeal, shall be placed in the custody of the marshal of this court at least one month before the case is heard or submitted. 2. All models, diagrams, and exhibits of material, placed in the custody of the marshal for the inspection of the court on the hearing of a case, must be taken away by the parties within one month after the case is decided. When this is not done, it shall be the duty of the marshal to notify the counsel in the case, by mail or otherwise, of the requirements of this rule; and if the articles are not re-

[24] S. C. Rule 8; C. C. A. Rule 14. *Cf.* § 667, *supra*. The judge is not justified in authorizing the incorporation of the original papers, instead of copies, in the transcript merely for the purpose of saving expense; nor to order that they be sent to the court of review; unless an inspection of the originals, instead of authenticated copies of the same, would assist in the determination of the appeal. Dowagiac Mfg. Co. v. Brennan, 156 Fed. 213. Documents used in the court of first instance cannot be examined in the court of review; unless by bill of exceptions, or some other proper manner, they are made a part of the record. Bassing v. Cady, 208 U. S. 386. Where, upon the argument and submission of a case in a court of review, references were made to the exhibits used in the trial court, and they were treated by both parties as properly before the appellate court; any informality in the manner in which they were brought there was waived. Wilson v. Chicago Lumber & Timber Co., C. C. A., 143 Fed. 705.

[25] S. C. Rule 11; C. C. A. Rule 15.

[26] S. C. Rule 11; C. C. A. Rule 15.

moved within a reasonable time after the notice is given, he shall destroy them, or make such other disposition of them as to him may seem best." [27]

A writ of error or appeal will not be dismissed because the transcript is defective, if properly authenticated.[28] The proper remedy is a certiorari for a diminution of the record.[29]

[27] S. C. Rule 33; C. C. A. Rule 34.

[28] S. C. Rule 14; C. C. A. Rule 18; Nashua & L. R. Corp. v. Boston & L. R. Corp., C. C. A., 61 Fed. 737; Merriman v. Chicago, D. & V. R. Co., C. C. A., 120 Fed. 240. But a direction was made that unless the appellant filed a supplementary transcript supplying the omitted evidence within thirty days, his appeal should be dismissed. Rodgers v. U. S. ex rel. Elsberg, C. C. A., 152 Fed. 426. And in other cases, the appellee was directed to designate the additional matter which he considered necessary for a proper presentation of the case and the appellant ordered to file a transcript thereof under penalty of a dismissal of the appeal. See Gregory v. Pike, C. C. A., 64 Fed. 415; State of Kansas v. Meriwether, C. C. A., 171 Fed. 39.

[29] S. C. Rule 14; C. C. A. Rule 18. Morgan v. Curtenius, 19 How. 8, 15 L. ed. 576; U. S. v. Gomez, 1 Wall. 690, 17 L. ed. 677; Baring v. Dabney, 19 Wall. 1, 22 L. ed. 90; Sweeney v. Lomme, 22 Wall. 208, 22 L. ed. 727; Missouri, K. & T. Ry. Co. v. Dinsmore, 108 U. S. 30, 27 L. ed. 640; U. S. v. Davenport's Heirs, 142 U. S. 704, 35 L. ed. 1174; City of Grafton v. Gentry Bros.' Shows, C. C. A., 240 Fed. 646; Presidio Mining Co. v. Overton, C. C. A., 261 Fed. 1023. An application made within a reasonable time after the record is printed will usually be granted, Bein v. Heath, 142 U. S. 704, 35 L. ed. 1174; provided, at least, that the transcript is sufficient to show the jurisdiction of the court of review. Kaw Valley Drainage Dist. v. Union Pac. R. Co., C. C. A., 163 Fed. 836. A *certiorari* for diminution of the record is not the proper remedy when the clerk has failed properly to authenticate the record. Gregory v. Pike, C. C. A., 64 Fed. 415.

According to earlier rulings it was held: that the clerk may supply a deficiency in the record by subsequently sending up the omitted matter properly authenticated without any further order of the court; Crandall v. Nevada, 6 Wall. 35, 18 L. ed. 745; and that the court of first instance may direct omitted matter to be supplied, Hobbs v. Nat. Bank of Commerce, C. C. A., 93 Fed. 615; Lincoln Nat. Bank v. Perry, C. C. A., 66 Fed. 887; Whiting v. Equitable L. A. Soc., C. C. A., 60 Fed. 197; but see Smith v. McIntyre, 84 Fed. 721; or amend the return, Lincoln Nat. Bank v. Perry, C. C. A., 66 Fed. 887; Rollins v. Board of Com'rs of Gunnison County, C. C. A., 78 Fed. 741; at least at the same term, Whiting v. Eq. L. A. Soc., C. C. A., 60 Fed. 197; Rollins v. Board of Com'rs of Gunnison County, C. C. A., 78 Fed. 741. But it seems that leave to file new matter must be obtained from the court of review, Telluride Power Transm. Co. v. Rio Grande W. Ry. Co., 175

It is the duty of the plaintiff in error or appellant to docket the cause and file the record thereof with the clerk of the appellate court before the return-day, which is usually within thirty days after the signature of the citation,[30] except in the Supreme Court, on appeals or writs of error from California, Oregon, Washington, New Mexico, Utah, Nevada, Arizona, Montana, Idaho, Wyoming, North Dakota, South Dakota, Alaska, Hawaii and Porto Rico when the period of thirty days is extended to sixty days, and from the Philippine Islands when the period is one hundred and twenty days.[31] Upon the due filing of the transcript and assignment of errors, together with the writ of error, if one has been duly issued, the court of review acquires jurisdiction of the case.[32] If the plaintiff in error or appellant fails to docket the case and file the record in time, he may for good cause shown obtain from the judge who signed the citation or a judge of the appellate court an order enlarging his time either before or after its expiration, at least before the term succeeding the return-day has expired.[33] This order must

U. S. 639, 44 L. ed. 305; Burnham v. N. Chicago St. Ry. Co., C. C. A., 87 Fed. 168. The clerk cannot in this manner correct an erroneous statement in the transcript, Hudgins v. Kemp, 18 How. 530, 15 L. ed. 511. The record may be amended in the appellate court by consent. Fletcher v. Peck, 6 Cranch, 87, 3 L. ed. 162; and in a case where it was evident from an inspection of the transcript that it contained a clerical error, the Supreme Court permitted it to be corrected by amendment, on the production of the certificate of the clerk below as to the error, without a *certiorari*. Woodward v. Brown, 13 Pet. 1, 10 L. ed. 31; Stitt v. Huidekopers, 17 Wall. 384, 21 L. ed. 644. See Kennedy v. Bank of Georgia, 8 How. 586, 12 L. ed. 1209; Shaw v. Railroad Co., 101 U. S. 557, 25 L. ed. 892. See Dist. of Columbia v. Brooke, 214 U. S. 138, 53 L. ed. 941. Defects in a transcript cannot be supplied by reference to the record in another appeal. South Carolina v. Wesley, 155 U. S. 542, 39 L. ed. 254.

[30] S. C. Rules 8 and 9; C. C. A. Rule 14, *supra*, §§ 699, 700a.

[31] S. C. Rule 9, as amended, 200 U. S. 626.

[32] Martin v. Burford, C. C A., 176 Fed. 554.

[33] S. C. Rule 9; C. C. A. Rule 16, *infra*, § 705.

A *mandamus* or other appropriate order may issue to compel the clerk to certify to a transcript of the record; U. S. v. Booth, 18 How. 476, 15 L. ed. 464; U. S. v. Gomez, 3 Wall. 752, 18 L. ed. 212. But not, it has been held, to compel him to transmit a particular paper. Starcke v. Klein, C. C. A., 62 Fed. 502; but a failure to move for a *mandamus* will not necessarily be considered

be filed with the clerk of the appellate court.[34] If the plaintiff in error or appellant fails to comply with this rule, the defendant in error or appellee may have the case docketed and dismissed upon producing a certificate from the clerk of the court wherein the judgment or decree was rendered, stating the case, and certifying that such writ of error or appeal was duly sued out and allowed.[35] After such dismissal, the plaintiff in error or appellant can only by special leave of the court docket the case and file the record.[36]

"No certiorari for diminution of the record will be hereafter awarded in any case, unless a motion therefor shall be made in writing, and the facts on which the same is founded shall, if not admitted by the other party, be verified by affidavit. And all motions for certiorari must be made at the first term of the entry of the case; otherwise, the same will not be granted, unless upon special cause shown to the court, accounting satisfactorily for the delay."[37] A case which is sought to be reviewed both by appeal and by writ of error need not be docketed.[38] The defendant in error or appellee may, if he chooses, docket the cause and file the record. If the defendant in error files the transcript or dockets the cause before the time has expired, and subsequently the plaintiff in error files the transcript and dockets the cause in due time, the case on the plaintiff's docketing will stand and on the defendant's docketing be dismissed.[39] The plaintiff in error or appellant must on docketing a cause and filing the record enter into an undertaking to the clerk, with surety to his satisfaction, for the payment of his fees, or otherwise satisfy him in that behalf.[40] Upon the filing of a transcript

laches by the plaintiff in error; U. S. v. Gomez, 3 Wall. 752, 18 L. ed. 212.

[34] S. C. Rule 9; C. C. A. Rule 16. In the Second Circuit "The order of enlargement to be filed with the clerk of the District Court and to be transmitted by him to this court with the transcript." (Amendment of March 13, 1916).

[35] *Ibid.*

[36] *Ibid.*

[37] S. C. Rule 14; C. C. A. Rule 18.

[38] Hurst v. Hollingsworth, 94 U. S. 111, 24 L. ed. 31; Plymouth G. M. Co. v. Amador & S. C. Co., 118 U. S. 264, 30 L. ed. 232.

[39] Hartshorn v. Day, 18 How. 28, 15 L. ed. 272; Davis v. Corbin, 113 U. S. 687, 28 L. ed. 1149.

[40] S. C. Rule 10. Where the transcript had been filed in time, but through inadvertence a fee bond had not been given to the clerk, the appellant was permitted to docket the cause after the term, in a case where

of the record, the appearance of the counsel for the party docketing the cause should be entered.[41] It has been held that a writ of error or appeal may be dismissed because no assignment of error is sent up with the return.[42] It seems that in a proper case and under proper restrictions, pending an application for a rehearing below, the appellate court may remit the record at the request of the court below,[43] but not, it seems, at the request of the parties.[44] The Supreme Court allowed a transcript to be returned to the court below for correction, by the addition of the clerk's signature, after the time to take a new appeal had expired.[45] After the dismissal of a writ of error on the motion of the plaintiff in error, the court refused to allow the transcript to be withdrawn.[46] After the transcript has been filed, the case is transferred to the court of review, and thenceforth the case should be entitled at common law by the names of the plaintiffs in error against the defendants in error, and in equity by the names of the appellants against the respondents, without regard to the respective positions of the parties below.

§ 705. Motions to dismiss appeals and writs of error. In general. Motions to dismiss writs of error and appeals may be made upon the following grounds: For want of jurisdiction; for abatement;[1] for irregularities or informalities in the papers;

no motion to dismiss had been made. Edwards v. U. S., 102 U. S. 575, 26 L. ed. 293; *contra*, Green v. Elbert, 137 U. S. 615, 34 L. ed. 792.

[41] S. C. Rule 9.

[42] S. C. Rule 35; C. C. A. Rule 11; Dufour v. Lang, C. C. A., 54 Fed. 913. But see School Dist. of Ackley v. Hall, 106 U. S. 428, 27 L. ed. 237; Gumbel v. Pitkin, 113 U. S. 545, 28 L. ed. 1128; S. C. Rule 35, as first adopted, 137 U. S. 709.

[43] Roemer v. Simon, 91 U. S. 149, 23 L. ed. 267; Nutter v. Mossberg, 118 Fed. 168; Mossberg v. Nutter, C. C. A., 124 Fed. 966, pending an application for leave to file a bill in the nature of a bill of review.

[44] Roemer v. Simon, 91 U. S. 149, 23 L. ed. 267.

[45] Idaho & Oregon, L. Imp. Co. v. Brandbury, 132 U. S. 509, 33 L. ed. 433.

[46] Cheney v. Hughes, 138 U. S. 403, 34 L. ed. 993. But see Porter v. Foley, 21 How. 393, 16 L. ed. 154.

§ 705. [1] An abatement may occur by the death of a sole party on either side where the plaintiff has failed below and the cause of action does not survive. Martin's Adm'r v. Balt & O. R. Co., 151 U. S. 673, 703, 38 L. ed. 311, 322. But see Roberts v. Criss, C. C. A., 266 Fed. 296. By the failure of the plaintiff in error or appellant to revive the suit after

for the failure of the plaintiff in error or appellant to perfect the appeal or proceedings in error; for the abandonment of the appeal or writ of error by the plaintiff in error or appellant;[2] upon the consent of the parties;[3] because of estoppel or waiver;[4] because the controversy has been settled pending the appeal or writ of error;[5] and because the suit is fictitious or there is no longer any real controversy between the parties.[6] Cross-appeals may be dismissed upon the same grounds as original appeals.[7]

A writ of error or appeal may be dismissed for want of jurisdiction on the motion of the appellate court without the suggestion of either party.[8] A writ of error or appeal will not be dis-

due notice of the death of a party, S. C. Rule 9; C. C. A. Rule 19; *supra*, § 227; but not when the right of action survives to or against the surviving parties, plaintiffs or defendants, as the case may be, Wilhite v. Shelton, C. C. A., 149 Fed. 67. By the death, State of Florida v. Croom, 226 U. S. 309, 57 L. ed. —, or the retirement from office of an officer sued solely in his official capacity. Lansing & Co. v. Hesing, C. C. A., 81 Fed. 242. Shaffer v. Howard, 249 U. S. 200, 39 Sup. Ct. 255, 63 L. ed. 559; unless in the case of an officer of the United States his successor has within six months been substituted, 30 St. at L. 822, quoted *supra*, § 216. LeCrone v. McAdoo, 253 U. S. 217; or in the case of a State officer when the State law authorizes a revival or continuance of the case against his successors. Shaffer v. Howard, 249 U. S. 200, 39 Sup. Ct. 255, 63 L. ed. 559. By the reversal of a judgment upon which the decree below was founded, Chicago & V. R. Co. v. Fosdick, 106 U. S. 47, 84, 85, 27 L. ed. 47, 65; by the subsequent probate of a will when the appellant's claims are founded upon a supposed intestacy, Kimball v. Kimball, 174 U. S. 158, 43 L. ed. 932.

By the foreclosure of a mortgage which cuts off the rights of the appellant, Lisman v. Knickerbocker Trust Co., C. C. A., 211 Fed. 413, 418; and by the repeal without a saving clause of the statute upon which the jurisdiction of the appellate court depends. *Ex parte* McCardle, 7 Wall. 506, 19 L. ed. 264; Balt. & P. R. Co. v. Grant, 98 U. S. 398, 25 L. ed. 231; *infra*, § 705e.

[2] *Infra*, § 705a.

[3] *Infra*, § 705b.

[4] *Infra*, § 705c.

[5] *Infra*, § 705d.

[6] *Ibid.*

[7] L. Bucki & Son L. Co. v. Atl. L. Co., C. C. A., 63 Fed. 765; Hilton v. Dickinson, 108 U. S. 165, 27 L. ed. 688; Hare v. Birkenfield, C. C. A., 181 Fed. 825.

[8] Hilton v. Dickinson, 108 U. S. 165, 27 L. ed. 688; New Orleans Nat. Banking Ass'n v. New Orleans Mut. Ins. Ass'n, 102 U. S. 121, 26 L. ed. 45; Hapai v. Brown, 239 U. S. 502; Youtsey v. Niswonger, C. C. A., 258 Fed. 16 (when taken too late). A writ of error or appeal may be dismissed where it appears upon the

missed for want of jurisdiction of the court below.[9] In such a case the court of review will take jurisdiction and direct a reversal.[10] A writ of error to a State court will be dismissed unless it shows at least a color of ground for the averment of a Federal question.[11] The Supreme Court cannot dismiss a cause on motion, because it was brought there for delay only, nor because the grounds of the appeal or writ of error are frivolous, unless a motion to affirm is coupled with the motion to dismiss.[12] Two concurrent appeals from the same order or

examination of affidavits and counter-affidavits filed in the appellate court, that the value of the property in dispute is less than the jurisdictional amount. Wells v. Wilkins, 116 U. S. 393, 29 L. ed. 671. See *supra*, § 696. Where an appeal has been allowed after a contest as to the value of the matter in dispute, it will not be dismissed because the court may be of the opinion that possibly the estimates acted upon below were too high, if there is no decided preponderance of evidence against jurisdiction. Gage v. Pumfelly, 108 U. S. 164, 27 L. ed. 668. See also Zeigler v. Hopkins, 117 U. S. 683, 29 L. ed. 1019. Where the court below had failed to give due effect to a *remittitur* or release of part of the recovery, the Supreme Court modified the judgment so as to give due effect to the *remittitur*, and affirmed the judgment as thus modified so as to be less than the jurisdictional amount without examining the other assignments of error. Simms v. Simms, 175 U. S. 162, 44 L. ed. 115. So of the objection that there is a defeat of parties to the appeal or writ of error. Estis v. Trabue, 128 U. S. 225, 32 L. ed. 437; Ayres v. Polsdorfer, C. C. A., 105 Fed. 737; and cases cited *supra*, § 697. But see Clinchfield Fuel Co. v. Titus, C. C. A., 226 Fed. 574. A writ of error by the receiver of a national bank will not be dismissed because the Comptroller in his direction to sue out the writ incorrectly named the defendant in error. Pacific Nat. Bank v. Mixter, 114 U. S. 463, 29 L. ed. 221.

[9] Harris v. Barber, 129 U. S. 366, 32 L. ed. 697; Pike v. Gregory, C. C. A., 94 Fed. 373; Nashua & L. R. Corp. v. Boston & L. R. Corp., C. C. A., 51 Fed. 929, 930; and cases cited *infra*, § 711.

[10] *Ibid.* But see Davis v. Virginia Ry. & Power Co., C. C. A., 229 Fed. 633. Where the act which gave the jurisdiction to the court of first instance was repealed after a judgment for the plaintiff, the appeal was dismissed. U. S. v. McCrory, C. C. A., 91 Fed. 295.

[11] Hamblin v. Western Land Co., 147 U. S. 531, 37 L. ed. 267; Deming v. Carlise Packing Co., 226 U. S. 102, 57 L. ed. —; *infra*, § 705b.

[12] Amory v. Amory, 91 U. S. 356, 23 L. ed. 436; Bohanan v. Nebraska, 118 U. S. 231, 30 L. ed. 71. See *infra*, § 705f. *Cf.* Citizens' Bank v. Farwell, C. C. A., 56 Fed. 539; Williams v. First Nat. Bank of Pauls Valley, 216 U. S. 582, 54 L. ed. 625. Where the time to appeal has expired the appellant is not prejudiced because of an affirmance instead of a dismissal. Corcoran v. Kostrometinoff, C. C. A., 164 Fed. 685.

decree by the same party to the same court are not allowed, and on motion such court will determine which of the two should be dismissed;[13] but a writ of error from the Circuit Court of Appeals should not be dismissed because the Supreme Court has issued a writ of error to review the judgment upon another ground.[14] Motions to dismiss writs of error and appeals for irregularities and informalities in the papers are of less importance now than formerly, on account of the statute allowing amendments in nearly every case of an irregularity or informality.[15]

[13] Wheeler v. Harris, 13 Wall. 51, 20 L. ed. 531. The allowance of an appeal which afterwards becomes of no avail, from failure to file the record and prosecute it, is no bar to a second appeal, within the time allowed by law. Evans v. State Nat. Bank, 134 U. S. 330, 33 L. ed. 917. No motion to dismiss will be granted because the transcript filed is incomplete, if properly certified. U. S. v. Davenport's Heirs, 142 U. S. 704, 35 L. ed. 1174; Gregory v. Pike, 64.

[14] Lamar v. U. S., 241 U. S. 103.

[15] U. S. R. S., § 1005. See *supra*, § 699. An appeal will not be dismissed because no citation was served when the appeal was taken in open court, nor because the citation was served less than thirty days before the return-day. Seagrist v. Crabtree, 127 U. S. 773, 32 L. ed. 323. An appeal will not be dismissed because no bond was filed in the court below, when the appeal was taken in open court, and the bond filed in the court of review. Sumpter Lumber Co. v. Sound Timber Co., C. C. A., 257 Fed. 408. Nor, it seems in any case where the appellate court sees fit to relieve the party from such a default. Graham v. O'Ferral, C. C. A., 236 Fed. 717. An appeal will not be dismissed because a *supersedeas* has been improperly awarded. Hudgins v. Kemp, 18 How. 530, 15 L. ed. 511; La Conner Trading & Transportation Co. v. Widmer, C. C. A., 136 Fed. 177 (an appeal bond in admiralty) nor, because the statement of facts found by the court and its conclusions of law thereon are not a sufficient compliance with the rules of the Supreme Court on that subject. U. S. v. Adams, 6 Wall. 101, 18 L. ed. 792. A writ of error has been dismissed for the failure to annex to the transcript an assignment of errors. Dufour v. Lang, C. C. A., 54 Fed. 913. See S. C. Rule 35; C. C. A. Rule 11; Benites v. Hampton, 123 U. S. 519, 31 L. ed. 260; *supra*, § 701. But see School Dist. v. Hall, 106 U. S. 428, 27 L. ed. 237; Gumbel v. Pitkin, 113 U. S. 545, 28 L. ed. 1128. The objection that the plaintiff in error or appellant has failed to perfect the appeal or writ of error must be taken by a preliminary motion to dismiss the writ of error or appeal for irregularity. Mandeville v. Riggs, 2 Pet. 482, 7 L. ed. 493. And in many cases it will be waived by the appearance of the defendant in error or respondent in the appellate court for a term without a motion to dismiss. U. S.

§ 705a. Dismissal because of default. If the plaintiff in error or appellant fails to docket the case with the clerk of the appellate court before the return-day, whether in vacation or

v. Armejo, 131 U. S. lxxxii, 18 L. ed. 247; Pierce v. Cox, 9 Wall. 786, 19 L. ed. 786; Buckingham v. McLean, 13 How. 150, 14 L. ed. 93; Radford v. Folsom, 123 U. S. 725, 31 L. ed. 292. Such an appearance and delay is a waiver of the objection that the citation has not been served; U. S. v. Armejo, 131 U. S. lxxxii, 18 L. ed. 247; Pierce v. Cox, 9 Wall. 786, 19 L. ed. 786; Buckingham v. McLean, 13 How. 150, 14 L. ed. 90; Radford v. Folsom, 123 U. S. 725, 31 L. ed. 292; Chaffee v. Hayward, 20 How. 208, 15 L. ed. 804; Lockman v. Lang, C. C. A., 132 Fed. 1; and a waiver of the objections that the citation is signed by a different judge from the one who allowed the appeal; Aldrich v. Ætna Co., 8 Wall. 491, 19 L. ed. 473; Sage v. Railroad Co., 96 U. S. 712, 24 L. ed. 641; and that the return-day named in the writ is too late; Freeman v. Clay, 48 Fed. 849; and of most objections that might be cured by amendment. Waters-Pierce Oil Co. v. Van Elderen, C. C. A., 137 Fed. 557; Love v. Busch, C. C. A., 142 Fed. 429, 431. *Cf.* Long v. Farmers' State Bank, C. C. A., 147 Fed. 360, citing McDonogh v. Millaudon, 3 How. 693, 700, 11 L. ed. 787, 794. Where a motion is made to dismiss an appeal upon the ground that no appeal bond has been given, or approved, or citation served, the court will usually give a reasonable time to supply the deficiency. Anson v. Blue Ridge R. Co., 23 How. 1, 16 L. ed. 517; Richardson v. Green, 130 U. S. 104, 32 L. ed. 872; Freeman v. Clay, 48 Fed. 849; O'Reilly v. Edrington, 96 U. S. 724, 24 L. ed. 659; Fisher Hydraulic Stone & Machinery Co. v. Warner, C. C. A., 233 Fed. 527; Graham v. O'Ferral, C. C. A., 236 Fed. 717; in one case sixty days, to file the bond; Anson v. Blue Ridge, R. C. 23 How. 1, 16 L. ed. 517. A writ of error was dismissed when the plaintiff in error refused to give the clerk security for his fees as required by the former rule. Owings v. Tierman, 10 Peters, 447, 9 L. ed. 480, § 8, S. C. Rule 10 quoted, § 706, *infra; supra*, § 704. A writ of error will not be dismissed because the bill of exceptions was not signed in due time. E. I. Du Pont de Nemours & Co. v. Smith, C. C. A., 249 Fed. 403; nor because it was allowed in a division of the district other than that in which was situated the county of the State where the case was pending when removed from the Federal court. Wheeler v. Taft, C. C. A., 216 Fed. 978; nor will an appeal be dismissed because of a clerical error in the description of the decree appealed from; Brown v. Kossove, C. C. A., 255 Fed. 806. Nor will the writ of error be dismissed because the case should have been reviewed by appeal. Toyo Kisen Kaisha v. Hartman, C. C. A., 253 Fed. 422; nor an appeal dismissed because the review should have been by writ of error (Act of Sept. 6, 1916, Ch. 448, § 4, 39 St. at L. 727, Comp. St., § 1649a), *supra*, § 687. Sola v. Cintron & Aboy, C. C. A., 237 Fed. 61.

in term, unless his time has been enlarged by the justice or judge who signed the citation or by a judge or justice of the appellate court,[1] which enlargement can only be by an order to be filed with the clerk of the appellate court; the defendant in error or appellee may have the case docketed and dismissed, upon producing a certificate from the clerk of the court wherein the judgment or decree was rendered, stating the case, and certifying that such writ of error or appeal has been duly sued out and allowed.[2] It seems that if the record is not filed in the court of review at the term succeeding that at which the appeal is allowed or the writ of error issued, the appeal or writ of error becomes void, and the appellate court will of its own motion dismiss the appeal,[3] unless good cause for a review is

§ 705a. [1] An order extending the time to file the return, if made by a district judge who, when he signs it, is not a member of the Circuit Court of Appeals, is a nullity. West v. Irwin, 54 Fed. 419, 420.

[2] S. C. Rule 9, C. C. A. Rule 16; Wong Sang v. U. S., C. C. A., 144 Fed. 968; incorporated town of Gilman v. Fernald, C. C. A., 141 Fed. 940; Love v. Busch, C. C. A., 142 Fed. 429. Where an appellant or plaintiff in error without fault on his part was prevented from filing the transcript by the fraud of his opponent or the contumacy of the clerk or the order of the court below, his time to file the transcript was enlarged. U. S. v. Gomez, 3 Wall. 752, 18 L. ed. 212; Ableman v. Booth, 21 How. 506, 512, 16 L. ed. 169, 172. The failure to docket in time is not excused by the fact that the clerk below agreed to file the record, and it was left with him for that purpose, Fayolle v. Texas & Pac. Ry. Co., 124 U. S. 519, 31 L. ed. 533; nor by his certificate that he could not, consistently with his other duties, return a transcript of the record within the required time, Sturgess v. Harrold, 18 How. 40, 15 L. ed. 261, nor by his mistake as to the return-day, Richardson v. Green, 130 U. S. 104, 32 L. ed. 872. But where the transcript was filed within the time required by the rule, but a few days after the return-day, the delay was excused, Florida v. Charlotte H. Ph. Co., C. C. A., 70 Fed. 883; Farmers' L. & Tr. Co. v. Chicago & N. P. R. Co., C. C. A., 73 Fed. 314; McClellan v. Pyeatt, C. C. A., 49 Fed. 259.

[3] Castro v. U. S., 3 Wall. 46, 18 L. ed. 163; Killian v. Clark, 111 U. S. 784, 28 L. ed. 599; Radford v. Folsom, 123 U. S. 725, 31 L. ed. 292; Small v. Northern Pac. R. Co., 124 U. S. 514, 33 L. ed. 1006; West v. Irwin, C. C. A., 54 Fed. 419. See authorities cited *supra*, § 704; Hudson v. Limestone Natural Gas Co., C. C. A., 144 Fed. 952; Wong Sang v. U. S., C. C. A., 144 Fed. 968. See Amendment of Rules, 137 U. S. 710; C. C. A. Rules 14, 16. As to appeals from the Supreme Court of Porto Rico, see Graham v. O'Ferral, C. C. A., 236 Fed. 717. But see

shown.[4] It has been held that an order of enlargement made after the time has expired, is ineffectual,[5] but where the transcript is filed before the motion to dismiss is made, the motion will usually be denied.[6] The fact that the appellee or defendant in error has failed to file the record and docket the cause within the time prescribed does not deprive him of the right to have the cause dismissed.[7] When the case is reached on the calendar and no counsel appears and no brief has been filed for the plaintiff in error or appellant, the defendant in error or respondent may have the plaintiff called and the writ of error or appeal dismissed, or may open the record and pray for an affirmance; but the court may, of its own motion, consider the case on the merits.[8] This, except in an extraordinary case, the court will not do unless the assignment of errors clearly presents the questions in issue.[9] A writ of error cannot be dis-

Betts v. Gahagan, C. C. A., 205 Fed. 890; Grafton v. Meikleham, C. C. A., 246 Fed. 737.

[4] Pender v. Brown, C. C. A., 120 Fed. 496.

[5] Chamberlain Transportation Co. v. South Pier Coal Co., C. C. A., 126 Fed. 165.

[6] Southern Pine Lumber Co. v. Ward, 208 U. S. 126, 52 L. ed. 420; Altenberg v. Grant, C. C. A., 83 Fed. 980, 981; The Kawailani, C. C. A., 128 Fed. 879; Incorporated Town of Gilman v. Fernald, C. C. A., 141 Fed. 940; Equitable Life Assur. Soc. of U. S. v. Tolbert, C. C. A., 145 Fed. 338. See Bingham v. Morris, 7 Cranch, 99, 3 L. ed. 281; Sutherland v. Pearce, C. C. A., 186 Fed. 783.

[7] U. S. v. Fremond, 18 How. 30, 15 L. ed. 302.

[8] S. C. Rule 16; C. C. A. Rule 22; Newman v. Moyers, 253 U. S. 182. This rule of the Circuit Court of Appeals does not apply when there is a call of the entire docket at the beginning of the term, and a case is then called in order to appoint a day for the argument, but is not actually reached for argument. Lem Hing Dun v. U. S., C. C. A., 49 Fed. 145. A cross-appeal will be dismissed if not ready for argument when the original appeal is called, unless reason for a postponement is shown. L. Bucki & Son L. Co. v. Atlantic C. L. Co., C. C. A., 93 Fed. 765; Yates v. Jones Nat. Bank, 206 U. S. 158, 51 L. ed. 1002 (where the writ of error was dismissed as regards one of two plaintiffs in error, and the judgment affirmed as regards the other).

[9] Fitch v. Richardson, C. C. A., 147 Fed. 196. An appeal was dismissed for delay in filing a brief, although the delay was authorized by a stipulation of the parties, made without the consent of the court, and the brief was filed a short time before the dismissal. Missouri, K. & T. Ry. Co. v. Kidd, C. C. A., 146 Fed. 499. See Moline Trust & Savings Bank v. Wylie, C. C. A., 149 Fed. 734. Additional time was re-

missed for want of the appearance of counsel for the plaintiff in error before it is reached on the calendar.[10] When a case is reached for argument on the regular call of the docket and there is no appearance of either party, the case will be dismissed at the cost of the plaintiff in error or appellant.[11] Such a default may for good cause be opened at the same term.[12] When a case is called for argument in the Supreme Court at two successive terms and upon the second term no one is prepared to argue it, it will be dismissed at the cost of the plaintiff in error or appellant, unless good cause to the contrary is shown.[13]

§ 705b. Dismissal upon consent. A writ of error or appeal may be dismissed on the consent of both parties thereto.[1] An

fused where it appeared that there must be an affirmance. Matsumura v. Higgins, C. C. A., 187 Fed. 601. When the plaintiff in error or appellant fails on the argument to submit a brief such as is required by Supreme Court Rule 21, or Circuit Court of Appeals Rule 24, the case may be dismissed. S. C. Rule 21; C. C. A. Rule 24; Benites v. Hampton, 123 U. S. 519, 31 L. ed. 260. See *infra*, § 707.

[10] Larman v. Tisdale, 142 U. S. 705, 35 L. ed. 1174; Newman v. Moyers, 253 U. S. 182, where the judgment enforced an illegal contract.

[11] S. C. Rule 18; C. C. A. Rule 22.

[12] Rosenthal v. Coates, 148 U. S. 142, 37 L. ed. 399.

[13] S. C. Rule 19; C. C. A. Rule 17.

§ 705b. [1] S. C. Rule 28; C. C. A. Rule 20. In the Supreme Court it seems that in term time a motion founded upon a stipulation for such dismissal should be made in open court before the case will be dismissed. In vacation in the Supreme Court and at all times in the Circuit Court of Appeals, whenever plaintiff and defendant in error, or appellant and appellee, sign and file an agreement in writing through their attorneys of record directing the case to be dismissed and specifying the terms on which it is to be dismissed as to costs, and pay to the clerk any fees that may be due to him, it is the duty of the clerk to enter the case dismissed, and give a copy of the agreement to the parties requesting it, but no mandate or other process will issue without the order of the court. S. C. Rule 91, C. C. A. Rule 16; Wong Sang v. U. S., C. C. A., 144 Fed. 968. Where, after an order of dismissal on such a stipulation in vacation, but before a mandate had issued, a third party intervened, claiming that he had previously bought the rights of the plaintiff in error, and that the dismissal was in fraud of his rights, the order of dismissal was amended by adding the words: "without prejudice to the right of Albert M. Henry to proceed as he may be advised in the court below, for the protection of his interest." Woodman v. Mis-

appeal or writ of error will not be dismissed at the request of the plaintiff in error or appellant, without the consent of the defendant or respondent, except on motion and for special reasons.[2] It is usual in the Supreme Court to grant leave to

sionary Soc., 124 U. S. 161, 31 L. ed. 352. Where it was suggested to the Supreme Court that a cause had been compromised, the debt, which the suit was brought to collect, paid, and a stipulation made that the plaintiff in error dismiss the suit; it was ordered that, unless the plaintiff in error show cause to the contrary on or before a motion day two weeks hence, the writ of error be dismissed, service of the order to show cause to be made on the counsel for the plaintiff in error, in Texas, by the clerk of the Supreme Court through the mail. Addington v. Burke, 125 U. S. 693, 31 L. ed. 853. In a case where appeals were being prosecuted by the order of the directors of a corporation, the Supreme Court refused to dismiss such appeals on the motion of parties who claimed to be holders of a majority of the stock of the corporation. Railway Co. v. Alling, 99 U. S. 463, 25 L. ed. 438. Where, on appeal by the city of New Orleans from a decree in favor of a railway company, the appellee moved for a dismissal of the appeal, on a stipulation therefor, signed by the city attorney pursuant to a compromise of the matter in dispute made with the city council; the Board of Liquidation of the city debt resisted the motion, claiming that, pending the appeal, authority over the subject-matter had been transferred from the city council to that board, and that the compromise was invalid; and also moved for leave to prosecute the appeal in the name of the city,—it was held that the question presented was too important to be settled summarily on a motion, and ordered that the cause and motions be continued to the next term, and that the appeal be then dismissed unless the Board of Liquidation should begin and prosecute, in some court of competent jurisdiction, without unnecessary delay, an appropriate proceeding to set aside the compromise made with the city council. City of New Orleans v. New Orleans, M. & T. R. Co., 108 U. S. 15, 27 L. ed. 635. In one case the Supreme Court refused, on motion of the attorney for the defendant in error, who claimed that he had a lien on the judgment for his costs, to docket a case which had been dismissed upon stipulation after a settlement between the parties. Platt v. Jerome, 19 How. 384, 15 L. ed. 623. In the Supreme Court no affidavits or other papers can be filed with such a stipulation. U. S. v. Griffith, 141 U. S. 212, 35 L. ed. 719.

[2] U. S. v. Minn. & N. W. R. Co., 18 How. 241, 15 L. ed. 347; McGuire v. Commonwealth, 3 Wall. 382, 18 L. ed. 164. In such a case, he is not entitled as of right to have the order state that the dismissal is without prejudice, but it may state the fact that there has been no hearing upon the merits. Donallan v. Tannage Patent Co., C. C. A., 79 Fed. 385. Where it is

withdraw an appearance whenever asked, without prejudice to all the rights of the adverse party.[3] After an appearance has been withdrawn, the defendant in error may have the plaintiff called and the suit dismissed, or open the record and pray for an affirmance.[4]

§ 705c. Dismissal because of waiver or estoppel. An appeal may be dismissed because the appellants are estopped from prosecuting it.[1] Compliance with the judgment or decree by

the practice, as in the Third Circuit, that an appeal in admiralty opens the case to both parties for a new trial a respondent whose time to appeal has expired may prevent the appeal from being dismissed upon the motion of the appellant. The John Twohy, 255 U. S. 77. An appeal may be dismissed at the request of the appellant, for the purpose of enabling him to apply to the court of original jurisdiction for leave to open the decree for further proceedings. Greene v. United Shoe Mach. Co., C. C. A., 124 Fed. 961. An appeal has been dismissed without costs at the request of the court below, in order that an application to file a bill of review might be made thereto. Mossberg v. Nutter, C. C. A., 124 Fed. 966. Where during the pendency of an appeal to the Supreme Court from the Court of Claims, the latter court grants a new trial, the appeal will be dismissed on motion of the appellant. U. S. v. Young, 94 U. S. 258, 24 L. ed. 153; Latham's Appeal, 9 Wall. 145, 19 L. ed. 771; Deming's Appeal, 10 Wall, 251, 19 L. ed. 893; U. S. v. Ayres, 9 Wall. 608, 19 L. ed. 625; U. S. v. Crusell, 12 Wall. 175, 20 L. ed. 384; *Ex parte* Russell, 13 Wall. 664, 20 L. ed. 632; *Ex parte* U. S., 16 Wall. 699, 21 L. ed. 507. An appeal will not usually be dismissed on motion of the appellant without the consent of the respondent, if the appellant intends to bring a new appeal; but when the Attorney-General averred that other questions not on the record were material and should be considered, leave to dismiss the appeal was granted. U. S. v. Minn. & N. W. R. Co., 18 How. 241, 15 L. ed. 347.

[3] McGuire v. Commonwealth, 3 Wall. 382, 18 L. ed. 164; U. S. v. Yates, 6 How. 605, 12 L. ed. 575. But see Farrar v. U. S., 3 Pet. 459, 7 L. ed. 741.

[4] McGuire v. Commonwealth, 3 Wall. 382, 18 L. ed. 164; S. C. Rule 16; C. C. A. Rule 22.

§ 705c. [1] Talbot v. Mason, C. C. A., 125 Fed. 101. Courts have dismissed appeals from judgments entered by consent. Ballot v. U. S., 171 Fed. 404. *Contra*, Street Grading Dist. No. 60 v. Hagadorn, C. C. A., 186 Fed. 451. And where there had been a valid stipulation not to appeal, U. S. Consol. Seeded R. Co. v. Chaddock & Co., C. C. A., 173 Fed. 577. In the absence of a new employment, an attorney who appeared in the court below has no authority to stipulate that no writ of error or appeal shall be taken. Brown v. Arnold, 127 Fed. 387. Where, after the entry of an *ex parte* order appointing a temporary receiver, the defendant by agree-

payment and satisfaction,[2] or by obedience thereto[3] is, it has been held, no bar to an appeal or writ of error, where restitution may be enforced or the effect of the compliance otherwise undone, in case of a reversal.

It is no ground for a dismissal that the plaintiff in error or appellant has been paid voluntarily by the respondent a sum of money, or has accepted a transfer of property under the judgment or decree brought up for review;[4] where he appeals from a part of the decree which is entirely disconnected with that which directs the payment or conveyance; or where he accepts money or property to which he is entitled in any event.[5] Other-

ment made by counsel consented to the retention of the receivership, he cannot review such order on an appeal taken from a subsequent decree in the cause. Haight & Freese Co. v. Weiss, C. C. A., 156 Fed. 328. The right to sue out a writ of error to a judgment granting insufficient relief is not waived by moving for the entry of judgment after the denial of a motion for a new trial. Butte & B. Consol. Min. Co. v. Montana Ore P. Co., C. C. A., 121 Fed. 524. Where the defendant in error had opposed a motion for leave to withdraw a writ of error, issued before an assignment of errors had been filed; it was held that he thereby waived his right to move to dismiss the writ because prematurely issued. Alaska Un. Gold Min. Co. v. Muset, C. C. A., 114 Fed. 66.

[2] Hoogendorn v. Daniel, C. C. A., 202 Fed. 431. A writ of error was dismissed where pending the same the plaintiff in error voluntarily paid so much of the judgment as to reduce it below the jurisdictional amount. Thorp v. Bonnifield, 177 U. S. 15, 44 L. ed. 652.

[3] Josevig-Kennecott Copper Co. v. James F. Howarth Co., C. C. A., 261 Fed. 567. A suit for specific performance of a contract to deliver stock.

[4] Erwin v. Lowry, 7 How. 172, 184, 12 L. ed. 655, 660; D. W. Standrod & Co. v. Utah Implement-Vehicle Co., C. C. A., 223 Fed. 517. A party does not waive his writ of error or appeal by withdrawal from the registry of the court of a sum awarded to the appellant in a separable part of the decree, from which no appeal was taken, Snow v. Hazlewood, C. C. A., 179 Fed. 182; nor by compliance with an order of distribution, by collecting a judgment for costs and paying these into court, Robinson v. Hayes, C. C. A., 186 Fed. 295; nor by using a part of the money thus collected to pay the costs of the appeal, Ibid.

[5] Carson Lumber Co. v. St. Louis & S. F. R. Co., C. C. A., 209 Fed. 191. Where the Supreme Court of a State enjoined the collection of the judgment of the Supreme Court of the District of Columbia beyond a certain sum, it was held that the plaintiff was not estopped from prosecuting his writ of error to the Supreme Court of the United States by the fact that he had accepted this sum. Embry v. Palmer, 107 U.

wise in such a case the appeal or writ of error will be dismissed.[6] The right to appeal or to prosecute a writ of error may also be waived by accepting other benefits under the judgment or decree of which complaint is made,[7] or by other inconsistent acts.[8]

§ 705d. Dismissal of appeals and writs of error in moot cases. An appeal or writ of error may be dismissed, even after argument and on the court's own motion, upon proof that the controversy between the parties has been terminated,[1] even when

S. 3, 27 L. ed. 346; Spencer v. Babylon R. Co., C. C. A., 250 Fed. 24.

[6] McSweeney Packing Co. v. Beshlin, C. C. A., 211 Fed. 922; Spencer v. Babylon R. Co., C. C. A., 250 Fed. 24. It was held otherwise when it was proved that the appellant believed that he was obligated to accept the money. Jones v. Pettingill, C. C. A., 245 Fed. 269.

[7] Bankers' Trust Co. v. Missouri, K. & T. Ry. Co., C. C. A., 257 Fed. 789, taking the benefit of the extension of a receivership or of the consolidation of two suits.

[8] Woodworth v. Chesbrough, 244 U. S. 78. It was held that a consent in the Circuit Court of Appeals to the direction of final judgment against the plaintiff in error instead of a new trial which had first been ordered was not a waiver and that such final judgment might be reviewed by writ of error. Thomsen v. Cayser, 243 U. S. 66.

§ 705d. [1] Little v. Bowers, 134 U. S. 547, 33 L. ed. 1016; Lord v. Veazie, 8 How. 251, 12 L. ed. 1067; Cleveland v. Chamberlain, 1 Black, 419, 17 L. ed. 93; Am. Wood Paper Co. v. Heft, 8 Wall. 333, 19 L. ed. 379; San Mateo County v. So. Pac. R. Co., 116 U. S. 138, 29 L. ed. 589; East Tenn., V. & G. R. Co. v. So. Tel. Co., 125 U. S. 695, 31 L. ed. 853; Buck's Stove & Range Co. v. Am. Federation of Labor, 219 U. S. 581, 55 L. ed. 345. Where the proceeding was brought solely to establish the right to an office and the term of the claimant had expired. Tennessee ex rel. Maloney v. Condon, 189 U. S. 64, 47 L. ed. 709.

Where the plaintiff in error sought to cancel the revocation of an annual license and the term thereof had expired. Security Mut. L. Ins. Co. v. Prewitt, 200 U. S. 446, 50 L. ed. 545, reinstated because it appeared that the court was mistaken as to the facts, and judgment affirmed in s. c. 202 U. S. 246, 50 L. ed. 1013. But see Boise City Irr. & Land Co. v. Clark, C. C. A., 131 Fed. 415. Where a patent expired pending an appeal from an interlocutory decree for an injunction against its infringement, Thomson-Houston El. Co. v. Nassau El. R. Co., C. C. A., 119 Fed. 354; or from a final decree for a perpetual injunction to that effect without an accounting, Chapin v. Friedberger-Aaron Mfg. Co., C. C. A., 158 Fed. 409. The facts in relation to the expiration of the patent should be presented to the appellate court at or before the argument of the appeal. Standard Fashion Co. v. Magrane Houston

Co., C. C. A., 259 Fed. 793; *Certiorari* granted, 250 U. S. 658, 40 Sup. Ct. 54, 63 L. ed. 1193. Otherwise, leave to file a supplemental bill in the nature of a bill of review so as to plead them may be denied or granted only upon terms. Westinghouse El. & Mfg. Co. v. Stanley Instrument Co., C. C. A., 138 Fed. 823, *Supra* §§ 231, 235. Where the complainant had waived the past damages and profits and had granted a license which the defendants accepted, Victor Talking Mach. Co. v. Am. Graphaphone Co., C. C. A., 192 Fed. 1023, or a compulsory license had been obtained under the copyright act; G. Ricordi & Co. v. Columbia Graphophone Co., C. C. A., 263 Fed. 354. In a suit for the infringement of a patent, one of several appellants, plaintiffs below, cannot have the appeal dismissed, against the objection of the others, upon the ground that a State court, in a suit between the same parties, has enjoined the appellants from making any claim against the appellee for the use of the patented invention. Marsh v. Nichols, 120 U. S. 598, — 30 L. ed. 796. But see Kimball v. Kimball, 174 U. S. 158, 43 L. ed. 932.

Appeals from orders denying injunctions will be dismissed when the appellant has been given the relief which he sought. Myers v. Cheesman, C. C. A., 174 Fed. 783; Lewis Pub. Co. v. Wyman, C. C. A., 182 Fed. 13; North British & Mercantile Ins. Co. v. Rose, C. C. A., 228 Fed. 290; Clark v. Fairbanks, C. C. A., 249 Fed. 431. Where after a writ of error to a judgment upon an indictment a *nolle prosequi* was entered in the court below by order of the President of the United States, and a copy thereof filed in the office of the clerk of the Supreme Court, this court on motion dismissed the case. U. S. v. Phillips, 6 Pet. 776, 8 L. ed. 578. Where, in an action on county bonds, subsequently to the judgment the county settled with the bondholders by giving them new bonds bearing a less rate of interest and destroying the old bonds, the writ of error was dismissed. Dakota County v. Glidden, 113 U. S. 222, 28 L. ed. 981. Where, pending an appeal from a decree granting or denying an injunction against the collection of a tax, the taxes have been voluntarily paid, Little v. Bowers, 134 U. S. 547, 33 L. ed. 1016; or deposited in a bank to the credit of the State under a statute which makes such a deposit the equivalent of payment, California v. San Pablo & Tulare R. Co., 149 U. S. 308, 37 L. ed. 747; or collected by compulsory process, Singer Mfg. Co. v. Wright, 141 U. S. 696, 35 L. ed. 906. Similarly, the appeal will be dismissed where the plaintiff in error had, in order to prevent a forfeiture, complied with the condition imposed by the judgment, and thus relieved itself from the forfeiture, therein decreed, American Book Co. v. Kansas, 193 U. S. 49, 48 L. ed. 613. Where the whole controversy except the question of costs has been settled, the appeal will be dismissed. Washington M. Co. v. District of Columbia, 137 U. S. 62, 34 L. ed. 572; Wingert v. First Nat. Bank of Hagerstown, 223 U. S. 670, 56 L. ed. 605; Arnold v. Woodsey, C. C. A., 54 Fed. 268; Lisman v. Knickerbocker Tr. Co., C. C. A., 211 Fed. 413; Clark

the appellant or plaintiff in error has acted under duress;[2] or upon proof that the act sought to be prohibited has been committed, at least in a case where no compensation can be given by damages.[3] Where the enactment of new legislation has rendered the controversy moot, the usual practice is not to consider the merits but to direct a dismissal of the bill without prejudice and without costs by affirmance or reversal as the action of the lower court demands.[4] An appeal will be dismissed by the court

v. Fairbanks, C. C. A., 249 Fed. 431. Appeals were dismissed when stipulations were made that the suits should abide by the orders, judgments and decrees that might be made and entered in another case, Knott v. St. Louis Southwestern Ry. Co., 230 U. S. 509. The fact that questions of costs are involved does not alter the rule as to the dismissal of moot questions. Wingert v. First Nat. Bank, 223 U. S. 670, 672, 32 Sup. Ct. 391, 56 L. ed. 605; Lisman v. Knickerbocker Tr. Co., C. C. A., 211 Fed. 413, 417.

Where there was an actual controversy, an appeal was not dismissed because the persons interested agreed in advance as to the steps taken to present the issue. *Ex parte* Steele, C. C. A., 162 Fed. 694. An appeal from a judgment enforcing a judgment of the Interstate Commerce Commission was not dismissed, although the time during which the order was effectual had expired. Southern Pac. Terminal Co. v. Interstate Commerce Commission, 219 U. S. 498, 55 L. ed. 310. Upon the point whether the questions presented are in fact moot the court may satisfy itself, if necessary, by extrinsic evidence. Mills v. Green, 159 U. S. 651, 16 Sup. Ct. 132, 40 L. ed. 293; Jones v. Montague, 194 U. S. 147, 24 Sup. Ct. 611, 48 L. ed. 913; Richardson v. McChesney, 218 U. S. 487, 31 Sup. Ct. 43, 54 L. ed. 1121; Buck Stove, etc., Co. v. Am. Federation of Labor, 219 U. S. 581, 31 Sup. Ct. 472, 55 L. ed. 345, Gompers v. Buck Stove, etc., Co., 221 U. S. 418, 451, 31 Sup. Ct. 492, 55 L. ed. 797, 34 L. R. A. (N. S.) 874; Meyers v. Cheesman, C. C. A., 174 Fed. 783, 785; Lisman v. Knickerbocker Tr. Co., C. C. A., 211 Fed. 413, 417.

[2] Am. Book Co. v. Kansas, 193 U. S. 49, 48 L. ed. 613.

[3] Wingert v. First Nat. Bank of Hagerstown, 223 U. S. 670, 56 L. ed. 605, the construction of a building; Mills v. Green, 159 U. S. 651, 40 L. ed. 293; Jones v. Montague, 194 U. S. 147; Richardson v. McChesney, 218 U. S. 487, 54 L. ed. 1121, election cases. *Contra*, matter of Madden, 148 N. Y. 136; Matter of Goodman, 146 N. Y. 284; People ex rel. Press Pub. Co. v. Martin, 72 Hun. 354; s. c., 142 N. Y. 228, 40 Am. St. Rep. 592; Matter of Cuddebeck, 3 N. Y. App. Div. 103; matter of Hopper v. Britt, 203 N. Y. 144; Matter of Hopper v. Britt, 204 N. Y. 524; People ex rel. Hotchkiss v. Smith, 206 N. Y. 231, 241; State *ex rel* Morris v. Wrightson, 56 N. J. Law 126. See also Davis v. Ohio, 241 U. S. 565.

[4] Dinsmore v. Southern Express Co., 183 U. S. 115, 46 L. ed. 111.

when it is shown by affidavits filed on behalf of persons not parties to the suit, that it is not conducted by parties having adverse interests, but is a collusive appeal taken for the purpose of obtaining a decision.[5]

§ 705e. Practice upon motions to dismiss. No motion to dismiss, except on special assignment by the court, will be heard, unless previous notice has been given to the adverse party, or his counsel or attorney.[1] In the Supreme Court the party moving to dismiss must serve notice of the motion, with a copy of his brief or argument, on the counsel for his opponent at least three weeks before the time fixed for submitting the motion, in all

In the latter cases after legislation which made the controversy moot the Supreme Court directed the dismissal of the bill without prejudice and without costs. Berry v. Davis, 242 U. S., 468; Board of Public Utility Commissioners v. Compañia General de Tabacos de Filipinas, 249 U. S. 425. So in City of Paducah v. Paducah Water Co., C. C. A., 258 Fed. 20 (municipal ordinance). This was also done where a war had rendered the controversy moot by interrupting the business which was affected. U. S. v. Hamburg-Amerikanische Packetfahrt-Actien Gesellschaft, 239 U. S. 466; U. S. v. Am.-Asiatic Steamship Co., 242 U. S. 537. See Commercial Cable Co. v. Burleson, 250 U. S. 360, 39 Sup. Ct. 512, 63 L. ed. 1030. Where the new statute re-enacted with additions the former law and was open to the same constitutional objections the Supreme Court exercised jurisdiction to decide those upon the writ of error. Campbell v. California, 200 U. S. 37, 50 L. ed. 382.

[5] Cleveland v. Chamberlain, 1 Black, 419, 17 L. ed. 93; Embry v. Palmer, 107 U. S. 3, 27 L. ed. 346; Benner v. Hayes, C. C. A., 80 Fed. 953. See S. Sternau & Co. v. George Borgfeldt & Co., C. C. A., 254 Fed. 694. Upon a motion to dismiss an appeal on the ground that the controversy is fictitious, where the evidence leaves the question doubtful, the court will grant a rule to show cause why the suit should not be dismissed, with leave to both parties to take and file depositions in support of and against the motion. Am. Wood Paper Co. v. Heft, 8 Wall, 333, 19 L. ed. 379; East Tenn., V. & G. R. Co. v. So. Tel. Co., 125 U. S. 695, 31 L. ed. 853. Where pending an appeal in a suit between two corporations a majority of the stock of the defendant appellant had been acquired by the parties in control of the plaintiff respondent, the Supreme Court reversed the decree without passing upon the merits and remanded the case for further proceeding in conformity with the law. So. Spring H. G. Min. Co. v. Amador M. G. Min. Co., 145 U. S. 300, 36 L. ed. 712. A receiver cannot, by a compromise subsequent to the decree, deprive of his right to appeal a creditor who is a party to the suit. Empire State Surety Co. v. Carroll County, C. C. A., 194 Fed. 593.

§ 705e. [1] S. C. Rule 6.

cases except where such counsel resides west of the Rocky Mountains, when the notice must be at least thirty days.[2] Affidavits of the deposit in the mail of the notice and brief, properly addressed to the counsel to be served, duly postpaid, in time to reach him by due course of mail, three weeks or thirty days, as the case may be, before the time fixed by the notice, is *prima facie* evidence of service on counsel who reside without the District of Columbia.[3] Further time may, however, be given either party by the court.[4] A motion to dismiss a writ of error or appeal upon the ground of want of jurisdiction, or, it seems, for any other ground except a failure to take the same in due time,[5] or a failure to perfect the same,[6] may be made at any time, even before the term to which the return should regularly be made.[7] The motion day in the Supreme Court is Monday throughout the term.[8] The motion, if not a motion to docket and dismiss for failure to file the record, must, in the first instance, be submitted on printed briefs and arguments.[9] If the court requires further argument on the subject, it will usually be ordered in connection with the argument of the case on the merits.[10]

The motion papers should contain so much of the record as to enable the court to act understandingly.[11] A printed transcript of the proceedings in the court below may be used although the record has not been printed in the court of review.[12] Affidavits may be used in support of the motion in a proper case.[13] Where

[2] S. C. Rule 6.

[3] S. C. Rule 6.

[4] S. C. Rule 6.

[5] Such a motion must be seasonably made. Bryar v. Campbell, 177 U. S. 649, 44 L. ed. 926.

[6] *Supra*, §§ 702, 704.

[7] *Ex Parte* Russell, 13 Wall. 664, 20 L. ed. 632; Clark v. Hancock, 94 U. S. 493, 24 L. ed. 146; Thomas v. Wooldridge, 23 Wall. 283, 23 L. ed. 135; Whitney v. Cook, 99 U. S. 607, 25 L. ed. 446; Whitcomb v. Smithson, 175 U. S. 635, 44 L. ed. 303; Sugg v. Thornton, 132 U. S. 524, 33 L. ed. 447; *supra*, note 2; Hook v. Mercantile Tr. Co., C. C. A., 95 Fed. 41. Laches is no ground for denying a motion to dismiss because of a settlement of the controversy. Little v. Bowers, 134 U. S. 547, 33 L. ed. 1016; *supra*, § 705, note 7.

[8] S. C. Rule 6.

[9] S. C. Rule 6.

[10] S. C. Rule 6.

[11] Texas Land & Cattle Co. v. Scott, 137 U. S. 436, 34 L. ed. 730; Waterville v. Van Slyke, 115 U. S. 290, 29 L. ed. 406; Mayer v. Walsh, 108 U. S. 17, 27 L. ed. 635.

[12] Lazarus v. Prentice, 234 U. S. 263.

[13] Rector v. Lipscomb, 141 U. S. 557, 35 L. ed. 857; Whiteside v. Hazleton, 110 U. S. 296, 28 L. ed. 152; *supra*, § 696. For a case where

the question is doubtful or the examination of a bulky record is required, it is usual to postpone the decision till the argument of the whole case.[14]

After one motion to dismiss has been filed and set down for a hearing, the party that filed it has no right to file a second motion to dismiss upon new grounds without leave of the court.[15] Such leave will not be granted upon formal grounds only.[16] If the papers are wholly insufficient to sustain the jurisdiction of the appellate court, that court may of its own motion, at the hearing on the merits, have notice of the insufficiency.[17] After the dismissal of a writ of error or appeal, the court may, but rarely will, reinstate this upon a motion made at the same term at which the order of dismissal was entered.[18] The dismissal of

the court held it improper to file copies of certain letters, see U. S. v. Griffith, 141 U. S. 212, 35 L. ed. 719.

[14] Standard Oil Co. v. Bell, C. C. A., 82 Fed. 113. This is usually done when the objection is a defect of parties. Graham v. O'Ferral, C. C. A., 236 Fed. 717. When there were cross appeals from different decisions in the same case and the dismissal of one would not limit the court's power to consider the questions thereby raised when deciding the other, instead of granting a motion to dismiss the former, they were consolidated. U. S. v. St. Louis Terminal, 236 U. S. 194. The postponement of the consideration of the motion until a hearing of the case upon the merits is not a decision that the court has power to review the judgment; Cerecedo v. U. S., 239 U. S. 1.

[15] Nashua & L. R. Corp. v. Boston & L. R. Corp., 51 Fed. 929, 931, per Gray, J.

[16] Ibid.

[17] Ibid.

[18] Bank of U. S. v. Swan, 3 Pet. 68, 7 L. ed. 605; Glenny v. Langdon, 94 U. S. 604, 24 L. ed. 237; Knox v. Exchange Bank, 12 Wall. 379, 20 L. ed. 414; Alviso v. U. S., 6 Wall. 457, 18 L. ed. 721; Betts v. Gahagan, C. C. A., 205 Fed. 890. The allowance of such an order rests in the discretion of the appellate court. Gwin v. Breedlove, 15 Pet. 284, 10 L. ed. 740; James v. McCormack, 105 U. S. 265, 26 L. ed. 1044. A motion to reinstate the cause must be made at the term at which the order of dismissal was entered. Rice v. Minn. & N. W. R. Co., 21 How. 82, 16 L. ed. 31; Selma & M. R. Co. v. Louisiana Nat. Bank, 94 U. S. 253, 24 L. ed. 32. But see Jackson v. Ashton, 10 Pet. 480, 9 L. ed. 502. Long delay may be a ground for denying such a motion, even though made at the term at which the order of dismissal was entered. Johnson v. Wilkins, 118 U. S. 228, 30 L. ed. 210; Deming's Appeal, 10 Wall. 251, 19 L. ed. 893. Such a motion may be granted, where the notice of the motion to dismiss was insufficient and irregular, since it designated no time for hearing, Glenny v. Lang-

an appeal, although erroneous, does not vacate the decree appealed from.[19] A party who has obtained an order dismissing his adversary's appeal is estopped from maintaining the jurisdiction of the appellate court by objecting to the jurisdiction of the court below although the time allowed for an application for a rehearing has not expired.[20] Upon the dismissal of an appeal the court has the power to allow damages not exceeding five per centum for the delay.[21]

§ 705f. Motions to affirm. "The court in any pending cause will receive a motion to affirm on the ground that it is manifest that the writ or appeal was taken for delay only, or that the questions on which the decision of the cause depend are so frivolous as not to need further argument. The same procedure shall apply to and control such motions as is provided for in cases of motions to dismiss under paragraph 4 of this rule."[1] This practice has been followed in the Circuit Court of Appeals for the Second Circuit when made in the alternative asking the court

don, 94 U. S. 604, 24 L. ed. 237; where the omission to return the citation arose from the neglect of the court below, and the citation has been lost or destroyed; Alviso v. U. S., 6 Wall. 457, 18 L. ed. 721; where a trustee in bankruptcy applies to have a case reinstated which was dismissed, and to be substituted for the bankrupt as plaintiff in error, if he applies at the same term, Knox v. Exchange Bank, 12 Wall. 379, 20 L. ed. 414; where an appeal has been dismissed for the failure of the appellant to file a transcript within the time required by the rule of the court, provided that the transcript is filed during the term. Bank of U. S. v. Swan, 3 Pet. 68, 7 L. ed. 605; West Chicago St. R. Co. v. Ellsworth, C. C. A., 77 Fed. 664. But see Rule 8 as amended, 137 U. S. 710; Bradley v. Eccles, C. C. A., 126 Fed. 945.

19 Stewart v. ONeal, C. C. A., 237 Fed. 897.

20 McSweeney Packing Co. v. Beshlin, C. C. A., 211 Fed. 922.

21 Deming v. Carlisle Packing Co., 226 U. S. 102, 57 L. ed. —.

§ 705f. 1 S. C. Rule 6, subd. 5; Whitney v. Cook, 99 U. S. 607, 25 L. ed. 446; Hinckley v. Morton, 103 U. S. 764, 26 L. ed. 458; Micas v. Williams, 104 U. S. 556, 26 L. ed. 842; Swope v. Leffingwell, 105 U. S. 3, 26 L. ed. 939; Chanute City v. Trader, 132 U. S. 210, 33 L. ed. 345; Ennis Water Works v. City of Ennis, 233 U. S. 652; Toop v. Ulysses Land Co., 237 U. S. 580; Pennsylvania Co. v. Donat, 239 U. S. 50; Chi. & Rock Island R. R. v. Devine, 239 U. S. 52; Union Pac. R. R. Co. v. Laughlin, 247 U. S. 204; Palmer v. Ohio, 248 U. S. 32; Piedmont Power & Light Co. v. Town of Graham, 253 U. S. 193. See § 707 *infra*. But see Contributors to the Pennsylvania Hospital v. City of Philadelphia, 245 U. S. 20; Bates v. Bodie, 245 U. S. 520.

either to dismiss or to affirm.[2] The motion, like all other motions in the Supreme Court, must be reduced to writing, and contain a brief statement of the facts and object of the motion.[3] It is the safer and the usual practice for the moving party to print the transcript before the submission of the motion, unless it has been previously printed by his adversary. The motion papers should contain so much of the record as to enable the court to act understandingly.[4] The motion to affirm, if made before the record is printed, will rarely be granted unless the motion papers, which must be printed, are very full, and clearly show the frivolous character of the appeal or error.[5] Where the question is doubtful or the examination of a bulky record is required, it is usual to postpone the decision till the argument of the whole case.[6]

§ 706. Printing the record. The record must be printed for the use of the court and counsel. The following rule regulates

[2] Rhederi Actien Gesellschaft Oceana v. Holland, C. C. A., 241 Fed. 990; National Surety Co. v. Universal Transp. Co., C. C. A., 256 Fed. 450; both in the Second Circuit. Felkner v. Southern Trust Co., C. C. A., 8th ct., 264 Fed. 798. Formerly in the Supreme Court a motion to affirm was not granted unless as an alternative to a motion to dismiss and not then unless there was a colorable ground for the dismissal. School Dist. v. Hall, 106 U. S. 428, 27 L. ed. 287; Hinckley v. Morton, 103 U. S. 764, 26 L. ed. 458; Davies v. Corbin, 113 U. S. 687, 28 L. ed. 1149; Walsington v. Nevin, 128 U. S. 578, 32 L. ed. 544; New Orleans v. Louisiana Const. Co., 129 U. S. 45, 32 L. ed. 607; The Alaska, 130 U. S. 201, 32 L. ed. 923. Except in cases where the appeal was clearly frivolous. Chanute City v. Trader, 132 U. S. 210, 33 L. ed. 345; The S. C. Tyron, 105 U. S. 267, 26 L. ed. 1026; Swope & Leffingwell, 105 U. S. 3, 26 L. ed. 939; Sugg v. Thornton, 132 U. S. 524, 33 L. ed. 447. But see Amory v. Amory, 91 U. S. 356, 23 L. ed. 436. It could not be united with a motion to dismiss for a defect in the bond, Gay v. Parpart, 101 U. S. 391, 25 L. ed. 841; but it might be with a motion to dismiss for a defect in the form of a writ of error; Evans v. Brown, 109 U. S. 180, 27 L. ed. 898; although it was usually coupled with a motion to dismiss for want of jurisdiction.

[3] S. C. Rule 6.

[4] Texas Land & Cattle Co. v. Scott, 137 U. S. 436, 34 L. ed. 730; Waterville v. Van Slyke, 115 U. S. 290, 29 L. ed. 406; Mayer v. Walsh, 108 U. S. 17, 27 L. ed. 635.

[5] Crane Iron Co. v. Hoagland, 108 U. S. 6, 27 L. ed. 632; Carey v. Houston & T. C. Ry. Co., 150 U. S. 170, 37 L. ed. 1041; The Colonel McLeod, 112 U. S. 710, 28 L. ed. 825.

[6] Standard Oil Co. v. Bell, C. C. A., 82 Fed. 113.

printing the record in the Supreme Court:—"1. In all cases the plaintiff in error or appellant, on docketing a case and filing the record, shall make such cash deposit with the clerk, for the payment of his fees as he may require, or otherwise satisfy him in that behalf. 2. The clerk shall cause an estimate to be made of the cost of printing the record, his fee for preparing it for the printer and supervising fee, and other probable fees, and upon application therefor shall furnish the same to the party docketing the case. If such estimated sum should not be paid within ninety days after the cause is docketed it shall be the duty of the Clerk to report that fact to the court, and thereupon the cause will be dismissed, unless good cause to the contrary is shown. 3. Upon payment by either party of the amount estimated by the clerk, twenty-five copies of the record shall be printed, under his supervision, for the use of the court and of counsel. 4. In cases of appellate jurisdiction the original transcript on file shall be taken by the clerk to the printer. But the clerk shall cause copies to be made for the printer of such original papers, sent up under Rule 8, section 4, as are necessary to be printed; and of the whole record in cases of original jurisdiction. 5. The clerk shall supervise the printing, and see that the printed copy is properly indexed. He shall distribute the printed copies to the justices and the reporter, from time to time, as required, and a copy to the counsel for the respective parties. 6. If the actual cost of printing the record, together with the fee of the clerk, shall be less than the amount estimated and paid, the amount of the difference shall be refunded by the clerk to the party paying it. If the actual cost and clerk's fee shall exceed the estimate the amount of the excess shall be paid to the clerk before the delivery of a printed copy to either party or his counsel. 7. In case of reversal, affirmance, or dismissal, with costs, the amount of the cost of printing the record and of the clerk's fee shall be taxed against the party whom costs are given, and shall be inserted in the body of the mandate or other proper process. 8. Upon the clerk's producing satisfactory evidence, by affidavit or the acknowledgment of the parties or their sureties of having served a copy of the bill of fees due by them, respectively, in this court, on such parties or their sureties, an attachment shall issue against such

parties or sureties, respectively, to compel payment of said fees. 9. When the record is filed, or within twenty days thereafter, the plaintiff in error or appellant may file with the Clerk a statement of the points on which he intends to rely and of the parts of the record which he thinks necessary for the consideration thereof, with proof of service of the same on the adverse party. The adverse party, within thirty days thereafter, may designate in writing, filed with the Clerk, additional parts of the record which he thinks material; and, if he shall not do so, he shall be held to have consented to a hearing on the parts designated by the plaintiff in error or appellant. If parts of the record shall be so designated by one or both of the parties, the Clerk shall print those parts only; and the Clerk will consider nothing but those parts of the record and the points so stated. If at the hearing it shall appear that any material part of the record has not been printed, the writ of error or appeal may be dismissed or such other order made as the circumstances may appear to the Court to require. If the defendant in error, or appellee, shall have caused unnecessary parts of the record to be printed, such order as to costs may be made as the Court shall think proper."[1]

By the general rules of the Circuit Courts of Appeals. "The counsel for the plaintiff in error or appellant shall print and file with the clerk of the court, at least six days before the case is called for argument, twenty copies of the record, unless a different order as to such printing is made by the court, either of its own motion, or upon application made at least ten days before the case is called for argument; and shall furnish three copies of the printed record to the adverse party at least six days before the argument. The parties may stipulate in writing that parts only of the record shall be printed, and the case may be heard on the part so printed, but the court may direct the printing of other parts of the record. If the record shall not have been printed when the case is reached in the regular call of the docket, the case may be dismissed. In case of reversal, affirm-

§ 706. [1] S. C. Rule 10, as amended October Term 1921: De Groot v. U. S., 5 Wall. 419, 18 L. ed. 700. Costs were enforced in Ball & Lockett Fastener Co. v. Kraetzer, 150 U. S. 111, 37 L. ed. 1019. See *supra*, § 704.

ance, or dismissal with costs, the amount paid for printing the record shall be taxed against the party against whom costs are given."[2] The cases in which records printed in the court below

[2] C. C. A. Rule 23. By subsequent amendments in the First Circuit twenty-five copies were required; in the Second Circuit, fifteen; in the Fourth Circuit, forty; in the Fifth, Sixth and Seventh Circuits, twenty-five. See *infra*, Appendix V. S. D. N. Y. Rule 26. "The parties in any suit in which an appeal or writ of error has been taken may stipulate by themselves or their attorneys what shall be printed as the record on appeal. If any party wishes any document or statement included or omitted in the record, to the inclusion or omission of which any other party objects, a summary application may be made to the judge who heard the case, or, in his absence, to the judge attending to *ex parte* business, to determine whether such document or statement shall be included or omitted. The appellant or plaintiff in error may thereupon print as many copies of such record on appeal as may be required by the rules of the Circuit Court of Appeals. Such copies shall be printed in fair and legible type upon pages eleven inches long by seven inches wide, with a margin of at least two inches in width. One such printed copy may be presented to the clerk with a stipulation by the parties or their attorneys that such printed copy is a true transcript of the record as agreed on by the parties or as settled by the court. If such copy with such stipulation is presented the clerk shall certify the same as the transcript of record, without charge, except such as may be lawfully made for the certificate itself: If, however, the parties to any appeal or writ of error shall fail to execute and deliver to the clerk the stipulation above required the clerk shall, before certification, examine the printed documents tendered him for certification and ascertain that the mode of printing conforms to this rule, and that the printed pages do contain a transcript of the record as agreed upon by the parties or as settled by the court, as the case may be, and for such examination the clerk shall before certification, charge and collect for the use of the United States the sum authorized to be charged for such services, in addition to the lawful charge for his certificate. This rule shall not apply to the preparation of records on appeal in Equity cases which are governed by Rules 75, 76 and 77 of the Supreme Court Equity Rules, but after the statement provided for in Supreme Court Equity Rule 75 or 77 has been approved by the court or a judge thereof the appeal record may be printed and certified as set forth in this Rule if the parties shall stipulate that the printed copy presented to the clerk is a true transcript of the record as agreed on by the parties or as settled by the court."

In one case the Circuit Court of Appeals extended the time to file the record until such a stipulation has been made or errors needing corrections had been shown. Meyers v. U. S., C. C. A., 218 Fed. 372.

can be used in the court of review have been previously explained.[3] Under special circumstances where there were serious objections to the enlargement of the defendant on bail, the court dispensed with the printing of the record and briefs upon a writ of error to review a judgment of conviction in a criminal prosecution.[4] In an extraordinary case, when the appellant was too poor to print the record, the same dispensation has been made in a civil suit.[5] The expense of printing the record on appeal or in the court below may be paid from funds in the hands of a receiver,[6] the record for the court below may be thus printed in such a manner as to be used in the court of review should an appeal be subsequently taken by either party.[7] All briefs and records for the use of the court must be printed in such form and size that they can be conveniently cut and bound so as to make an ordinary octavo volume.[8]

§ 707. Argument of appeals and writs of error. The rules of the Supreme Court provide: "1. In all cases brought here on writ of error, appeal, or otherwise, the court will receive printed arguments without regard to the number of the cases on the docket, if the counsel on both sides shall choose to submit the same within the first ninety days of the term; and, in addition, appeals from the Court of Claims may be submitted by both parties within thirty days after they are docketed, but not after the first day of April; but thirty copies of the arguments, signed by attorneys or counsellors of this court, must be first filed. 2. When a case is reached in the regular call of the docket, and a printed argument shall be filed for one or both parties, the case shall stand on the same footing as if there were an appearance by counsel. 3. When a case is taken up for trial upon the regular call of the docket, and argued orally in behalf of only one of the parties, no printed argument for the opposite party will be received, unless it is filed before the oral argument begins, and the court will proceed to consider and decide the case upon the *ex parte* argument. 4. No brief or argument will be received, either

[3] *Supra*, §§ 417, 417a. See Baldwin Co. v. R. S. Howard Co., C. C. A., Nov. 10, 1919.

[4] Morse v. U. S., C. C. A., 168 Fed. 49.

[5] *Re* Friedman, C. C. A., 161 Fed. 260, 262, in bankruptcy. See § 417, 667, *supra*.

[6] Ferguson v. Dent, 46 Fed. 88.

[7] Dent v. Ferguson, 131 U. S. 397.

[8] S. C. Rule 31; C. C. A. Rule 26.

through the clerk or otherwise, after a case has been argued or submitted, except upon leave granted in open court after notice to opposing counsel."[1]

"1. The court, on the second day in each term, will commence calling the cases for argument in the order in which they stand on the docket, and proceed from day to day during the term in the same order (except as hereinafter provided); and if the parties, or either of them, shall be ready when the case is called, the same will be heard; and if neither party shall be ready to proceed in the argument, the case shall be continued to the next term of the court unless some good and satisfactory reason to the contrary shall be shown to the court.

§ 707. [1] S. C. Rule 20. Where parties stipulate to submit a case without any mention of the time of submission, or any reference to the rule just cited, the court will not compel a submission before the case is called for argument in its regular place on the calendar. Glen v. Fant, 124 U. S. 123, 31 L. ed. 352. Such a stipulation cannot be withdrawn except by leave of the court for cause shown. Muller v. Dows, 94 U. S. 277, 24 L. ed. 76. Where, after such a stipulation has been made, at the time appointed for the submission no argument was filed by the plaintiff in error, the court treated the cause as submitted, and affirmed the judgment without passing specially upon the assignments of error returned with the record; but subsequently rescinded the order of affirmance on condition that the plaintiff should pay the costs of the term and print the record within sixty days. Aurrecoechea v. Bangs, 110 U. S. 217, 28 L. ed. 125. Where a number of causes were pending against different defendants who relied upon a common ground of defense, united in the employment of counsel, and contributed to a common fund for the expense of litigation; the Supreme Court refused to accept the submission of one of the causes, which it was claimed had been amicably arranged under the employment of new counsel for the defense, when the original counsel employed for the general defense, who were still retained in a subsequent case, objected to such a submission. Smelting Co. v. Kemp, 103 U. S. 666, 26 L. ed. 313. *Cf.*, *supra*, § 705b. Where a cause which had been submitted on briefs involved a constitutional question upon which there was a difference of opinion in the Supreme Court, the submission was set aside, the cause restored to the calendar, and an oral argument ordered. Louisiana v. New Orleans, 103 U. S. 521, 26 L. ed. 306. Where a cause was submitted under a stipulation, but the brief did not comply with that provision of Rule 21 which provides that "when a statute of a State is cited, it shall be printed at length," the submission was set aside, and the cause restored to its place on the docket. School District v. Insurance Co., 101 U. S. 472, 25 L. ed. 868.

2. Ten cases only shall be considered as liable to be called on each day during the term. But on the coming in of the court on each day the entire number of such ten cases will be called, with a view to the disposition of such of them as are not to be argued. 3. Criminal cases may be advanced by leave of the court on motion of either party. 4. Cases once adjudicated by this court upon merits, and again brought up by writ of error or appeal, may be advanced by leave of the court on motion of either party. 5. Revenue and other cases in which the United States are concerned, which also involve or affect some matter of general public interest, or which may be entitled to precedence under the provisions of any act of Congress, may also by leave of the court be advanced on motion of the Attorney-General."[2] The calendar practice of the Circuit Courts of Appeals differs in the different circuits.[3] Special rules provide for a summary disposition of petitions for the revision of orders in bankruptcy.[4]

[2] S. C. Rule 26. By S. C. Rule 6, subd. 6: "Although the court upon consideration of a motion to dismiss or a motion to affirm may refuse to grant the motion, it may nevertheless, if the conclusion is arrived at that the case is of such a character as not to justify extended argument, order the cause transferred for hearing to a summary docket. The hearing of the causes on such docket will be expedited, the court providing from time to time for such speedy disposition of the docket as the regular order of business may permit, and on the hearing of such causes one-half hour will be allowed each side for oral argument." Writs of error to revise the judgments of State courts in criminal cases take precedence on the calendar, unless the Supreme Court otherwise directs. U. S. R. S., § 710. Writs of error to judgments of conviction of capital crimes in the courts of the United States must be advanced to a speedy hearing on motion of either party. 25 St. at L. 656, Ch. 113, § 6. Other criminal cases may be advanced by leave of the court on motion of either party. S. C. Rule 26. Where a State is a party, or the execution of the revenue laws of a State is enjoined or stayed, such State or the party claiming under the revenue laws of a State, the execution whereof is stayed, is entitled on showing sufficient reason to have the cause heard at any time after it is docketed, in preference to any civil causes pending in the court between private parties. U. S. R. S., § 949. See *supra*, § 373. Such a case will not be advanced at the motion of the party opposing the State, or seeking to enjoin the execution of its revenue laws. Central R. Co. v. Bourbon County, 116 U. S. 538, 29 L. ed. 725.

[3] See the rules in the Appendix V, *infra*.

[4] Ibid.

Supreme Court Rule 26 "6 all motions to advance cases must be printed, and must contain a brief statement of the matter involved, with the reasons for the application. 7. No other case will be taken up out of the order on the docket, or be set down for any particular day, except under special and peculiar circumstance to be shown to the court.[5] 8. Two or more cases, involving the same question, may, by the leave of the court, be heard together, but they must be argued as one case.[6] 9. If, after a case has been passed, the parties shall desire to have it heard, they may file with the clerk their joint request to that effect, and the case shall then be by him reinstated for call ten cases after that under argument, or next to be called at the end of the day the request is filed. If the parties will not unite in such a request, either may move to take up the case, and it shall then be assigned to such place upon the docket as the court may direct. 10. No stipulation to pass a case will be recognized as binding upon the court. A case can only be so passed upon application made and leave granted in open court."[7] When a case is called for argument at two successive terms, and upon the call at the second term neither party is prepared to argue it, the case will be dismissed at the costs of the plaintiff unless sufficient cause for a postponement is shown.[8] The Supreme Court may postpone the argument of an important constitutional question when the bench is not full.[9] "The court will, at every term, announce on what day it will adjourn at least ten days before the time which shall be fixed upon, and the court will take up no case for argument, nor receive any case upon printed briefs,

[5] S. C. Rule 26. But see Poindexter v. Greenhow, 109 U. S. 63, 27 L. ed. 860. An appeal from part of an order will rarely, if ever, be heard before the rest of the appeal taken. U. S. v. Lee Yen Tai, C. C. A., 108 Fed. 950.

[6] Ableman v. Booth, 18 How. 479, 15 L. ed. 465. See Cissna v. State of Tennessee, 242 U. S. 195. "Cases brought to this court by writ of error or appeal where the only question in issue is the question of the jurisdiction of the court below, will be advanced on motion, and heard under the rules prescribed by Rule 6, in regard to motions to dismiss writs or error and appeals." S. C. Rule 32.

[7] S. C. Rule 26.

[8] S. C. Rule 19.

[9] Mayor of N. Y. v. Miln, 9 Pet. 85, 9 L. ed. 60; Briscoe v. Commonwealth Bank, 9 Pet. 85, 9 L. ed. 60.

within three days next before the day fixed upon for adjournment."[10]

By Supreme Court Rule 21 "1. The counsel for plaintiff in error or appellant shall file with the clerk of the court, at least three weeks before the case is called for argument, thirty copies of a printed brief, one of which shall, on application, be furnished to each of the counsel engaged upon the opposite side. 2. This brief shall contain, in the order here stated: (1) A concise abstract, or statement of the case, presenting succinctly the questions involved and the manner in which they are raised.[11] (2) A specification of the errors relied upon, which, in cases brought up by writ of error, shall set out separately and particularly each error asserted and intended to be urged; and in cases brought up by appeal the specification shall state, as particularly as may be, in what the decree is alleged to be erroneous.[12] When

[10] S. C. Rule 27.

[11] In one case where this was not done, the Circuit Court of Appeals considered the question whether the findings below were sufficient to support the judgment. Eastern Oil Co. v. Holcomb, C. C. A., 212 Fed. 126; Lee Edwards v. Bodkin, C. C. A., 249 Fed. 562. In the Circuit Court of Appeals for the Third Circuit, Rule 24, § 2, directs that the brief shall contain "a statement of the question or questions involved which shall be in the briefest and most general terms, without names, dates, amounts or particulars of any kind whatever." (224 Fed. xvii.) The court approved the following summary: "(a) Whether, under the undisputed evidence, the court should have held as a matter of law, that the plaintiff assumed the risk of injury. (b) Whether, under the undisputed evidence, the court should have held, as a matter of law, that the plaintiff was guilty of contributory negligence. (c) Whether, under all the evidence, the court should have directed a verdict for the defendant." Am. Car & Foundry Co. v. Matzok, C. C. A., 228 Fed. 179.

[12] A disregard of the rules in this respect will justify an affirmance. Lohman v. Stockyards Loan Co., 243 Fed. 517; *certiorari* denied, 245 U. S. 668, 38 Sup. Ct. 134, 63 L. ed. 539; Daly-West Mining Co. v. Savage, C. C. A., 253 Fed. 548; *certiorari* denied, 249 U. S. 607, 39 Sup. Ct. 290, 63 L. ed. 799. The pages in the transcript which contain the rulings as to which error is charged should be cited, Thompkins v. Missouri, K. & T. Ry. Co., 211 Fed. 385; Illinois Cent. R. Co. v. Nelson, C. C. A., 212 Fed. 69, 75; Eastern Oil Co. v. Holcomb, C. C. A., 212 Fed. 126; Colorado Yule Marble Co. v. Collins, C. C. A., 230 Fed. 78; Broatch v. Boysen, C. C. A., 236 Fed. 516. For a case where the court refused to consider an objection in the absence of the citation to the pages of the record showing the rulings and exceptions

the error alleged is to the admission or to the rejection of evidence, the specification shall quote the full substance of the evidence admitted or rejected.[13] When the error alleged is to the charge of the court, the specification shall set out the part referred to *totidem verbis*, whether it be instructions given or instructions refused. When the error alleged is to a ruling upon the report of a master, the specification shall state the exception to the report and the action of the court upon it. (3) A brief of the argument, exhibiting a clear statement of the points of law or fact to be discussed, with a reference to the pages of the record and the authorities relied upon in support of each point.[14]

upon the subject, see Northwestern S. B. & Mfg. Co. v. Great Lakes E. Works, 181 Fed. 38. As to the references to the record, see Nat. Cash Reg. Co. v. Leland, C. C. A., 94 Fed. 502. The specification of errors in the brief should conform substantially to the assignment of errors in the record. Vider v. O'Brien, C. C. A., 62 Fed. 326. As to setting forth the evidence in the specifications, see Haldane v. U. S., C. C. A., 69 Fed. 819. Where several specifications of error are referred to in a brief as a whole, the court may refuse to examine them. New York Dry Goods Store v. Pabst Brewing Co., C. C. A., 112 Fed. 381, 383. Matters contained in the assignment of errors in the transcript to which the brief contains no reference are usually not considered. Eastern Oil Co. v. Holcomb, C. C. A., 212 Fed. 126; Gibson v. Chesapeake & O. Ry. Co., C. C. A., 215 Fed. 24; Town of Newberry v. National Bank, C. C. A., 234 Fed. 209; City of Goldfield, Colo. v. Roger, C. C. A., 249 Fed. 39; Consolidated Interstate-Callahan M. Co. v. Witkouski, C. C. A., 249 Fed. 833. As to waiver of an error assigned, see also, Boston & M. R. R. v. Baker, C. C. A., 236 Fed. 896. The specifications should refer to the assignments in the record. Badders Clothing Co. v. Burnham-Munger-Root Dry Goods Co., C. C. A., 228 Fed. 470. For a case where an error argued in the brief at length but not set forth in the specifications was considered, see Klink v. Chicago, R. I. & P. Ry. Co., 219 Fed. 457.

[13] Weiland v. Pioneer Irr. Co., C. C. A., 238 Fed. 519; Kreuzer v. U. S., C. C. A., 254 Fed. 34. But see Ludwig v. Bressler, C. C. A., 253 Fed. 8. "In all cases of equity or admiralty jurisdiction, heard in this court, no objection shall hereafter be allowed to be taken to the admissibility of any deposition, deed, grant, or other exhibit found in the record as evidence, unless objection was taken thereto in the court below and entered of record; but the same shall otherwise be deemed to have been admitted by consent." S. C. Rule 13. See *infra*, § 711g.

[14] A citation of the American Bankruptcy Reports without reference to the volume and page of the Supreme Court Reports or the Federal Reporter where the case is

When a statute of a State is cited, so much thereof as may be deemed necessary to the decision of the case shall be printed at length. 3. The counsel for a defendant in error or an appellee shall file with the clerk thirty printed copies of his argument, at least one week before the case is called for hearing. His brief shall be of like character with that required of the plaintiff in error or appellant, except that no specification of errors shall be required, and no statement of the case, unless that presented by the plaintiff in error or appellant is controverted. 4. When there is no assignment of errors, as required by section 997 of the Revised Statutes, counsel will not be heard, except at the request of the court; and errors not specified according to this rule will be disregarded; but the court, at its option, may notice a plain error not assigned or specified.[15] 5. When, according to this rule, a plaintiff in error or an appellant is in default, the case may be dismissed on motion; and when a defendant in error or an appellee is in default, he will not be heard, except on consent of his adversary, and by request of the court. 6. When no oral argument is made for one of the parties, only one counsel will be heard for the adverse party. 7. No brief or printed argument, required by the foregoing sections, shall be filed by the clerk unless the same shall be accompanied by satisfactory proof of service upon counsel for the adverse party. 8. Every brief of more than 20 pages shall contain on its front fly leaves a subject index with page references, the subject index to be supplemented by a list of all

reported is improper. *Re* Kerner, C. C. A., 250 Fed. 993.

[15] See *supra*, § 701; U. S. R. S., § 997, and S. C. Rule 35; C. C. A. Rules 11, 24, § 701; Treat v. Jemison, 20 Wall. 652, 22 L. ed. 449; Ryan v. Koch, 17 Wall. 19, 21 L. ed. 611; Boston M. Co. v. Eagle M. Co., 115 U. S. 221, 29 L. ed. 392; Hunt v. Blackburn, 127 U. S. 774, 32 L. ed. 323; Stevenson v. Barbour, 140 U. S. 48, 35 L. ed. 338; Mann v. Dempster, C. C. A., 181 Fed. 76; Western Union Tel. Co. v. Winland, C. C. A., 182 Fed. 493; Ireton v. Pennsylvania Co., C. C. A., 185 Fed. 84. The appellate court will take notice of a question affecting the jurisdiction, although not specified in the assignment of errors, and in such a case may direct that briefs be filed on that point. Pennsylvania R. Co. v. St. Louis, A. & T. H. R. Co., 116 U. S. 472, 29 L. ed. 696; Perez v. Fernandez, 202 U. S. 80, 100, 50 L. ed. 942, 949; A. Santaella & Co. v. Otto F. Lange Co., C. C. A., 155 Fed. 719; Yeandle v. Pennsylvania R. Co., C. C. A., 169 Fed. 938.

cases referred to, alphabetically arranged, together with references to pages where the cases are cited."[16] The same practice prevails in this respect in the Circuit Courts of Appeals, except that the time of filing briefs and the number of copies varies in the different circuits, and that an index and table of cases is not usually required.[17] Where a brief contains scandalous matter, irrelevant to the questions raised by the writ of error or appeal, it may be stricken from the file.[18] A constitutional question not raised in the court below cannot,[19] except in an extraordinary case,[20] be raised for the first time in the appellate court. In the Supreme Court the brief must be of octavo size and all of the same, including the quotations, must be printed in clear type (never smaller than small pica), and on unglazed paper.[21] The rules of the different Circuit Courts of Appeals have certain different regulations upon this subject.[22] No printed argument will be received after the oral argument begins or after a case has been submitted, except upon leave granted in open court after notice to opposing counsel.[23]

[16] S. C. Rule 21. Walton v. Wild Goose Min. & Trading Co., C. C. A., 123 Fed. 209; Ætna Indemnity Co. v. J. R. Crowe Coal & Min. Co., C. C. A., 154 Fed. 545; Davidson S. S. Co. v. U. S., C. C. A., 142 Fed. 315; Crosby v. Emerson, C. C. A., 142 Fed. 713; A. Santaella & Co. v. Otto F. Lange Co., C. C. A., 155 Fed. 719; Chicago Great Western Ry. Co. v. Egan, C. C. A., 159 Fed. 40.

[17] See Appendix V, *infra*. For a case where the Court of Appeals for the Ninth Circuit refused to consider a brief signed by a counsel not admitted, nor qualified for admission, to its bar, see Piper v. Cashell, C. C. A., 118 Fed. 1019. Deposit in the mail ten days before the argument is sufficient if the brief is duly addressed. Russo-Chinese Bank v. Nat. Bank of Commerce of Seattle, Wash., C. C. A., 187 Fed. 80.

[18] Green v. Elbert, 137 U. S. 615, 34 L. ed. 792; Yellow Poplar Lumber Co. v. Chapman, 173 U. S. 705, a petition for a writ of *certiorari;* Royal Arcanum v. Green, 237 U. S. 531, 546; Smith v. Simpson, C. C. A., 140 Fed. 712, see U. S. Ex rel. Brown v. Lane, 232 U. S. 598. See Cox v. Wood, 247 U. S. 3. Where a party's brief contained argument based on a letter from opposing counsel, written after decree and offering a compromise, he was denied costs. Malleable Iron Range Co. v. Lee, C. C. A., 263 Fed. 896.

[19] Western Union Tel. Co. v. Winland, C. C. A., 182 Fed. 493.

[20] See Weems v. U. S., 217 U. S. 349, 54 L. ed. 793.

[21] S. C. Rule 31.

[22] See Appendix V, *infra*.

[23] S. C. Rule 20.

When there is no appearance for the plaintiff in error when the case is called for argument, the defendant may have him called and have the writ of error or appeal dismissed, or may open the record and pray for an affirmance.[24] When the defendant in error then fails to appear, the court may proceed to hear argument on the part of the plaintiff, and give judgment according to the right of the cause.[25] When a case is reached and no appearance is entered for either party, the case is dismissed at the cost of the plaintiff.[26] A printed argument filed on behalf of either party is equivalent to an appearance on his behalf.[27] In the Supreme Court when no oral argument is made for one of the parties, only one counsel will be heard for the adverse party.[28] Otherwise, each party is entitled to be heard by two counsel and no more, except by leave of the court.[29] In the Supreme Court one hour on each side is allowed for the argument of an appeal or writ of error, and one hour on the argument of a motion which is heard orally; but in cases certified from the Circuit Courts of Appeals, cases involving solely the jurisdiction of the courts below and writs of error brought by the United States to review the quashing or dismissal of an indictment, forty-five minutes only on each side was allowed.[30] In the Circuit Courts of Appeals the matter is regulated by their respective rules. By leave of the court granted before the argument begins more time may be allowed.[31] The time may be apportioned between counsel on each side at their discretion; but a fair opening of the case must be made by the party having the opening and closing arguments.[32] The plaintiff in error or

[24] S. C. Rule 16; Hunt v. Blackburn, 127 U. S. 774, 32 L. ed. 323; Stevenson v. Barbour, 140 U. S. 48, 35 L. ed. 338; Boston M. Co. v. Eagle M. Co., 115 U. S. 221, 29 L. ed. 392. A motion to set aside a judgment of affirmance for a default, which would otherwise be excused, will be denied if it appears that the judgment must be affirmed on the merits. Treat v. Jemison, 131 U. S. cxxxv, 23 L. ed. 134.

[25] S. C. Rule 17.

[26] S. C. Rule 18; *supra*, § 512.

[27] S. C. Rule 20.

[28] S. C. Rule 21 as amended December 11, 1893, 150 U. S. 713; C. C. A. Rule 24.

[29] S. C. Rule 21; C. C. A. Rules 24, 25.

[30] S. C. Rule 22, as amended Oct. 21, 1918, 248 U. S. 528; and Rule 6; C. C. A. Rules 25 and 21.

[31] S. C. Rule 22; C. C. A. Rule 25.

[32] S. C. Rule 22; C. C. A. Rule 25.

appellant is entitled to open and conclude the case.[33] Where there are cross-appeals, they are argued together as one case, and the plaintiff below has the right to open and conclude the argument.[34] No persons not appearing in the record have the right to be heard on an appeal or writ of error,[35] but the trustee of a bankrupt may be heard, as well as the bankrupt, on a writ of error brought by the bankrupt of which the trustee is entitled to the benefit.[36] The court of review may allow a hearing to a person interested in a decision who is not a party and was not entitled to intervene below;[37] but in such a case he is usually only permitted to file a brief as *amicus curiae*.[38] In a case in which the United States are parties, the court will rarely hear counsel employed by another Executive Department in opposition to the Attorney-General or his representative.[39] Except perhaps in admiralty,[40] appellees who have perfected no cross-appeal cannot be heard except in support of the decree below.[41] Where a board of county commissioners alone brought a writ of error to an order for a *mandamus* against them and the clerk and treasurer of the county, who did not join in the writ, the board was not allowed to allege an error affecting the clerk and treasurer, but not the board.[42] The appellate court may refuse

[33] S. C. Rule 22; C. C. A. Rule 25.

[34] S. C. Rule 22; C. C. A. Rule 25; L. Bucki & Son L. Co. v. Atl. Lumber Co., C. C. A., 93 Fed. 765.

[35] Harrison v. Nixon, 9 Pet. 483, 9 L. ed. 201; U. S. v. Patterson, 15 How. 10, 14 L. ed. 578; The Mabey, 10 Wall. 419, 19 L. ed. 963. The William Bagley v. U. S., 5 Wall. 377, 18 L. ed. 583.

[36] Hill v. Harding, 107 U. S. 631, 27 L. ed. 493.

[37] U. S. v. Terminal R. R. Ass'n, 236 U. S. 194.

[38] Veitia v. Fortuna Estates, C. C. A., 240 Fed. 256.

[39] The Gray Jacket, 5 Wall. 370, 18 L. ed. 653.

[40] Irvine v. The Hesper, 122 U. S. 256, 30 L. ed. 1175; Munson S. S. Line v. Miraman S. S. Co., C. C. A., 167 Fed. 960.

[41] The Slavers, 2 Wall. 383, 17 L. ed. 911; The Stephen Morgan, 94 U. S. 599, 24 L. ed. 266; Loudon v. Taxing Dist. of Shelby County, 104 U. S. 771, 26 L. ed. 923; Gage v. Pumpelly, 115 U. S. 454, 29 L. ed. 449; O'Neil v. Wolcott Min. Co., C. C. A., 174 Fed. 527; Philadelphia Casualty Co. v. Fechheimer, C. C. A., 220 Fed. 401; Moller v. Herring, C. C. A., 255 Fed. 670; Davey Tree Expert Co. v. Van Billiard, C. C. A., 255 Fed. 781. Cross-errors cannot be presented by a party who is neither plaintiff in error nor appellant. Midland Valley R. Co. v. Fulgham, 181 Fed. 91.

[42] Cherokee County Comrs' v.

to hear argument in support of a writ of error in a criminal case where the plaintiff in error has put himself beyond the reach of process of the court below.[43] "No justice or judge before whom a cause or question shall have been tried or heard in a District Court * * * shall sit in the trial or hearing of such cause or question in the Circuit Court of Appeals."[44]

§ 708. Rehearings. In the Supreme Court, "A petition for rehearing after judgment can be presented only at the term at which judgment is entered, unless by special leave granted during the term; and must be printed and briefly and distinctly state its grounds, and be supported by certificate of counsel; and will not be granted, or permitted to be argued, unless a justice who concurred in the judgment desires it, and a majority of the court so determines."[1] The practice in the Circuit Courts of Appeals is substantially the same;[2] but, in some of the circuits, the time of filing the petition is limited to thirty days or a month after the entry of the judgment or the receipt by the clerk of the printed opinion, and in the Fifth Circuit twenty days.[3] No rehearing or reargument will be allowed when not applied for till after the term at which a cause is decided, unless by special leave of the court granted during the term.[4]

Wilson, 109 U. S. 621, 27 L. ed. 1053. See Indiana So. R. Co. v. Liverpool, L. & G. Ins. Co., 109 U. S. 168, 27 L. ed. 895.

[43] Smith v. U. S., 94 U. S. 97, 24 L. ed. 32. On an appeal from an order upon a petition for the writ of *habeas corpus*, where the petitioner had in pursuance of the order been placed without the jurisdiction of the court and of the United States, the Supreme Court dismissed the writ without an examination into its merits. Cheiong Al Moy v. U. S., 113 U. S. 216, 28 L. ed. 983.

[44] 26 St. at L. 827, § 3; Am. Construction Co. v. Jacksonville, T. & K. R. Co., 148 U. S. 372, 37 L. ed. 486; Morgan v. Dillingham, 174 U. S. 153, 43 L. ed. 930, *supra*, § 693.

§ 708. [1] S. C. Rule 30.

[2] C. C. A. Rule 29. For a case where this rule was disregarded, see Omaha Electric Light & Power Co. v. City of Omaha, C. C. A., 216 Fed. 848, 856.

[3] See *infra*, Appendix V.

[4] Hudson v. Guestier, 7 Cranch. 1, 3 L. ed. 249; Bushnell v. Crooke Min. & Sm. Co., 150 U. S. 82, 37 L. ed. 1007; Williams v. Conger, 131 U. S. 390, 33 L. ed. 201; S. C. Rule 30; C. C. A. Rule 29. Kirchberger v. American Acetylene Burner Co., C. C. A., 142 Fed. 169. The filing during the term is in due time although because of an immediate vacation it cannot be heard till the following term. Oehring v. Fox Typewriter Co., C. C. A., 254 Fed. 774. Where the Cir-

Nor, at least in an equity case, after the cause has been remitted to the court below,[5] unless the mandate has been recalled.[6] Nor, after the decision of any case, unless a justice who concurred in the decision moves for a rehearing, even if the court was equally divided,[7] and not then unless the proposition receives the support of a majority of the court.[8]

The proper practice for a party who desires a rehearing is to submit without argument a brief printed petition or suggestion of the points thought important which must be supported by the certificate of counsel that in his opinion the petition is well founded and is not made for the purpose of delay.[9] If upon such petitioner's suggestion, any judge who concurred in the decision thinks proper to move for a rehearing, the motion will be considered.[10] Otherwise the motion will be denied as of course, except in the Circuit Court of Appeals for the Seventh

cuit Court of Appeals rule required that the petition for a rehearing be filed within thirty days after the opinion was filed, it was held that the rule should not be enforced thereafter when an authority, upon which the decision was based had been reversed during the same term. Unitype Co. v. Long, C. C. A., 149 Fed. 196.

[5] Browder v. McArthur, 7 Wheat. 58, 5 L. ed. 397; Sibbald v. U. S., 12 Pet. 488, 9 L. ed. 1167; Washington Bridge Co. v. Stewart, 3 How. 413, 11 L. ed. 658; Peck v. Sanderson, 18 How. 42, 15 L. ed. 262.

[6] Killian v. Ebbinghaus, 111 U. S. 798, 28 L. ed. 593; *Ex parte* Crenshaw, 15 Pet. 119, 10 L. ed. 682; U. S. v. Gomez, 23 How. 326, 16 L. ed. 552. Where the rule required mandates to be retained a specified time after the decision, it was held that a motion for a reargument would not be entertained after that time, unless it was shown that counsel were not notified of the decision or that the grounds of the motion could not have been easily ascertained within the time. Crabtree v. McCurtain, C. C. A., 66 Fed. 1.

[7] Brown v. Aspden, 14 How. 25, 14 L. ed. 311; U. S. v. Knight, 1 Black. 488, 17 L. ed. 80; Public Schools v. Walker, 9 Wall. 603, 19 L. ed. 650; Shreveport v. Holmes, 125 U. S. 694, 31 L. ed. 854; S. C. Rule 30; C. C. A. Rule 29.

[8] Ambler v. Whipple, 23 Wall. 278, 23 L. ed. 127. Very rarely then in the Supreme Court unless an important constitutional question is involved. Shreveport v. Holmes, 125 U. S. 694.

[9] S. C. Rule 30; C. C. A. Rule 29; Hinds v. Keith, C. C. A., 57 Fed. 10; U. S. v. The Dago, C. C. A., 63 Fed. 182; Gregory v. Pike, C. C. A., 67 Fed. 837; *supra*, § 445. For a form, see New Orleans v. Walker, 176 U. S. 92, 44 L. ed. 385.

[10] Public Schools v. Walker, 9 Wall. 603, 19 L. ed. 650.

Circuit.[11] No reply to the application is allowed to the other side; nor does the court usually write an opinion when the petition is denied.[12] A rehearing has been granted at the request of a stranger to the record whose rights were affected by the decision.[13] The petition should not set forth matter not disclosed by the record;[14] but a subsequent decision of another tribunal which is binding upon the court may be a sufficient rea-

[11] C. C. A. Rule 7th Ct. 29. See Appendix.

[12] Ambler v. Whipple, 23 Wall. 278, 23 L. ed. 127. If the hearing in the appellate court was on an imperfect record, a large part of the material evidence which was before the court below was omitted from the transcript, and there was no laches on the part of the appellee in failing to examine and perfect the record before the hearing; a strong case for a reargument was presented. Ambler v. Whipple, 23 Wall. 278, 23 L. ed. 127. A rehearing was granted on the ground that the decree brought up by the appeal was not that recited in the prayer for an appeal, but one rendered subsequently thereto, and merely in execution of it; so that the parties might present all the questions which arose both on the original transcript and upon the transcript as corrected. Chicago & V. R. Co. v. Fosdick, 106 U. S. 47, 80, 27 L. ed. 47, 59. A rehearing was refused when the application was based on the ground that the record of another suit, the decree in which had not been pleaded and was not rendered upon the merits, should be embodied in the transcript. Morgan County v. Allen, 103 U. S. 515, 26 L. ed. 504. A rehearing will ordinarily be refused when asked upon a theory inconsistent with the original argument and not then presented. Merriman v. Chicago & E. I. R. Co., C. C. A., 66 Fed. 663; Reece Folding Mach. Co. v. Fenwick, C. C. A., 140 Fed. 287, 292. A rehearing will not be granted merely because the case is one of importance. Canfield v. U. S., C. C. A., 66 Fed. 18. And very rarely by a Circuit Court of Appeals in a case where its decision is not final. Texas & Pac. Ry. Co. v. Gentry, C. C. A., 57 Fed. 422. A rehearing will not be granted because the court misquoted testimony in its opinion, where such misquotation did not affect the result. Torrent v. Duluth Lumber Co., 32 Fed. 229. Nor when a dismissal was directed for want of jurisdiction because of statements in the opinion when discussing the merits. Supreme Council of Royal Arcanum v. Hobart, C. C. A., 244 Fed. 385.

[13] Alexander v. Fidelity Trust Co., C. C. A., 249 Fed. 1.

[14] Chapman & Dewey Lumber Co. v. St. Francis Levee District, 234 U. S. 667; Omaha Elec. Light & Power Co. v. City of Omaha, C. C. A., 216 Fed. 848. Not a subsequent intervention which gave the necessary diversity of citizenship, Supreme Council of Royal Arcanum v. Hobart, C. C. A., 244 Fed. 385. It has been said that the court may consider a disclaimer of a claim under a patent filed by the appellant pending the

son.[15] The court may upon its own motion grant a rehearing.[16] It has been said that the effect of granting a rehearing is to make the cause stand as if no judgment had been entered in the court of review;[17] but an equal division of the court upon a rehearing of a judgment of reversal results in a reversal, not in an affirmance.[18]

§ 709. Further proof on appeal. On an appeal in equity no new evidence can be taken either below or above for the consideration of the appellate court.[1] The same rule applies to proceedings on writs of error to review judgments at common law.[2] Matter of record or documentary evidence which cannot be contradicted is usually admitted in support of a decree;[3] but not in order to secure a reversal.[4] A *certiorari* may issue to

mandate. U. S. Light & H. Co. v. Safety Car H. & L. Co., C. C. A., 202 Fed. 915.

[15] A rehearing on appeal cannot be granted for newly discovered evidence. Maxwell Land Grant Case, 122 U. S. 365, 30 L. ed. 1211. Utah Power & Light Co. v. U. S., C. C. A., 242 Fed. 924.

[16] James v. Clements, C. C. A., 217 Fed. 51.

[17] Hook v. Mercantile Tr. Co., C. C. A., 95 Fed. 41.

[18] Garmichael v. Eberle, 177 U. S. 63, 44 L. ed. 672.

§ 709. [1] Holmes v. Trout, 7 Pet. 171, 8 L. ed. 647; Mitchell v. U. S., 9 Pet. 711, 9 L. ed. 283; Pacific R. Co. of Mo. v. Ketchum, 95 U. S. 1, 24 L. ed. 347; Boone v. Chiles, 10 Pet. 177, 9 L. ed. 388.

[2] Thornton v. Carson, 7 Cranch. 596, 601, 3 L. ed. 451; Turner v. Schaeffer, C. C. A., 249 Fed. 654.

[3] Hart Steel Co. v. Railroad Supply Co., 244 U. S. 294; G. Ricordi & Co. v. Columbia Graphophone Co., C. C. A., 263 Fed. 354; Dunham v. Townshend, 118 N. Y. 281, 286.

[4] Witzel v. Berman, C. C. A., 212 Fed. 734; (anticipatory patents) Barber v. Otis Motor Sales Co., C. C. A., 240 Fed. 723; Stillwell v. Carpenter, 62 N. Y. 639; Day v. Town of New Lots, 107 N. Y. 157. It has been said: "An appellate court may avail itself of authentic evidence outside of the record before it of matters occurring since the decree of the trial court when such course is necessary to prevent a miscarriage of justice, to avoid a useless circuity of proceeding, to preserve a jurisdiction lawfully acquired, or to protect itself from imposition or further prosecution of litigation where the controversy between the parties has been settled, or for other reasons has ceased to exist." Ridge v. Manker, C. C. A., 132 Fed. 599, 601, per Hook, C. J. Citing Chamberlain v. Cleveland, 1 Black. 419, 17 L. ed. 93; Lord v. Veazie, 8 How. 251, 12 L. ed. 1067; Wood Paper Co. v. Heft, 8 Wall. 333, 19 L. ed. 379; Board of Liquidation v. Railroad Co., 109 U. S. 221, 3 Sup. Ct. 144, 27 L. ed. 916; Dakota v. Glidden, 113 U. S. 222, 5 Sup. Ct. 428, 28 L. ed. 981; Little v. Bowers, 134 U.

bring before the court of review, subsequent proceedings in the court of first instance that affect a judgment or decree, from which an appeal is taken.[5] Further proof upon appeals in admiralty is previously considered.[6]

§ 710. Amendments of the original record upon appeal or error. The court of review may allow an amendment of the record below alleging facts which show the requisite diversity of citizenship[1] or which obviate the objection that a suit in equity should have been brought at law or an action at law should have been brought in equity.[2] Otherwise not,[3] except by consent.[4] Or when the parties have treated the case below as if an amendment were unnecessary or had been made.[5] It has been held that the court of review cannot permit an amendment

S. 547, 10 Sup. Ct. 620, 33 L. ed. 1016; Washington and Idaho Railroad Co. v. Coeur D'Alene R. & N. Co., 160 U. S. 101, 16 Sup. Ct. 239, 40 L. ed. 355. In Bryar v. Campbell, 177 U. S. 649, 20 Sup. Ct. 794, 44 L. ed. 926; documentary evidence of a decree of a State court, which was *res adjudicata*, was admitted in evidence by a Circuit Court of Appeals upon an appeal from a decree in equity. Where a material document had been admitted, which the complainant-appellant, through oversight, had failed to offer in evidence below, the case was remanded with instructions that the bill be dismissed unless he pays the costs in both courts within sixty days and submit to the court of first instance his further proofs upon this question, whereupon the case should be reopened for a rehearing in the court below to the extent that equity might require. St. Claire Foundry Co. v. Union Jack Co., C. C. A., 184 Fed. 989. Upon proof of a recent discovery of an anticipatory patent the court dismissed the appeal without prejudice and remanded the cause with a direction that it be reopened for additional proof. Firestone Tire & Rubber Co. v. Seiberling, C. C. A., 245 Fed. 937.

[5] Barton v. Petit, 7 Cranch. 288, 3 L. ed. 347.

[6] *Supra*, § 592a.

§ 710. [1] 38 St. at L. 956, Comp. St. § 1251c, quoted *supra*, § 206; Swayne & Hoyt v. Barsch, C. C. A., 226 Fed. 581.

[2] 38 St. at L. 956, Comp. St. § 1251a, quoted *supra*, § 206.

[3] Pacific R. Co. of Mo. v. Ketchum, 95 U. S. 1, 24 L. ed. 347; Yeandle v. Pa. R. Co., C. C. A., 169 Fed. 938. But see Williams v. Molther, C. C. A., 198 Fed. 460.

[4] Kennedy v. Georgia State Bank, 8 How. 586, 12 L. ed. 1209.

[5] Tremolo Patent, 23 Wall. 518, 23 L. ed. 97; Confectioner's Mach. & Mfg. Co. v. Racine Eng. & Mach. Co., 163 Fed. 914; Old Dominion Copper Mining & Smelting Co. v. Lewisohn, 176 Fed. 745; Pa. Steel Co. v. N. Y. City Ry. Co., 190 Fed. 602; McEldowney v. Card, 193 Fed. 475.

striking out a proper but unnecessary party whose presence defeats the jurisdiction.[6]

§ 711. Decisions. In general. On proceedings upon a writ of error to a State Court or to review the final judgments or decrees of the Supreme Court of the Territory of Hawaii, or of the Supreme Court of Porto Rico, the Supreme Court may reverse, modify, or affirm the judgment or decree below; and has discretionary power to award execution, or remand the case to the court to which the writ of error issued.[1] The Supreme Court or a Circuit Court of Appeals may affirm, modify or reverse any judgment, decree or order of a District Court, lawfully brought before it for review, or may direct such judgment, decree, or order to be rendered, or such further proceedings to be had by

[6] Thomas v. Anderson, C. C. A., 223 Fed. 41.

§ 711. [1] Jud. Code, § 237, 36 St. at L. 1156, 38 St. at L. 790, 39 St. at L. 726; re-enacting U. S. R. S., § 709; Comp. St., § 1214; Jud. Code, § 246, 36 St. at L. § 1158, 38 St. at L. 804, Comp. St., § 1223. See *supra*, §§ 691b, 692. The decisions of the Supreme Court of Porto Rico upon questions of local law will rarely be disturbed. Richardson v. Fajardo Sugar Co., C. C. A., 237 Fed. 195; Philippine Sugar Estates Development Co. v. Government of the Phil. Islands, 247 U. S. 385, 38 Sup. Ct. 513, 62 L. ed. 1177; *supra*, § 691b.

Upon writs of error to review judgments under the Federal Employers' Liability Act of April 22, 1908, 35 St. at L. 65, Comp. St., § 8657; the Supreme Court ordinarily considers only assignments in relation to practice pleading an evidence which involve the construction of the statute. Central Vermont Ry. v. White, 238 U. S. 507; unless there is a clear and palpable error, Southern Ry. Co. v. Gadd, 233 U. S. 572; Yazoo & Mississippi Valley R. R. Co. v. Wright, 235 U. S. 376; Great Northern Ry. Co. v. Knapp, 240 U. S. 464. The question whether any substantial evidence justified the submission to the jury of the issue of approximate causal negligence may be reviewed. Union Pacific R. R. Co. v. Huxoll, 245 U. S. 535. The decision of the State trial and appellate courts that there was sufficient evidence of negligence to go to the jury will rarely be disturbed. Great Northern Ry. Co. v. Donaldson, 246 U. S. 121; or insufficient, Gillis v. N. Y., N. H. & H. R. R. Co., 249 U. S. 515. See *supra*, §§ 454f, 689e. When the only foundation of its jurisdiction is that the appellant or plaintiff in error is a corporation chartered by the United States, the Supreme Court goes no further than to inquire whether a plain error appears. Texas & Pac. Ry. Co. v. Howell, 224 U. S. 577, 56 L. ed. 892; Chicago, R. I. & Pac. Ry. v. Brown, 229 U. S. 317; Texas & Pacific Ry. Co. v. Rosborough, 235 U. S. 429.

the inferior court, as the justice of the case may require.[2] Neither the Supreme Court nor, it seems, a Circuit Court of Appeals has power to issue execution in a cause brought up from a District Court, but must send a special mandate to the inferior court to award execution thereupon.[3] Whenever on appeal or writ of error, or otherwise, a case coming from a Circuit Court of Appeals is reviewed and determined in the Supreme Court, the cause must be remanded to the proper District Court for further proceedings in pursuance of such determination.[4] Whenever on appeal or writ of error, or otherwise, a case coming from a District Court [5] or other court [6] is reviewed and determined in a Circuit Court of Appeals, in a case in which the decision of the Circuit Court of Appeals is final, the cause must be remanded to such lower court for further proceedings to be taken in pursuance of such decisions. The same rules apply to the review by the Supreme Court of the final judgments and decrees of the Court of Appeals of the District of Columbia,[7] of the District Court of the District of Alaska;[8] of the United States District Courts of Porto Rico and Hawaii.[9] No judge before whom a cause or question has been

[2] U. S. R. S., § 701; 26 St. at L. 829, §§ 10, 11.

[3] U. S. R. S., § 701; 26 St. at L. 829, §§ 10, 11.

[4] 26 St. at L. 829, § 10.

[5] 26 St. at L. 829, § 10. See Harper v. Victor, C. C. A., 212 Fed. 903.

[6] This rule applies to the review by the Circuit Court of Appeals for the First Circuit of the final judgments and decrees of the United States District Court, and of the Supreme Court of Porto Rico, to the review by the Circuit Court of Appeals for the Fifth Circuit of the final judgments and decrees of the District Court of the Canal Zone, 37 St. at L. 565, § 9, Comp. St., § 10045, to the review by the Circuit Court of Appeals for the Ninth Circuit of the final judgments and decrees of the district court for the district of Alaska, Jud. Code, §§ 134, 247, 249; and of the Supreme Court and United States District Court of Hawaii and of the United States Court for China. Jud. Code, §§ 131, 246, as amended by act of Jan'y 28, 1915, ch. 22, § 2, 38 St. at L. 804, Comp. St., § 1126a. The Circuit Court of Appeals cannot direct the Supreme Court of Hawaii to correct a judgment of reversal by the latter court so as to render such judgment final in form and appealable. Rumsey v. N. Y. Life Ins. Co., C. C. A., 267 Fed. 554.

[7] Jud. Code, §§ 249, 250, 36 St. at L. 1087.

[8] *Ibid.*, §§ 247, 249, 134.

[9] *Ibid.*, §§ 238, 249.

tried or heard in a District Court can sit on the trial or hearing of such cause or question in the Circuit Court of Appeals.[10]

The court of review will not consider exceptions taken by a party who has not sued out a writ of error or taken an appeal.[11] A court of review cannot consider, by agreement of the parties questions not in the case; although a stipulation is made that other suits or proceedings, which have not been brought up on appeal, be consolidated with that appeal, when they were not consolidated in the court of first instance.[12] But by stipulation the consideration may be limited to a single question,[13] provided that the jurisdiction appears in the record.[14]

It has been said to be the duty of an intermediate appellate court, when reversing a judgment, to pass on all the errors that have been assigned, provided, at least, that they are not constitutional questions, in order to avoid duplicate appeals.[15] Where the appellate court is equally divided, the judgment or decree of the court below is affirmed upon the point as to which there is a division,[16] and usually without any opinion.[17] In such a case the appellate court cannot change the decree of the court below in any respect; nor exercise any discretionary power to allow interest on the affirmance;[18] and the decision is not to be considered as settling any principle.[19]

[10] *Ibid.*, § 120, re-enacting § 3 of the Evarts Act, 28 St. at L. 666. See Rexford v. Brunswick-Balke-Collender Co., 228 U. S. 339, 57 L. ed. —.

[11] U. S. v. Blackfeather, 155 U. S. 180, 39 L. ed. 114; Guarantee Co. v. Phoenix Ins. Co., C. C. A., 124 Fed. 170; Cooper v. Jewett, C. C. A., 233 Fed. 618; Thacher v. Transit Const. Co., C. C. A., 234 Fed. 640; Lasswell Land & Lumber Co. v. Lee Wilson & Co., C. C. A., 236 Fed. 322; Henna v. Sauri & Subira, C. C. A., 237 Fed. 145; Rogers v. Marion County Lumber Corporation, C. C. A., 251 Fed. 876; Santa Marina Co. v. Canadian Bank of Commerce, C. C. A., 254 Fed. 391.

[12] Headrick v. Larson, C. C. A., 152 Fed. 170.

[13] Lydiard-Peterson Co. v. Woodman, C. C. A., 205 Fed. 900.

[14] See *infra*, § 711g.

[15] William W. Bierce, Limited v. Waterhouse, 219 U. S. 320, 55 L. ed. 237.

[16] The Antelope, 10 Wheat. 66, 6 L. ed. 268; Washington Bridge Co. v. Stewart, 3 How. 413, 11 L. ed. 658; Holmes v. Jennison, 14 Pet. 540, 10 L. ed. 579. But see Carmichael v. Eberle, 177 U. S. 63, 44 L. ed. 672; *supra*, § 709.

[17] Benton v. Woolsey, 12 Pet. 27, 9 L. ed. 987; Hertz v. Woodman, 218 U. S. 205, 54 L. ed. 1001.

[18] Hemmenway v. Fisher, 20 How. 255, 15 L. ed. 709.

[19] Etting v. Bank of U. S., 11 Wheat. 59, 6 L. ed. 419; Hanifen v. Armitage, 117 Fed. 845; Westhus

Where the record does not show the jurisdiction, the court of review should reverse the judgment of its own motion.[20] In such a case it will usually direct the entry of a judgment or decree of dismissal,[21] or in a case originally brought in a State court will direct a remand, even if it has been stipulated that the case shall abide the decision of another appeal.[22]

§ 711a. Final determination of the controversy. In general, the appellate court, when reversing a judgment at common law, will order a new trial,[1] and when reversing a decree in equity

v. Union Tr. Co. of St. Louis, C. C. A., 168 Fed. 617. A decision of an inferior court does not bind a court of appellate jurisdiction. U. S. v. Stone & Downer Co., C. C. A., 175 Fed. 33, 35. Unless the court of review affirms a judgment "on the opinion below," there is no presumption that it approved of the reasoning of such court, although it affirmed its judgment. Victor Talking Mach. Co. v. Hoschke, C. C. A., 188 Fed. 326.

[20] Grace v. Am. Cent. Ins. Co., 109 U. S. 278, 27 L. ed. 932, *infra*, § 711g.

[21] Bingham v. Cabbot, 3 Dall. 19, 1 L. ed. 491; Grace v. Am. Cent. Ins. Co., 109 U. S. 278, 27 L. ed. 724; Bors v. Preston, 111 U. S. 252, 28 L. ed. 419. City of New York v. Consolidated Gas Co., 253 U. S. 219. But where the objection was first taken upon the writ of error, and it appeared, although not by direct averment, that there was a diversity of citizenship between the parties, the case was remanded for appropriate action by the trial court with permission to grant leave to amend. Hunt v. Howes, C. C. A., 74 Fed. 657. *Cf.* Everhart v. Huntsville College, 120 U. S. 223, 30 L. ed. 623; *supra*, § 556. As to costs see § 412, *supra*.

[22] Ryder v. Holt, 128 U. S. 525, 32 L. ed. 529.

§ 711a. [1] Hudson v. Guestier, 6 Cranch. 281; Exchange Nat. Bank v. Third Nat. Bank, 112 U. S. 276, 28 L. ed. 722; Little Miami & C. & X. R. Co. v. U. S., 108 U. S. 277, 27 L. ed. 724; Farmer v. Atlantic Coast Line R. Co., 205 Fed. 319; Murphy v. Milford, A. & W. St. Ry. Co., C. C. A., 210 Fed. 135; Union Pac. R. Co. v. U. S., C. C. A., 219 Fed. 427; Sucesores De L. Villamil & Co., S. En. C. v. Merced Co., 11239 Fed. 86; Sucrerie Central Coloso De Porto Rico v. Fajardo, C. C. A., 248 Fed. 432; United States v. Fernandez, C. C. A., 254 Fed. 302; Lehigh Valley R. Co. v. Normile, C. C. A., 254 Fed. 680. *Cf.* Slocum v. N. Y. Life Ins. Co., 228 U. S. 364, decided by a majority of the Supreme Court with a strong dissenting opinion by Hughes, J., a case which has been severely criticised. See The Green Bag for March, 1914, the New York Law Journal for March and April, 1914. For a defense of this case see the Illinois Law Review, VIII, 287, 381, 465. Where the essential and ultimate facts have not been found below, South Chicago Elevator Co. v. United Grain Co., C. C. A., 165 Fed. 132; Chicago, R. I. & P. Ry. Co. v. Barrett, C. C. A., 190 Fed.

or admiralty, will direct the entry of a decree below finally disposing of the matters in litigation.[2] But a decree in equity may be affirmed in part and reversed in part,[3] an accounting,[4] or other further proceedings may be ordered when necessary.[5]

118; and there is not sufficient in the record to justify a final disposition of the case, Exchange Mut. Life Ins. Co. v. Warsaw-Wilkinson Co., C. C. A., 185 Fed. 487; the Circuit Court of Appeals will direct a new trial. This was done where a case had been heard upon the pleadings and it appeared to the court of review that justice could be better done by consideration of the evidence of the facts which they alleged. Pfeil v. Jamison, C. C. A., 245 Fed. 119. Where the court below, in its charge to the jury, proceeded on an erroneous construction of a statute, upon which the action was based, the court of review did not undertake to determine the case on the evidence in the record, but directed a new trial. Union Castle Mail S. S. Co. v. Thomson, C. C. A., 190 Fed. 536. See Hawkins v. Dannenberg Co., C. C. A., 253 Fed. 529. Where a judgment in favor of, National Surety Co. v. U. S., C. C. A., 228 Fed. 577; or against, Chiarello Bros. Co. v. Pedersen, C. C. A., 242 Fed. 482, several parties is in its nature several it may be treated as containing separate judgments some of which may be affirmed and a new trial of the issues in the others directed. For a modification in favor of an alien enemy see Birge-Forbes Co. v. Heye, C. C. A., 248 Fed. 636. For a refusal to set aside a stipulation of a dismissal and to render judgment against the parties dismissed, see Griggs v. Nadeau, C. C. A., 221 Fed. 381. In a criminal case, where the only error is in the sentence and judgment, the court of review may either impose the lawful sentence and enter judgment accordingly or transmit the case to the court below, with instructions so to do. Whitworth v. U. S., C. C. A., 114 Fed. 302.

[2] Wickliffe v. Owings, 17 How. 47; Penhallow v. Doane, 3 Dallas, 54, 1 L. ed. 507; Blease v. Garlington, 92 U. S. 1, 23 L. ed. 521; Denver v. Denver Union Water Co., 246 U. S. 178; Philippine Sugar &c. Co. v. Philippine Islands, 247 U. S. 385; Harrison v. Clarke, 182 Fed. 765, 767; United States v. Illinois Surety Co., C. C. A., 226 Fed. 653; Alwood v. Lewis, C. C. A., 254 Fed. 810.

[3] Elizabeth v. Am. N. P. Co., 131 U. S. cxlviii, 24 L. ed. 1059; Kneeland v. American L. & Tr. Co., 136 U. S. 89, 34 L. ed. 379, s. c., 138 U. S. 509, 511, 34 L. ed. 1052, 1053.

[4] Chouteau v. Barlow, 110 U. S. 238, 28 L. ed. 132; Tatum Bros. Real Estate & Investment Co. v. Shenk, C. C. A., 221 Fed. 182.

[5] Where a decree in equity is reversed for the refusal of the court below to permit leave to file an amended bill or other bill not original, a new hearing upon the new bill and the subsequent proceedings thereupon will be ordered below. Riddle v. Whitehall, 135 U. S. 621, 640, 34 L. ed. 282, 289; Ballard v. Searls, 130 U. S. 50, 32 L. ed. 846. The appellate court may also in such a case affirm in part the decree below, but send a mandate directing

And where a suit in equity or admiralty[6] is decided upon an erroneous theory, and all the evidence does not appear to have been taken, the decree may be reversed, even upon the court's own motion, with direction for a rehearing below and leave to amend or serve new pleadings,[7] and to offer additional evidence.[8] When questions of local law or others upon which the evidence is conflicting have not been passed upon by the court below the Supreme Court has also directed a rehearing there.[9] This is usually done, in proceedings both at law[10] and in equity,[11] when the case has been erroneously dismissed below for want of jurisdiction. A new hearing will not be ordered where evidence was erroneously admitted on a hearing in equity, or on a trial

the inferior court to reopen its decree and allow further proceedings. Watts v. Waddle, 6 Pet. 389, 8 L. ed. 437.

[6] Clinchfield Fuel Co. v. Henderson Iron Works Co., C. C. A., 254 Fed. 411.

[7] N. Y. Central R. R. Co. v. Beaham, 242 U. S. 148; Lane v. Pueblo of Santa Rosa, 249 U. S. 110; Kirkpatrick v. McBride, C. C. A., 203 Fed. 449. In an extraordinary case leave to amend the pleading may be given by the appellate court. Jones v. Meehan, 175 U. S. 1, 44 L. ed. 49; Wiggins Ferry Co. v. Ohio & M. Ry. Co., 142 U. S. 396, 35 L. ed. 1055; Crocket v. Lee, 7 Wheat. 522, 5 L. ed. 513; Watts v. Waddle, 6 Pet. 389, 8 L. ed. 437. This will rarely be done when the amendment would require new evidence. Am. Bell Tel. Co. v. U. S., C. C. A., 68 Fed. 542. Analogous relief may also be granted to a defendant appellant in a proper case. Crockett v. Lee, 7 Wheat. 522, 5 L. ed. 513.

[8] Estho v. Lear, 7 Peters, 130, 8 L. ed. 632; Illinois Cent. R. Co. v. Illinois, 146 U. S. 387, 36 L. ed. 1018; Peoria Gas & El. Co. v. Peoria, 200 U. S. 48, 50 L. ed. 365; Westinghouse El. & Mfg. Co. v. Wagner El. & Mfg. Co., 225 U. S. 604, 56 L. ed. 1222; Barber v. Coit, C. C. A., 118 Fed. 272; Standard Computing Scale Co. v. Computing Scale Co., C. C. A., 145 Fed. 627; Massachusetts Bonding & Ins. Co. v. Chouteau Tr. Co., C. C. A., 264 Fed. 793.

[9] Wilson Cypress Co. v. Del Pozo, 236 U. S. 635; Marconi Wireless Co. v. Simon, 246 U. S. 46. See Estho v. Lear, 7 Peters, 130, 8 L. ed. 632; U. S. v. Galbraith, 22 Howard, 89, 96, 16 L. ed. 321, 323; Illinois Cent. R. Co. v. Illinois, 146 U. S. 387, 36 L. ed. 1018; U. S. v. Rio Grande Dam & Irrig. Co., 184 U. S. 416, 46 L. ed. 619. In an extraordinary case the Supreme Court reversed a decree without passing on the merits, with instructions to refer the case to a master to find upon a certain question. Chicago, M. & St. P. Ry. Co. v. Tompkins, 176 U. S. 167, 44 L. ed. 417.

[10] Lamar v. U. S., 241 U. S. 103.

[11] Fifth Third Nat. Bank v. Johnson, 219 Fed. 89.

before a judge without a jury; but the court of review will render such judgment in the case as may be proper.[12] When the District Court had dismissed upon the merits a suit of which it had no jurisdiction, the appellate court reversed the decree and directed a dismissal for want of jurisdiction.[13] Where all the facts have been determined by a special verdict, a case stated, or findings below, and the judgment is reversed because the judgment was not in conformity with them, the court of review may direct final judgment to be entered in favor of the plaintiff in error without a new trial;[14] it has been held it may remit the case to the court below for an assessment of damages.[15] Where the only error in the record was an omission

[12] Field v. U. S., 9 Pet. 182, 9 L. ed. 94; U. S. v. King, 7 How. 833, 854, 12 L. ed. 934, 943; Howard v. Perrin, 200 U. S. 71, 50 L. ed. 374; Kuzek v. Magaha, C. C. A., 148 Fed. 618; Ajax Forge Co. v. Morden Frog & Crossing Forks, C. C. A., 164 Fed. 843.

[13] Weyman-Bruton v. Ladd, C. C. A., 231 Fed. 898. See *supra*, § 705d.

[14] National Bank v. Insurance Co., 95 U. S. 673, 679, 24 L. ed. 563, 565; Allen v. St. Louis Bank, 120 U. S. 20, 30 L. ed. 573; Cleveland R. M. Co. v. Rhodes, 121 U. S. 255, 30 L. ed. 920; Fort Scott v. Hickman, 112 U. S. 150, 28 L. ed. 636; Graham v. Bayne, 18 How. 60, 15 L. ed. 265; Bayne v. U. S., C. C. A., 195 Fed. 236. *Cf.* Walker v. Windsor Nat. Bank, C. C. A., 56 Fed. 76; Knight v. Illinois Cent. R. Co., C. C. A., 180 Fed. 368; Fellman v. Royal Ins. Co., C. C. A., 184 Fed. 577. But see St. Louis v. W. U. Tel. Co., 148 U. S. 92, 37 L. ed. 380; Miller v. Houston City St. R. Co., C. C. A., 55 Fed. 366; Mundy v. Stevens, C. C. A., 61 Fed. 77, 86; Bierce v. Hutchins, 205 U. S. 340, 51 L. ed. 828; Slocum v. N. Y. Life Ins. Co., 228 U. S. 364, 57 L. ed. —. This is usually done when the Supreme Court reverses a judgment of the Circuit Court of Appeals ordering a new trial. Delk v. St. Louis & San Francisco R. R. Co., 220 U. S. 580, 55 L. ed. 590. It was held to be improper to direct the entry of judgment upon a verdict on a former trial which had been erroneously set aside although the judgment upon a subsequent verdict was reversed. McGovern v. Philadelphia & Reading Ry. Co., 235 U. S. 389; Louis. & Nash. R. R. v. Stewart, 241 U. S. 261.

[15] Fisher v. Newark City Ice Co., C. C. A., 3rd Ct., 62 Fed. 569, containing an argument by the writer citing cases in support of this decision. See Am. Locomotive Co. v. Harris, C. C. A., 239 Fed. 234; Empire Fuel Co. v. Lyons, C. C. A., 257 Fed. 890. It was held otherwise in an action for tort, Farrar v. Wheeler, C. C. A., 1st Ct., 145 Fed. 482. In McKeon v. Central Stamping Co., C. C. A., 3rd Ct., 264 Fed. 385; the court refused to follow a New Jersey statute passed in 1912 providing that: "when a new trial is ordered because the damages are excessive or inadequate, the

to plead the jurisdictional facts, the Circuit Courts of Appeals have reversed judgments at common law, with leave to the plaintiff to file an amended pleading curing the omission, and with a direction to the court below to let the verdict stand and try the question of jurisdiction alone, if issue was taken thereupon by a plea in abatement.[16]

§ 711b. Review of questions of discretion. As a general rule the court of review has no power to review questions within the discretion of the court below;[1] but the discretionary exercise

verdict shall be set aside only in respect of damages and shall stand good in all other respects;'' holding that this was not constitutional.

[16] Grand Trunk Western Ry. Co. v. Reddick, C. C. A., 7th Ct., 160 Fed. 898; Chicago, R. I. & P. Ry. Co. v. Stephens, C. C. A., 216 Fed. 535; Fentress Coal & Coke Co. v. Elmore, C. C. A., 240 Fed. 328; Chicago & A. R. Co. v. Allen, C. C. A., 249 Fed. 280; Alexandria Paper Co. v. Cleveland, C., C. & St. L. Ry. Co., C. C. A., 246 Fed. 122. See Atchison, T. & S. F. R. R. Co. v. Gilliland, C. C. A., 193 Fed. 608, 113 C. C. A. 476; Atlantic Coast Line R. Co. v. Whilden, C. C. A., 195 Fed. 263; Empire Fuel Co. v. Lyons, C. C. A., 257 Fed. 890.

§ 711b. [1] Cook v. Burnley, 11 Wall. 659, 20 L. ed. 29; Silsby v. Foote, 14 How. 218, 14 L. ed. 394; Freeborn v. Smith, 2 Wall. 160, 17 L. ed. 922; Cheang-Kee v. U. S., 3 Wall. 320, 18 L. ed. 72; Barton v. Forsyth, 5 Wall. 190, 18 L. ed. 545; De La Rama v. De La Rama, 241 U. S. 154. *A refusal to quash an indictment*, will ordinarly not be reviewed, U. S. v. Gooding, 12 Wheaton, 460, 6 L. ed. 693; Betts v. U. S., C. C. A., 132 Fed. 228, 231; *supra*, § 515. *The mode of conducting trials, the order of introducing evidence*, and the time when it is to be introduced, are properly matters belonging to the practice of the trial court, with which the appellate court ought not to interfere. Philadelphia & T. R. Co. v. Stimpson, 14 Pet. 448, 10 L. ed. 535. See *infra*, § 711g. So are all questions as to surprise, as to reopening a case, or as to the order of proof. Ames v. Quimby, 106 U. S. 342, 27 L. ed. 100. A judgment may, but rarely will, be reversed for the expressions of opinion on the facts by the judge in his charge, when he left all the questions of fact to the decision of the jury. *Cf.* Arey v. De Loriea, C. C. A., 55 Fed. 323. But see *supra*, § 527b. The decision of the trial court as to which party is entitled to the opening and closing of the argument to the jury will not be reviewed by the court of error. Hall v. Weare, 92 U. S. 728, 23 L. ed. 500; Day v. Woodworth, 13 How. 363, 14 L. ed. 181; Lancaster v. Collins, 115 U. S. 222, 29 L. ed. 373; at least where it does not appear that the plaintiff in error was thereby prejudiced, New York Dry Goods Store v. Pabst Brewing Co., C. C. A., 112 Fed. 381, 383. An allowance or refusal

of an *amendment* to a pleading is ordinarily a matter for the discretion of the court below. Jenkins v. Banning, 23 How. 455, 16 L. ed. 580; *Ex parte* Bradstreet, 7 Pet. 634, 8 L. ed. 810; Wright v. Hollingsworth, 1 Pet. 165, 7 L. ed. 96; Spencer v. Lapsley, 20 How. 264, 15 L. ed. 902; Jones v. Meehan, 175 U. S. 1, 29, 44 L. ed. 49, 60; Rucker v. Bolles, C. C. A., 133 Fed. 858; Dunn v. Mayo Mills, C. C. A., 134 Fed. 804, 806; Chicago, St. P., M. & O. Ry. Co. v. Nelson, 226 Fed. 708; Ames v. Sullivan, C. C. A., 235 Fed. 880. But in an extraordinary case a decision thereupon may be reviewed. Riddle v. Whitehill. 135 U. S. 621, 627, 640, 34 L. ed. 282, 285, 289; Herman v. Am. Bridge Co., C. C. A., 11 Fed. 930 (where there were reversals for refusals to permit an amendment). Warner v. Godfrey, 186 U. S. 365, 46 L. ed. 1203 (here a reversal was made because of a grant of permission to amend). Cordingly v. Kennedy, C. C. A., 239 Fed. 645. Upon a trial, plaintiff was allowed to withdraw a juror and given permission to amend his declaration within a specified time, and subsequently, after the jurors had been discharged, he was ordered to pay the costs of the term as a condition for such amendment, and in default thereof his complaint was dismissed. For this the judgment was reversed. Jackson v. Emmons, 176 U. S. 532, 44 L. ed. 576. See *supra*, § 215. The same rule applies to a motion to amend a judgment. Mason v. Smith, C. C. A., 191 Fed. 502; Des Moines v. Des Moines Water Co., C. C. A., 230 Fed. 570. The refusal of the court below to allow new pleas to be filed cannot be assigned as error except in case of a gross abuse of discretion. Mandeville v. Wilson, 5 Cranch, 15, 17, 3 L. ed. 23, 24; Marine Ins. Co. v. Hodgson, 6 Cranch, 206, 3 L. ed. 200; U. S. v. Buford, 3 Pt. 12, 7 L. ed. 585; Dean v. Mason, 20 How. 198, 15 L. ed. 876; Spencer v. Lapsley, 20 How. 264, 15 L. ed. 902; Ætna Ins. Co. v. Weide, 9 Wall. 677, 19 L. ed. 810; Chapman v. Barney, 129 U. S. 677, 32 L. ed. 800; Gormley v. Bunyan, 138 U. S. 623, 631, 34 L. ed. 1086, 1089. In an extraordinary case the appellate court may review a refusal to allow the filing of a supplemental answer. Jones v. Meehan, 175 U. S. 1, 29, 44 L. ed. 49, 60. *The grant of permission to withdraw a juror* is usually not reviewable. Tex. & Pac. Ry. v. Hill, 237 U. S. 208; Huntington v. Toledo, St. L. & W. R. Co., C. C. A., 175 Fed. 532. The *continuance* of a case or the refusal to continue it is in the discretion of the court to which the motion is made. Woods v. Young, 4 Cranch, 237, 2 L. ed. 607; Sims v. Hundley, 6 How. 1, 12 L. ed. 319; Thompson v. Selden, 20 How. 194, 15 L. ed. 1001; McFaul v. Ramsey, 20 How. 523, 15 L. ed. 1010; Cook v. Burnley, 11 Wall. 659, 20 L. ed. 29; Cox v. Hart, 145 U. S. 376, 36 L. ed. 741; Pickett v. U. S., 216 U. S. 456, 54 L. ed. 566; Guardian Assurance Co. of London v. Quintana, 227 U. S. 100; Tex. & Pac. Ry. v. Hill, 237 U. S. 208; Davis v. Patrick, C. C. A., 57 Fed. 909; Texas & Pac. Ry. Co. v. Humble, C. C. A., 97 Fed. 837; Means v. Bank of Randall, 146 U. S. 620, 36 L. ed. 1107; Drexel v. True, C. C. A., 74 Fed. 12; Baker v. Texarkana Nat. Bank, C. C. A., 74 Fed. 598;

of equitable jurisdiction, for example, in granting or refusing specific performance, may be reviewed.[2] The granting[3] or refusal of a motion for a new trial, either absolutely[4] or condi-

Hardy v. U. S., 186 U. S. 224, 46 L. ed. 1137; Copper River Min. Co. v. McClellan, C. C. A., 138 Fed. 333; Myers v. Kessler, C. C. A., 142 Fed. 730; Huntington v. Toledo, St. L. & W. R. Co., C. C. A., 175 Fed. 532; St. Louis Stave & Lumber Co. v. U. S., C. C. A., 177 Fed. 178; Callahan v. U. S., C. C. A., 195 Fed. 924; Pocahontas Distilling Co. v. United States, C. C. A., 218 Fed. 782; McClendon v. U. S., C. C. A., 229 Fed. 804; Pennsylvania Co. v. Fanger, C. C. A., 231 Fed. 851; Spear v. U. S., C. C. A., 246 Fed. 250; Hale v. U. S., C. C. A., 242 Fed. 891; Panama R. Co. v. Curran, C. C. A., 256 Fed. 768. For a reversal because of a denial of an application for a continuance, see Younge v. U. S., C. C. A., 223 Fed. 941; *supra*, §§ 473a, 536a. It seems that the exceptions to rulings on a *motion to change the venue* are not available upon a writ of error, McFaul v. Ramsey, 20 How. 523, 15 L. ed. 1010; Cook v. Burnley, 11 Wallace, 659, 20 L. ed. 29. There will rarely be a reversal of a decision of the trial court upon a challenge to the favor of a juror. Press Pub. Co. v. McDonald, C. C. A., 73 Fed. 440; So. Pac. Co. v. Rauk, C. C. A., 49 Fed. 696; or of the decision upon an application for the remission of the penalty of a recognizance; U. S. v. Smart, C. C. A., 237 Fed. 978. Decisions of administrative questions in the course of receivership, such as granting leave to sue a receiver, N. Y. Security & Tr. Co. v. Illinois Transfer R. Co., C. C. A., 104 Fed. 710; or determining to retain a leasehold, Mercantile Tr. Co. v. Farmers' L. & Tr. Co., C. C. A., 81 Fed. 254; or the amount of compensation allowed to counsel; see Equitable Trust Co. v. Western Pac. Ry. Co., 236 Fed. 814; *supra*, § 321a, will rarely be reviewed upon appeal. An order setting aside an award of arbitrators may be reviewed by writ of error to the final judgment in the case. Nolan v. Colo. Cent. Consol. Min. Co., C. C. A., 63 Fed. 930. It has been held that an order overruling exceptions to a master's report, because the record was not printed in accordance with the rules, cannot be reviewed by the Circuit Court of Appeals. Du Bois v. Mayor of N. Y., C. C. A., 128 Fed. 418. That an order refusing naturalization is discretionary and is not reviewable by either appeal or writ of error. U. S. v. Dolla, C. C. A., 177 Fed. 101. *Contra*, U. S. v. Breen, 135 App. Div. (N. Y.) 824. *Supra*, §§ 151b, 695. The review of rulings upon the admission and exclusion of evidence is subsequently considered; *infra*, § 711e.

[2] Leicester Piano Co. v. Front R. R. Imp. Co., C. C. A., 55 Fed. 190.

[3] Mound Valley Vitrified Brick Co. v. Mound Valley Natural Gas & Oil Co., 205 Fed. 147; Farrell v. First Nat. Bank of Philadelphia, C. C. A., 254 Fed. 801; Glenwood Irr. Co. v. Vallery, C. C. A., 248 Fed. 483.

[4] Henderson v. Moore, 5 Cranch, 11, 3 L. ed. 22; Blunt v. Smith, 7

tionally,[5] is within the discretion of the court; and usually cannot be reviewed;[6] but where the court below refuses to con-

Wheat. 248, 5 L. ed. 446; M'Lanahan v. Universal Ins. Co., 1 Pet. 170, 7 L. ed. 98; U. S. v. Buford, 3 Pet. 12, 3 L. ed. 585; Life F. Ins. Co. v. Wilson, 8 Pet. 291, 8 L. ed. 949; Doswell v. De LaLanza, 20 How. 29, 15 L. ed. 824; Warner v. Norton, 20 How. 448, 15 L. ed. 950; Pomeroy v. Bank of Indiana, 1 Wall. 592, 17 L. ed. 638; Freeborn v. Smith, 2 Wall. 160, 17 L. ed. 922; Laber v. Cooper, 7 Wall. 565, 19 L. ed. 151; Ewing v. Howard, 7 Wall. 499, 19 L. ed. 293; Home Ins. Co. v. Barton, 13 Wall. 603, 20 L. ed. 708; Erskine v. Hohnbach, 14 Wall. 613, 20 L. ed. 745; Republican R. B. Co. v. Kansas P. R. Co., 92 U. S. 315, 23 L. ed. 515; Cambuston v. U. S., 95 U. S. 285, 24 L. ed. 448; Young v. U. S., 95 U. S. 641, 24 L. ed. 467; Kerr v. Clampitt, 95 U. S. 188, 24 L. ed. 493; San Antonio v. Mehaffy, 96 U. S. 312, 24 L. ed. 816; Newcomb v. Wood, 97 U. S. 581, 24 L. ed. 1085; Kansas Pac. R. Co. v. Twombly, 100 U. S. 78, 25 L. ed. 550; Boogher v. Insurance Co., 103 U. S. 90, 26 L. ed. 310; Jones v. Buckell, 104 U. S. 554, 26 L. ed. 841; Embry v. Palmer, 107 U. S. 3, 27 L. ed. 346; Terre Haute & Ind. R. Co. v. Struble, 109 U. S. 381, 27 L. ed. 970; Alexander v. U. S., 57 Fed. 828, 830; Myers v. Kessler, C. C. A., 142 Fed. 730; Hanaway v. Guarantee Savings, Loan & Investment Co., C. C. A., 143 Fed. 962; Bell Telephone Co. v. Detharding, C. C. A., 148 Fed. 371; Atlantic Coast Line R. Co. v. Thompson, C. C. A., 211 Fed. 889; Pocahontas Distilling Co., Inc., v. U. S., C. C. A., 218 Fed. 782; Montgomery v. U. S., 219 Fed. 162 (where it was contended that there was misconduct of a juror, and newly discovered evidence); Gladden v. Gabbert, C. C. A., 219 Fed. 855; (a denial of what was called a motion in arrest of judgment) S. M. Hamilton Coal Co. v. Watts, C. C. A., 232 Fed. 832; (an order vacating a judgment of dismissal and setting the case for hearing); Barrowman v. Northern Central Coal Co., C. C. A., 246 Fed. 906, (a denial), City of Goldfield v. Roger, C. C. A., 249 Fed. 39, (a denial of what the plaintiff in error called a motion to reconsider and enlarge the judgment). So is the denial of a motion to set aside a judgment and permit the withdrawal of a plea of guilty, when there is no jurisdictional question involved. Whitworth v. U. S., C. C. A., 114 Fed. 302.

[5] No. Pac. R. Co. v. Herbert, 116 U. S. 642, n, 29 L. ed. 755.

[6] N. Y., L. E. & W. R. Co. v. Winter, 143 U. S. 60, 75, 36 L. ed. 71, 80; and authorities cited *infra*, § 711i. But see Coughin v. District of Columbia, 106 U. S. 7, 27 L. ed. 74. In a death case, an order denying a new trial was reversed because nominal damages had been awarded. Pugh v. Bluff City Excursion Co., C. C. A., 177 Fed. 399. Where the plaintiff's damages were liquidated and not controverted; but the verdict was in his favor for a less amount; the Circuit Court of Appeals reversed the judgment because of a refusal to order a new trial. Glenwood Irr. Co. v. Vallery, C. C. A., 248 Fed. 483.

sider a motion for a new trial upon the ground that it has no power so to do,[7] or improperly refuses to consider affidavits upon such a motion,[8] or grants a new trial when it has no power to act upon the motion,[9] the decision may be reviewed by a writ of error. A decree upon a bill in the nature of a bill of review, which set aside a previous decree, was reversed upon appeal.[10] The opening of a default is not subject to revision in the appellate court.[11] A refusal to open a default is not the subject of review; except possibly, in case of a gross abuse of discretion.[12] An order directing a compulsory nonsuit or a dismissal of a complaint [13] may be reviewed by writ of error to the final judgment.[14] Except on writs of error to review the judgment of a State court,[15] there can be no reversal for error in sustaining,[16] or refusing to entertain or overruling, a plea in abatement other than a plea to the jurisdiction.[17]

§ 711c. Review of findings of fact. A Federal court of error cannot set aside the verdict of a jury in an action at common law as against the weight of evidence, when there was any evidence in support thereof; [1] since this would be an infringement

[7] Felton v. Spiro, C. C. A., 78 Fed. 576.

[8] Clyde Mattox v. U. S., 146 U. S. 140, 147, 36 L. ed. 917, 920; Dwyer v. U. S., 170 Fed. 160, *supra*, § 478.

[9] City of Manning v. German Ins. Co., C. C. A., 107 Fed. 52, 54; Nelson et al. v. Meehan et al., C. C. A., 12 L.R.A.(N.S.) 374, 155 Fed. 1.

[10] Hendryx v. Perkins, C. C. A., 114 Fed. 801. An order refusing leave to file a bill of review is appealable. Board of Councilmen of Frankfort v. Deposit Bank, C. C. A., 124 Fed. 18.

[11] U. S. v. Estudillo, 1 Wall. 710, 17 L. ed. 702; McAllister v. Kuhn, 96 U. S. 87, 24 L. ed. 615, Newcomb v. Burbank, 159 Fed. 569.

[12] Metropolitan St. Ry. Co. v. Davis, C. C. A., 112 Fed. 633; Dexter v. Kelles, C. C. A., 113 Fed. 48.

[13] Central Transp. Co. v. Pullman's P. C. Co., 139 U. S. 24, 39, 35 L. ed. 55, 61; Southern Pac. Co. v. Kelley, C. C. A., 187 Fed. 937.

[14] Elmore v. Grymes, 1 Pet. 469, 7 L. ed. 224; Central Transp. Co. v. Pullman's P. C. Co., 139 U. S. 24, 39, 35 L. ed. 55, 61.

[15] But see O'Neil v. Wolcott Min. Co., C. C. A., 27 L.R.A.(N.S.) 200, 174 Fed. 527.

[16] U. S. R. S., § 1011, Comp. St., § 1901; Marinette Sawmill Co. v. Scofield, C. C. A., 174 Fed. 562.

[17] U. S. R. S., § 1011, Comp. St., 1901; Wilder v. U. S., C. C. A., 143 Fed. 433.

§ 711c. [1] Wilson v. Everett, 139 U. S. 616, 35 L. ed. 286; N. Y., L. E. & W. R. Co. v. Winter's Adm'r, 143 U. S. 60, 75, 36 L. ed. 71, 80; Texas & Pac. Ry. Co. v. Bigger, 239 U. S. 330; Toledo Newspaper

of the Seventh Amendment which secures to the plaintiff the right of trial by jury.[2] The consent of the parties cannot authorize this to be done.[3] Findings of fact in equity[4] and admiralty[5] upon conflicting evidence taken orally, will rarely be set aside upon appeal; especially when two courts have concurred therein,[6] or when they confirm findings of fact made by a master or referee upon oral testimony taken before him;[7] but

Co. v. U. S., 247 U. S. 402 (the tendency of a publication); O'Donnell v. N. Y. Transp. Co., C. C. A., 187 Fed. 109; Devine v. Chicago, M. & St. P. Ry. Co., C. C. A., 194 Fed. 861; Canadian Northern Ry. Co. v. Akre, C. C. A., 200 Fed. 955. Alpha Portland Cement Co. v. Corsi, C. C. A., 229 Fed. 381; Carolina, C. & O. Ry. Co. v. Stroup, C. C. A., 239 Fed. 75.

[2] Slocum v. N. Y. Life Ins. Co., 228 U. S. 364; Union Pac. R. Co. v. U. S., C. C. A., 219 Fed. 427.

[3] Sierra Land & Live Stock Co. v. Desert Power & M. Co., 229 Fed. 982.

[4] Harding v. Hart, C. C. A., 113 Fed. 304; Kimberly v. Arms, 129 U. S. 512, 32 L. ed. 764; Oteri v. Scalzo, 145 U. S. 578, 589, 590, 36 L. ed. 824, 828; Topliff v. Topliff, 145 U. S. 156, 36 L. ed. 658; Monagas v. Albertucci, 235 U. S. 81; U. S. v. United Shoe Mach. Co., 247 U. S. 32; Thorndyke v. Alaska Perseverance Min. Co., C. C. A., 164 Fed. 657; Vanderbilt v. Bishop, C. C. A., 199 Fed. 420; *Re* Hodge, 205 Fed. 824; U. S. v. Marshall, C. C. A., 210 Fed. 595; Arctic Lumber Co. v. Borden, C. C. A., 211 Fed. 50; Lacy v. McCafferty, C. C. A., 215 Fed. 357; Tobey v. Kilbourne, C. C. A., 222 Fed. 760; Nichols v. Elken, C. C. A., 225 Fed. 689; Brookheim v. Greenbaum, C. C. A., 225 Fed. 763; U. S. v. Ness, C. C. A., 230 Fed. 950; Gibson v. Am. Graphaphone Co., C. C. A., 234 Fed. 633; U. S. v. Grass Creek Oil & Gas Co., C. C. A., 236 Fed. 481; Bijur Motor Lighting Co. v. Eclipse Mach. Co., C. C. A., 243 Fed. 600; Schank v. Smith, C. C. A., 246 Fed. 686; Fuller v. Reed, C. C. A., 249 Fed. 158; Farmers' State Bank v. Freeman, C. C. A., 249 Fed. 579.

[5] The Fin MacCool, C. C. A., 147 Fed. 123; Erie & M. Ry. & Nav. Co. v. Dunseith, C. C. A., 239 Fed. 814; The W. H. Flannery, C. C. A., 249 Fed. 349; Goode v. Oceanic Steam Nav. Co., C. C. A., 251 Fed. 556 (size and age).

[6] Dun v. Lumbermen's Credit Ass'n, 209 U. S. 20, 23, 52 L. ed. 663, 665, 14 Ann. Cas. 501; First Nat. Bank v. Littlefield, 226 U. S. 110, 57 L. ed. —; Texas & Pacific Ry. Co. v. R. R. Commission of Louisiana, 232 U. S. 338; Nat. Bank v. Shackelford, 239 U. S. 81; Villanueva v. Villanueva, 239 U. S. 293; Causey v. U. S., 240 U. S. 399; Eichel v. U. S. Fidelity &c. Co., 245 U. S. 102; Butte & Superior Co. v. Clark-Montana Co., 349 U. S. 12; Diamond Patent Co. v. Webster Bros., C. C. A., 249 Fed. 155. (The character and condition of exhibits).

[7] Mercantile Trust Co. v. Chicago, P. & St. L. Ry. Co., C. C. A., 147 Fed. 699; Emerson & Norris Co. v. Simpson Bros. Corporation, C. C.

an appellate court may reverse them.[8]

In suits upon claims against the United States the findings of fact of the trial court are in the Supreme Court conclusive and the sole question is whether the conclusions of law are warranted by the facts found, unless the record justifies the conclusion that the ultimate facts are not supported by any evidence.[9] The review of findings by the Court of Claims is previously considered.[10]

§ 711d. Review of questions of damages. A court of error cannot modify a judgment upon a verdict at common law by reducing the amount of damages, and directing the entry of a judgment in favor of the defendant in error for the reduced amount of damages.[1] Where the amount of damages is excessive, but capable of correction by computation,[2] as, for example, where interest was erroneously allowed,[3] or erroneously computed,[4] the usual practice is not to reverse absolutely, but to

A., 214 Fed. 572; Poff v. Adams, Payne & Gleaves, 226 Fed. 187; Barber v. Columbia Chemical Co., C. C. A., 228 Fed. 476; Rutan v. Johnson & Johnson, C. C. A., 231 Fed. 369; Lasswell Land & Lumber Co. v. Lee Wilson & Co., C. C. A., 236 Fed. 322; Stephen Putney Shoe Co. v. Dashiell, C. C. A., 246 Fed. 121; Firestone Tire & Rubber Co. v. Riverside Bridge Co., C. C. A., 247 Fed. 625; Brown v. Pennsylvania R. Co., C. C. A., 250 Fed. 513; *supra*, § 393.

[8] Willcox v. Consolidated Gas Co., 212 U. S. 19, 53 L. ed. 382, 15 Ann. Cas. 1034; Florida East Coast Ry. Co. v. U. S., 234 U. S. 167 (Admiralty); The Fin MacCool, 147 Fed. 123; Alexander v. Redmond, C. C. A., 180 Fed. 92; U. S. v. Cantini, C. C. A., 212 Fed. 925, (a hearing upon bill in answer); *Re* Heilbron Bros., 226 Fed. 803 (inferences of fact); Davis v. Anderson-Tully Co., C. C. A., 252 Fed. 681.

[9] U. S. v. Buffalo Pitts Co., 234 U. S. 228.

[10] *Supra*, §§ 686, 690.

§ 711d. [1] Kennon v. Gilmer, 131 U. S. 22, 33 L. ed. 110. The court of error will rarely review an award of counsel fees assessed by the trial judge under statutory authority. S. E. Hendricks Co. v. Thomas Pub. Co., C. C. A., 242 Fed. 37; Pennsylvania R. Co. v. Minds, C. C. A., 243 Fed. 53. See *supra*, §§ 416a, 416b.

[2] Van Boskerck v. Torbert, C. C. A., 184 Fed. 419; A. J. Huebel Co. v. Leaper, C. C. A., 188 Fed. 769; Breakwater Co. v. Donovan, C. C. A., 218 Fed. 340; Universal Trans. Co. v. Rederiaktiebolaget Omie, C. C. A, 250 Fed. 400.

[3] Washington & Georgetown R. Co. v. Harmon, 147 U. S. 571, 590, 37 L. ed. 284, 291.

[4] Gulf, C. & S. F. Ry. Co. v. Johnson, C. C. A., 54 Fed. 474, 481.

direct that the judgment be reversed unless the defendant in error files in the court below a *remittitur* of the excessive interest and produces a certified copy of the same to the court of review at the same term.[5] If the pleadings and the verdict clearly afford the means of distinguishing the invalid part of the plaintiff's claim from the rest, the Supreme Court or the Circuit Court of Appeals may do the same;[6] but otherwise it seems that neither of these courts can reverse a judgment at common law upon a verdict because of excessive damages when there is no exception to any ruling at the trial upon the subject,[7] and the

[5] Washington & G. R. Co. v. Harmon, 147 U. S. 571, 590, 37 L. ed. 284, 291; Gulf, C. & S. F. Ry. Co. v. Johnson, C. C. A., 54 Fed. 474; Hansen v. Boyd, 161 U. S. 397, 411, 40 L. ed. 746, 751; Koenigsberger v. R. S. Ins. Co., 158 U. S. 41, 53, 39 L. ed. 889, 893. In a case under Federal Employers' Liability Act where it appeared that the jury were not properly instructed as to the rule of damages if contributory negligence appeared; the Circuit Court of Appeals directed a reversal unless the plaintiff should file within thirty days a stipulation in due form to accept two-thirds of the damages awarded. Pennsylvania Co. v. Sheeley, C. C. A., 221 Fed. 901, 906. Formerly the Supreme Court of a Territory might enter an order directing that a judgment be reversed and a new trial had, unless the defendant in error stipulated to remit a specified portion of the damages, and that if he did so remit the judgment be affirmed. Hopkins v. Orr, 124 U. S. 510; Arkansas Val. L. & C. Co. v. Mann, 130 U. S. 69, 32 L. ed. 854. Not allowed in Chesbrough v. Woodworth, C. C. A., 195 Fed. 875, 887.

[6] Bank of Kentucky v. Ashley, 2 Pet. 327, 7 L. ed. 440. But see Wilson v. Everett, 139 U. S. 616, 35 L. ed. 286.

[7] Wilson v. Everett, 139 U. S. 616, 35 L. ed. 616; Wabash R. Co. v. McDaniels, 107 U. S. 454, 27 L. ed. 605; Arizona v. Copper Queen Mining Co., 233 U. S. 80; Tex. & Pac. Ry. v. Hill, 237 U. S. 208; Southern Ry. Co. v. Bennett, 233 U. S. 80; No. Pac. R. Co. v. Charles, C. C. A., 51 Fed. 562, 580; Morning Journal Ass'n v. Rutherford, C. C. A., 16 L.R.A. 803, 51 Fed. 513, 516; Hogg v. Emerson, 11 How. 587, 13 L. ed. 824; Walker Mfg. Co. v. Knox, C. C. A., 136 Fed. 334; Illinois Cent. R. Co. v. Davies, C. C. A., 146 Fed. 247; Phoenix Assur. Co. v. Maryland Gold Min. & D. Co., C. C. A., 146 Fed. 501; Omaha Water Co. v. Schamel, C. C. A., 147 Fed. 502; Mann v. Dempster, C. C. A., 181 Fed. 76; Chicago & E. R. Co. v. Penn, C. C. A., 191 Fed. 682; Joplin & P. Ry. Co. v. Payne, C. C. A., 194 Fed. 387. *Cf.* In Duke v. Morning Journal Ass'n, 120 Fed. 860. Suravitz v. Pristasz, C. C. A., 201 Fed. 335; Black v. Canadian Pac. Ry. Co., 218 Fed. 239; Williamson v. Osenton, C. C. A., 220 Fed. 653; National Enameling & Stamping Co. v. Zirkovics, C. C. A., 221 Fed. 184; Baltimore

damages were not liquidated; nor for inadequate damages,[8] at least when they are not nominal,[9] and the amount is not fixed by law. And in case of reversal for such a reason after a verdict a new trial must almost invariably be directed.[10]

§ 711e. Review of rulings upon evidence. In equity, "When evidence is offered and excluded, and the party against whom the ruling is made excepts thereto at the time, the court shall take and report so much thereof, or make such a statement respecting it, as will clearly show the character of the evidence, the form in which it was offered, the objection made, the ruling, and the exception. If the appellate court shall be of opinion that the evidence should have been admitted, it shall not reverse the decree unless it be clearly of opinion that material prejudice will result from an affirmance, in which event it shall direct such further steps as justice may require."[1] At common law, the rule is otherwise. Upon the exclusion of a competent question which admits of an answer tending to prove a fact relevant to the issues an exception to such exclusion is sufficient to bring the error before the court of review,[2] and no offer of proof is

& O. R. Co. v. Smith, C. C. A., 222 Fed. 667; Kansas City Southern Ry. Co. v. Willsie, C. C. A., 224 Fed. 908, 909; Central Vermont Ry. Co. v. Cauble, C. C. A., 228 Fed. 876; Thrush v. Fullhart, C. C. A., 230 Fed. 24; Southern Ry. Co. v. White, C. C. A., 232 Fed. 144. But see Bank of Kentucky v. Ashley, 2 Pet. 327, 7 L. ed. 440.

[8] Denison v. Shawmut Min. Co., C. C. A., 159 Fed. 102; Donohue v. Boston & M. R. R., C. C. A., 209 Fed. 824; Worden v. Kenny, C. C. A., 239 Fed. 131. Where there was no controversy as to the amount of damages, if the plaintiff was entitled to any recovery and the court charged the jury to bring in a verdict for such a sum in case they found for the plaintiff; the Circuit Court of Appeals reversed the judgment and directed a new trial because the verdict was for less. Glenwood Irr. Co. v. Vallery, C. C. A., 248 Fed. 483.

[9] Pugh v. Bluff City Excursion Co., C. C. A., 177 Fed. 399.

[10] Buckeye Cotton Oil Co. v. Sloan, C. C. A., 250 Fed. 712; Washington & C. Ry. Co. v. Mobile & O. R. Co., C. C. A., 255 Fed. 12; Olivier v. Mt. Union Tanning & Extract Co., C. C. A., 264 Fed. 601. See *supra*, § 711a.

§ 711e. [1] Eq. Rule 46. For the former practice, see Blease v. Garlington, 92 U. S. 1, 23 L. ed. 521; Shauer v. Alterton, 151 U. S. 607, 617, 38 L. ed. 286, 289. Depositions, § 352, *supra*. Incompetent evidence admitted by the court below should be disregarded. Anderson v. Hultberg, C. C. A., 247 Fed. 273, 279.

[2] Buckstaff v. Russell, 151 U. S. 626, 38 L. ed. 292; Himrod v. Ft.

necessary;[3] but the trial court may require the party who puts the question to state the facts which he proposes to prove by the answer,[4] and it has been said that the record should indicate the nature of the testimony expected to be elicited by the question.[5] The rejection of an offer of evidence which is relevant and competent may be a ground for a reversal, although no question was put;[6] provided that the trial court did not direct that a question upon the subject be propounded. A judgment will not be reversed for the admission of evidence when no objection and exception was taken on the trial.[7]

Pitt Mining & Milling Co., C. C. A., 202 Fed. 724. An objection to the exclusion of a question upon cross-examination cannot be considered unless the bill of exceptions states the substance of the testimony in chief of the witness. First Nat. Bank of Pittston v. Hoggson Bros., C. C. A., 242 Fed. 261. To a large extent, the course and extent of a cross-examination of a witness is left to the control of the court in the exercise of a sound discretion; and the exercise of that discretion is not ordinarily reviewable on a writ of error. Rea v. Missouri, 17 Wall. 532, 21 L. ed. 707. But see Eames v. Kaiser, 142 U. S. 488, 35 L. ed. 1090; O'Connell v. Pennsylvania Co., C. C. A., 118 Fed. 989. Nor is ordinarily a limitation of the scope of a cross-examination because it is not germane to the examination in chief or has been unduly extended. Post Pub. Co. v. Peck, C. C. A., 199 Fed. 6. Nor the admission of a question objected to as leading. Linn v. U. S., C. C. A., 251 Fed. 476. Nor a ruling as to the qualification of a witness to testify. U. S. v. Fischer, C. C. A., 245 Fed. 422. Nor the admission or exclusion of testimony objected to as too remote. Overstreet v. Norfolk & W. Ry. Co., C. C. A., 238 Fed. 565. It has been held that an erroneous admission of evidence in corroboration of the testimony of an unimpeached and uncontradicted witness, in respect to a matter of detail, is not a ground for reversal. First Nat. Bank of Houston v. Wells, Fargo & Co., C. C. A., 127 Fed. 818.

[3] Himrod v. Ft. Pitt Mining & Milling Co., C. C. A., 202 Fed. 724.

[4] Buckstaff v. Russell, 151 U. S. 626, 38 L. ed. 292. See §§ 473, 473d, 478, 479, *supra*.

[5] McCurley v. National Savings & Trust Co., 258 Fed. 154.

[6] Platte Valley Cattle Co. v. Bosserman-Gates Live Stock & Loan Co., C. C. A., 202 Fed. 692; Owl Creek Coal Co. v. Goleb, C. C. A., 210 Fed. 209.

[7] Hinde v. Longworth, 11 Wheat. 199, 6 L. ed. 454; Pennock v. Dialogue, 2 Pet. 1, 7 L. ed. 327; Nelson v. Woodruff, 1 Black, 156 17 L. ed. 97; Cucullu v. Emmerling, 22 How. 83, 16 L. ed. 300; Prialeau v. U. S., C. C. A., 143 Fed. 320. The same rule has been applied upon an appeal in equity. Kalamazoo Ry. Supply Co. v. Duff Mfg. Co., C. C. A., 113 Fed. 264. It is too late to raise upon writ of error for the first time

§ 711f. Review of rulings upon interlocutory applications. Upon a writ of error or appeal, the court will review any decision upon an interlocutory application appearing on the record, not discretionary,[1] whereby the rights of the plaintiff in error or appellant were injuriously affected.[2]

upon writ of error or appeal the objection that a deposition read in evidence without objection was taken too late, Ray v. Smith, 17 Wall. 411, 21 L. ed. 666. A judgment will rarely be reversed for the admission of evidence against an objection and exception when the ground of the objection was not stated, Ward v. Blake Mfg. Co., C. C. A., 56 Fed. 437, 441; U. S. v. Shapleigh, C. C. A., 54 Fed. 126; No. Pac. R. Co. v. Charless, C. C. A., 51 Fed. 562; Burton v. Driggs, 20 Wall. 125, 22 L. ed. 299; Deering Harvester Co. v. Kelly, C. C. A., 103 Fed. 261; Westinghouse El. & Mfg. Co. v. Stanley Instrument Co., C. C. A., 133 Fed. 167, 174; Klein v. Darnell, C. C. A., 239 Fed. 844; Smith v. Smith, C. C. A., 247 Fed. 461; at least unless the objection is one which could not have been obviated by preliminary evidence; or by a change in the form of the question; or otherwise, Westinghouse El. & Mfg. Co. v. Stanley Instrument Co., C. C. A., 133 Fed. 167, 174; Turner v. Newburgh, 109 N. Y. 301, 308, and authorities cited in 38 Cyc. 1385; or possibly where the evidence is so clearly irrevelant or incompetent that the trial court could not fail to understand the ground of the objection. Deering Harvester Co. v. Kelly, C. C. A., 103 Fed. 261, 264; Groh v. Groh, 177 N. Y. 8; Nevers Lumber Co. v. Fields, 151 Ala., 367, 44 So. Rep. 81; 38 Cyc. 1385, 1386.

§ 711f. [1] See *supra*, § 711b.

[2] Buckingham v. McLean, 13 How. 150, 14 L. ed. 90; Riddle v. Whitehill, 135 U. S. 621, 34 L. ed. 283. See, however, Gunn v. Black, C. C. A., 60 Fed. 151. Buster v. Wright, C. C. A., 135 Fed. 947; *supra*, § 695.

The court, where the assignment of errors is sufficient, will review upon an appeal from a final judgment or decree: a decision on a plea of abatement to a writ of attachment. Fitzpatrick v. Flannigan, 106 U. S. 648, 27 L. ed. 211. But see Leitensdorfer v. Webb, 20 How. 176, 15 L. ed. 891. An order denying a motion to remand seasonably made, on the ground that the petition for a removal was filed too late or because the case was not removable. Edrington v. Jefferson, 111 U. S. 770, 28 L. ed. 594; *supra*, § 558. In an extraordinary case a denial of leave to amend. Riddle v. Whitehill, 135 U. S. 621, 34 L. ed. 282; Hernan v. Am. Bridge Co., C. C. A., 167 Fed. 930. But see National Bank v. Carpenter, 101 U. S. 567, 568, 25 L. ed. 815, 816; Gormley v. Bunyan, 138 U. S. 623, 634, 34 L. ed. 1086, 1090; Hernan v. Am. Bridge Co., C. C. A., 167 Fed. 930; Garrett v. Louisville & N. R. Co., C. C. A., 197 Fed. 715, 723; *supra*, §§ 215, 711b. An order made without jurisdiction granting a new trial. Coughlin v. District of Columbia, 106 U. S. 7, 27 L. ed. 74. *Cf.* Spaulding v. Mason, 161 U. S. 375, 40 L. ed. 738; *supra*, §§ 478, 711b. An order fining a party

for contempt, and directing that part of the fine be paid to the opposite party. Worden v. Searls, 121 U. S. 14, 26, 30 L. ed. 853, 857. See *supra*, §§ 436, 437. Where the defendant after his demurrer had been overruled was allowed to answer by an order expressly reserving his objection to such ruling, the court considered the question upon a writ of error to the final judgment. Bauserman v. Blunt, 147 U. S. 647, 37 L. ed. 316. It was so held, when leave to reserve the objection had not been granted. Dennis v. Slyfield, C. C. A., 117 Fed. 474. But a court of review will *not* reverse a judgment an error in ruling upon a plea to the jurisdiction of the court. U. S. R. S., § 1011. See Henderson v. Henshall, C. C. A., 54 Fed. 320, 330, and *supra*, § 687. Nor reverse a prior order or decree which was in its nature final. Hill v. Chicago & E. R. Co., 140 U. S. 52, 35 L. ed. 331; Quinton v. Neville, C. C. A., 154 Fed. 432. See Porter v. Pittsburg B. S. Co., 120 U. S. 649, 30 L. ed. 830; *supra*, §§ 397, 695. Nor it has been said an order granting an interlocutory injunction which was itself appealable. Chapman v. Yellow Poplar Lumber Co., C. C. A., 143 Fed. 201, 204 (holding that so much of an order as required the plaintiff to replead at law could be reviewed upon appeal from the final decree); nor review an order subsequent to that specified in the writ of error or appeal. Ford Motor Co. v. Harrington, C. C. A., 245 Fed. 850. The fact that a prior appeal, which had been dismissed for a failure to perfect the same or for some other reason, was taken from the interlocutory order or decree, does not prevent this from being thus reviewed on appeal from the subsequent final decree, Buckingham v. McLean, 13 How. 150, 14 L. ed. 90. Upon an appeal from a final decree, a subsequent order denying a motion to set the same aside cannot be reviewed. Nowell v. International Tr. Co., C. C. A., 169 Fed. 497. An appeal from an order confirming a sale does not bring up for view a decree denying a motion to dismiss the bill. Turner v. Farmer L. & Tr. Co., 106 U. S. 552, 27 L. ed. 273; Long v. Maxwell, C. C. A., 59 Fed. 948. A judgment or order on a collateral question arising on the suggestion of a party not on the record, who has himself sued out no writ of error, cannot be thus reviewed. Bayard v. Lombard, 9 How. 530, 13 L. ed. 245. Upon an appeal from an order directing payment out of the proceeds of a foreclosure sale, the propriety of the orders made during the foreclosure is not considered. Central Tr. Co. v. Grant Locom. Works, 135 U. S. 207, 34 L. ed. 97. Where a suit originally in equity was transferred by consent to the common-law side of the court below, it was held that a bill of exceptions did not bring up for revision proceedings prior to such transfer. Nations v. Johnson, 24 How. 195, 16 L. ed. 628. An appellate court will not hold that the court below erred in the interpretation of its own order, unless it is clear that injustice resulted from the erroneous interpretation. Girard L. Ins. Ass'n & Tr. Co. v. Cooper, C. C. A., 51 Fed. 332, 335. For a case where it was held that the reversal of one judgment compelled the reversal of another, see Blanco v. Hubbard, 220 U. S. 233, 55 L. ed. 447.

§ 711g. Objections not raised below. As a general rule, no judgment or decree will be reversed upon an objection not raised below.[1] This is almost always the case when the objection is to

§ 711g. [1] Barrow v. Reab, 9 How. 366, 13 L. ed. 177; Lathrop v. Judson, 19 How. 66, 15 L. ed. 553; Ins. Co. of Va. Valley v. Mordecai, 22 How. 111, 16 L. ed. 329; De Sobry v. Nicholson, 3 Wall. 420, 18 L. ed. 263; Clements v. Moore, 6 Wall. 299, 18 L. ed. 786; Tome v. Dubois, 6 Wall. 548, 18 L. ed. 943; The Georgia, 7 Wall. 32, 19 L. ed. 122; Laber v. Cooper, id. 565, 19 L. ed. 151; Alviso v. U. S., 8 Wall. 337, 19 L. ed. 305; The Eagle, id. 15, 19 L. ed. 365; Express Co. v. Kountze, id. 342, 19 L. ed. 457; Nat. Bank v. Kentucky, 9 Wall. 353, 19 L. ed. 701; Rogers v. Bitter, 12 Wall. 317, 20 L. ed. 417; Klein v. Russell, 19 Wall. 433, 22 L. ed. 116; Wood County v. Lackawanna I. & C. Co., 93 U. S. 619, 23 L. ed. 989; Wheeler v. Sedgwick, 94 U. S. 1, 24 L. ed. 31; Flournoy v. Lastrapes, 131 U. S. clxi, 25 L. ed. 406; U. S. v. Morgan, 131 U. S. clxiv, 19 L. ed. 256; Wilson v. McNamee, 102 U. S. 572, 26 L. ed. 234; Springer v. U. S., id. 586, 26 L. ed. 253; Wood v. Weimar, 104 U. S. 786, 26 L. ed. 779; Clark v. Fredericks, 105 U. S. 4, 26 L. ed. 938; Morrill v. Jones, 106 U. S. 466, 21 L. ed. 267; Union Pac. R. Co. v. Myers (Pacific R. R. Removal Cases), 115 U. S. 1, 29 L. ed. 319; Gila Valley Ry. Co. v. Hall, 232 U. S. 97; Grant Bros. Constr. Co. v. U. S., 232 U. S. 647; Hessian v. Patten, C. C. A., 156 Fed. 956; Bluegrass Canning Co. v. Stewart, C. C. A., 175 Fed. 537; Provident Life & Tr. Co., v. Camden & T. Ry. Co., C. C. A., 117 Fed. 854; Tredegar Co. v. Seaboard Air Line Ry., C. C. A., 183 Fed. 289; Choctaw, O. & G. R. Co. v. Jackson, C. C. A., 192 Fed. 792; Burchett v. U. S., C. C. A., 194 Fed. 821; J. H. Lane & Co. v. Maple Cotton Mills, C. C. A., 226 Fed. 692; Richardson v. Fajardo Sugar Co., C. C. A., 237 Fed. 195; Kleman v. Anheuser-Busch Brewing Ass'n, C. C. A., 237 Fed. 993. It is too late to object in the Supreme Court for the first time that an appeal below was heard at chambers, and not in open court. Roberts v. Reilly, 116 U. S. 80, 29 L. ed. 544. It is too late to object in the court of review for the first time that the action is improper in form: Marine Bank v. Fulton Bank, 2 Wall. 252, 17 L. ed. 785; Goldswith v. Koopman, C. C. A., 152 Fed. 173. That a receiver was appointed before the plaintiff had not reduced his claim to judgment. L. D. George Lumber Co. v. Daugherty, C. C. A., 214 Fed. 958. That the evidence shows usury, Ewing v. Howard, 7 Wall. 499, 19 L. ed. 293. That there was a misnomer of the plaintiff. Breedlove v. Nicolet, 7 Pet. 413, 8 L. ed. 731. That the plaintiff is not the real party in interest. Northwestern S. S. Co. v. Cochran, C. C. A., 191 Fed. 146. That the plaintiff had no legal capacity to sue. St. Louis S. W. Ry. Co. v. Henson, C. C. A., 58 Fed. 531; Coggey v. Bird, C. C. A., 209 Fed. 803. That there was a misjoinder of parties. Historial Pub. Co. v. Jones Bros. Pub. Co., C. C. A., 231 Fed. 639. Under the former practice that there was an insufficient replication. Erskine v. Hohnbach, 14 Wall. 613, 20 L. ed. 745; or no replication,

Fretz v. Stover, 22 Wall. 198, 22 L. ed. 769; Laber v. Cooper, 7 Wall. 565, 19 L. ed. 151; Nauvoo v. Ritter, 97 U. S. 389, 24 L. ed. 1050; Central Nat. Bank of Baltimore v. Conn. Mutual Life Ins. Co., 104 U. S. 54, 26 L. ed. 693, when the case was tried as if the issues were properly raised. That there was a defect in pleading which was cured by the verdict, De Sobry v. Nicholson, 3 Wall. 420, 18 L. ed. 263; Coffey v. U. S., 116 U. S. 436, 29 L. ed. 684; San Antonio Ry. v. Wagner, 241 U. S. 476; Westinghouse v. Carlton, C. C. A., 202 Fed. 129; Duluth St. Ry. Co. v. Speaks, C. C. A., 204 Fed. 573; Law v. Illinois Cent. R. Co., C. C. A., 208 Fed. 869; Conley Camera Co. v. Multiscope & Film Co.; C. C. A., 216 Fed. 892; or findings below. The Vaughan and Telegraph, 14 Wall. 258, 20 L. ed. 807. Anglo-American Land, M. & A. Co. v. Lombard, C. C. A., 132 Fed. 721. That the complaint or findings did not show forth compliance with a condition precedent to the right to sue. Bankers' Surety Co. v. Town of Holly, 219 Fed. 96; City of Charlotte v. Atlantic Bitulithic Co., C. C. A., 228 Fed. 455; Towle v. Pullen, C. C. A., 238 Fed. 107; Reliance Const. Co. v. Hassam Paving Co., C. C. A., 248 Fed. 701. That a suit was prematurely brought. Lumbermen's Trust Co. v. Title Ins. & Inv. Co., C. C. A., 248 Fed. 212. That the proof varied from the pleadings, when the objection might have been obviated if taken below. Raberts v. Graham, 6 Wall. 578. That defendant was estopped from pleading a counterclaim. Mesa Market Co. v. Crosby, C. C. A., 174 Fed. 96. That a fact in issue essential to the judgment was not proved, when for all that appears, proof might have been offered had the objection been seasonably made. O'Reilly v. Campbell, 116 U. S. 418, 29 L. ed. 669; Martin v. Marks, 97 U. S. 345, 24 L. ed. 940; Mercantile Trust Co. v. Hensey, 205 U. S. 298, 306, 51 L. ed. 811; Singers-Bigger v. Young, C. C. A., 166 Fed. 82, National Surety Co. v. Lincoln County, C. C. A., 238 Fed. 705; Kalloch v. Hoagland, C. C. A., 239 Fed. 252; Lohman v. Stockyards Loan Co., C. C. A., 243 Fed. 517; Couts v. U. S., C. C. A., 249 Fed. 595. But the Circuit Court of Appeals for the Fifth Circuit reversed a judgment on a writ of error where the evidence did not justify a verdict for the plaintiff, although no direction of a verdict for the defendant was requested below, Texas & P. Ry. Co. v. Patton, 61 Fed. 259. *Contra*, Missouri, K. & T. Ry. Co. v. Collier, C. C. A., 157 Fed. 347. A failure to renew, after the close of defendant's evidence, a motion to dismiss, made at the close of the evidence for the plaintiff, was held not to waive an error in refusing to grant the former motion, when the defendant's evidence did not affect the point. Lydia Cotton Mills v. Prairie Cotton Co., C. C. A., 156 Fed. 235. That no leave to amend was granted when a demurrer was sustained, Childs v. Mo., K. & T. Ry. Co., C. C. A., 221 Fed. 219. But see Hodges v. Erie R. R. Co., C. C. A., 257 Fed. 494; *supra*, § 701. That a Mexican grant was fictitious U. S. v. Larkin, 18 How. 557, 15 L. ed. 485. That errors then excepted to were made on the trial of an issue directed by a court of equity, where the exceptions were not brought to the attention of the court of equity

the constitutionality of a statute.[2] A judgment or decree will be reversed for want of jurisdiction below, by the appellate court of its own motion, although the objection is not raised by the parties below or above.[3] When a new trial is directed, the

after the trial, Brockett v. Brockett, 3 How. 691, 11 L. ed. 786; McLaughlin v. Bank of Potomac, 7 How. 220, 12 L. ed. 675. The fact that the sufficiency of the evidence to support the verdict was passed upon by the court below on a motion for a new trial will not authorize a review of its action on a writ of error. City of Lincoln v. Sun V. S. L. Co., C. C. A., 59 Fed. 756. A verdict for defendants, when but one defendant appeared and defended, and the others were formal parties, was held to be a clerical error which was no ground for a reversal upon a writ of error, when no motion to correct it was made at the time. Shattuck v. No. Br. L. & Mer. Ins. Co., C. C. A., 58 Fed. 609. Nor because receivership proceedings were pending in a Federal Court sitting in another State. Wetzel & T. Ry. Co. v. Tennis Bros. Co., C. C. A., 145 Fed. 458. That there was no disposition of a cross bill. Carson v. Hurt, C. C. A., 250 Fed. 30.

That the form of the decree was erroneous when no rights were thereby prejudiced. Peace v. Rathbun-Jones Eng. Co., 243 U. S. 273. As to objection to the admission of evidence, see *supra*, § 711e.

[2] Southern Ry. Co. v. King, 169 Fed. 332; Brothers v. Cunningham, C. C. A., 189 Fed. 884. But see Weems v. U. S., 217 U. S. 349, 54 L. ed. 793, *cited supra*, § 701. It was so held of an omission to refer to a State statute a violation of which it was contended for the first time upon writ of error constituted contributory negligence. Federal Mining & Smelting Co. v. Hodge, C. C. A., 213 Fed. 605.

[3] Grace v. American Cent. Ins. Co., 109 U. S. 278, 27 L. ed. 932; Bors v. Preston, 111 U. S. 252, 28 L. ed. 419; Pennsylvania R. Co. v. St. Louis, A. & T. H. R. Co., 116 U. S. 472, 29 L. ed. 696; Fore River Shipbuilding Co. v. Hagg, 219 U. S. 175; Puget Sound Navigation Co. v. Lavendar, C. C. A., 156 Fed. 361; Royal Ins. Co. of Liverpool, Eng., v. Stoddard, C. C. A., 201 Fed. 915; Farmers' Oil & Guano Co. v. Duckworth Co., C. C. A., 217 Fed. 362; Empire City Fire Ins. Co. v. American Cent. Ins. Co., C. C. A., 218 Fed. 774; Thomas v. Anderson, C. C. A., 223 Fed. 41; Spencer v. Patey, C. C. A., 243 Fed. 558; Supreme Council of Royal Arcanum v. Hobart, C. C. A., 244 Fed. 385; Devost v. Twin State Gas & Electric Co., C. C. A., 250 Fed. 349. Such an objection may be assigned or raised by the party at whose suggestion the error was committed. Devost v. Twin State Gas & El. Co., C. C. A., 240 Fed. 349. Where the court had jurisdiction of the parties and of the subject matter of the litigation, the party who asked for an amendment changing the nature of the suit was not permitted to raise the objection that there was no power to grant his application. Mercelis v. Wilson, 235 U. S. 579. When the point was not taken below, the court of review will usually disregard the

court of review may, for the instruction of the lower court, decide questions material to the case which have not been pre-

motion, that equitable relief has been granted in an action at common law. Louisville & Nashville R. R. Co. v. Cook Brewing Co., 223 U. S. 70, 56 L. ed. 355; Cook v. Foley, C. C. A., 152 Fed. 41; U. S. v. Illinois Surety Co., C. C. A., 226 Fed. 653; or a suit in equity maintained where the remedy at law was adequate. Wylie v. Coxe, 15 How. 415, 14 L. ed. 753; Crosby v. Buchanan, 23 Wall. 420, 23 L. ed. 138; Reynes v. Dumont, 130 U. S. 354, 32 L. ed. 934; *supra*, §§ 365, 453; McCloskey v. Pacific Coast Co., C. C. A., 22 L.R.A.(N.S.) 673, 160 Fed. 794; Hattiesburg Lumber Co. v. Herrick, C. C. A., 212 Fed. 835; El Dora Oil Co. v. U. S., C. C. A., 229 Fed. 946; Babcock & Wilcox v. Am. Surety Co., C. C. A., 236 Fed. 340; Equitable Trust Co. v. Western Pac. Ry. Co., C. C. A., 250 Fed. 327; Cone Mfg. Co. v. Bruckman, C. C. A., 255 Fed. 957; Becker-Franz Co. v. Shannon Copper Co., C. C. A., 256 Fed. 522. But see Street Grading District No. 60 v. Hagadorn, C. C. A., 186 Fed. 451; although the court may of its own motion transfer a case to either docket at any stage of the proceedings; and it has the power in such a case to reverse a decree for the latter reason. Lewis v. Cocks, 23 Wall. 466, 23 L. ed. 70; Oelrichs v. Spain, 15 Wall. 211, 21 L. ed. 43; Reynes v. Dumont, 130 U. S. 354, 395, 32 L. ed. 934, 945; Allen v. Pullman's P. C. Co., 139 U. S. 658, 35 L. ed. 303. Chicago, Burlington & Quincy Ry. Co. v. Willard, 220 U. S. 413, 55 L. ed. 521; McGilvra v. Ross, C. C. A., 164 Fed. 604; Newcomb v. Burbank, C. C. A., 181 Fed. 334; Atlantic Coast Line R. Co. v. Whilden, C. C. A., 195 Fed. 263. But see Williams v. Molther, C. C. A., 198 Fed. 460, *supra*, §§ 365, 376, 377, 453. Where this objection was raised below, it may be considered in the court of review. Singer Sewing Mach. Co. v. Benedict, C. C. A., 179 Fed. 628. The Supreme Court refused to reverse a judgment because the judge refused to allow a plea concerning the citizenship of the plaintiff to be filed during the trial. Mexican C. Ry. Co. v. Pinkney, 149 U. S. 194, 37 L. ed. 699. The assumption by the court of jurisdiction in another case, where the question was not raised, is not controlling subsequently when the point is brought to its attention. Tefft, Weller & Co. v. Munsuri, 222 U. S. 114, 56 L. ed. 118. Arant v. Lane, 245 U. S. 167. It has been said that where the plaintiff's pleading showed the jurisdiction and there is a general denial, the point cannot be raised above, unless there was affirmative proof or the question was specifically brought to the attention of the court below. Pike County, Pa. v. Spencer, C. C. A., 192 Fed. 11. In one case the Supreme Court refused to affirm a judgment "upon a jurisdictional ground not passed upon by the Circuit Court," when of the opinion that the Circuit Court decided the case below upon an erroneous ground which might prejudice the plaintiff in error in subsequent litigation; and consequently reversed the judgment. Scott v. Armstrong, 146 U. S. 499, 512, 36 L. ed. 1059. The Supreme Court reversed a judgment because the case

viously presented.[4] Where the decision below was based upon a statute which had been repealed, it will be reversed although the repeal was not brought to the attention of the inferior court.[5] So when the judgment is in violation of an Act of Congress forbidding such a contract as it enforces.[6] Where an indispensable party to a suit in equity has been omitted, the decision may be reversed although the objection was not taken below.[7] Where the error appears upon the pleadings in equity,[8] or upon the record at common law,[9] and would have been fatal on a motion in arrest of judgment, or on a general demurrer, it is equally fatal upon a writ of error although not raised below.[9a] An appellant may claim relief upon a different theory from that on which he relied below, provided that the pleadings are sufficiently

was tried below by both parties under a mutual mistake of law. Murdock v. Ward, 178 U. S. 139, 44 L. ed. 1009.

[4] Guaranty Tr. Co. of N. Y. v. Koeler, C. C. A., 195 Fed. 669.

[5] Fourth Nat. Bank v. Francklyn, 120 U. S. 747, 751, 30 L. ed. 825, 827.

[6] Newman v. Moyers, 253 U. S. 182; *supra*, §§ 701, 707.

[7] Coiron v. Millaudon, 19 How. 113, 15 L. ed. 575; Hoe v. Wilson, 9 Wall. 501, 19 L. ed. 762. See *supra*, §§ 120, 129.

[8] Nat. Bank of Commerce v. Rockefeller, C. C. A., 174 Fed. 22.

[9] Slacum v. Pomery, 6 Cranch, 221, 3 L. ed. 205; Garland v. Davis, 4 How. 131, 11 L. ed. 907; McAllister v. Kuhn, 96 U. S. 87, 24 L. ed. 615; Cragin v. Lovell, 109 U. S. 194, 27 L. ed. 903; Coffey v. U. S., 116 U. S. 436, 29 L. ed. 684; Griggs v. Nadeau, 221 Fed. 381; Mound Coal Co. v. Jeffrey Mfg. Co., C. C. A., 233 Fed. 913. Such have been held to be: an omission to allege notice of protest in a declaration against an indorser, Slacum v. Pomery, 6 Cranch, 221, 3 L. ed. 204, (where counsel did not suggest the point to the Supreme Court); the failure to show that the plaintiff had a title to the cause of action upon which he sued. Sterrett v. Second Nat. Bank, C. C. A., 246 Fed. 753. The sustaining of a plea of *non assumpsit* to a declaration in tort, Garland v. Davis, 4 How. 131, 11 L. ed. 907. Where there was a combination of errors of a grave character, including the filing of an amended bill after issue without leave of court; a reference to an auditor which was not revoked nor apparently terminated before the final decree; a failure to file a replication to either of the answers; and a petition "by way of cross-bill," naming no defendants, seeking no process, and upon which no process was issued, but upon which the final decree was based,—the Supreme Court reversed the decree although no objection on any of these grounds was raised below. Washington R. Co. v. Bradleys, 10 Wall. 299, 19 L. ed. 894.

[9a] Wiggins Ferry Co. v. Ohio & Miss. Ry. Co., 142 U. S. 396, 35 L. ed. 1055; McCloskey v. Pacific Coast Co., 160 Fed. 794. But see

broad to support this[10] unless his adversary has lost an opportunity to present evidence to meet the new contention[11] or the right to relief upon such other ground has been waived.[12] Where the existence of a certain fact is assumed in the trial court and the trial proceeds upon such assumption without objection, neither party may question the existence thereof in the court of review.[13]

It has not yet been decided to what extent this doctrine has been modified by the act of February 26, 1919, authorizing the court to "give judgment after an examination of the entire record before the court, without regard to technical errors, defects, or exceptions which do not affect the substantial rights of the parties."[14]

[illegible] v. Northwestern Nat. Ins. Milwaukee, Wisc., C. C. A., [illegible]d. 23.

[illegible]re the verdict for defendant [illegible]et up two defenses might have been given under either, plaintiff, on writ of error to review the judgment thereupon was allowed to raise legal rulings relevant to either defense. Buckeye Powder Co. v. V. E. I. Du Pont De Memours P. Co., C. C. A., 223 Fed. 881.

10 Wiggins Ferry Co. v. Ohio & Miss. Ry Co., 142 U. S. 396, 35 L. ed. 1055; McCloskey v. Pacific Coast Co., 160 Fed. 794. But see Hatcher v. Northwestern Nat. Ins. Co. v. Milwaukee, Wisc., C. C. A., 184 Fed. 23.

11 Illinois Cent. R. Co. v. Egan, C. C. A., 203 Fed. 937.

12 Illinois Cent. R. Co. v. Egan, C. C. A., 203 Fed. 937; U. S. v. Kettenbach, C. C. A., 208 Fed. 209; Kennelly v. Frederick Starr Contracting Co., C. C. A., 250 Fed. 229.

13 Southern Cotton Oil Co. v. Shelton, C. C. A., 220 Fed. 247.

14 Ch. 48, 40 St. at L. 1181, Comp. St. § 1246, amending Judicial Code, § 269. See *supra*, § 536a, *infra*, § 711j. It seems that in criminal cases this justifies a reversal because of flagrant errors in a charge to which no exceptions was taken upon the trial, Stokes v. U. S., C. C. A., 264 Fed. 18. And even because of prejudicial remarks by the prosecuting attorney to which no objection nor exception was then taken, Smith v. U. S., C. C. A., 231 Fed. 25; August v. U. S., C. C. A., 257 Fed. 388, 392, a most extraordinary decision. See *supra*, §§ 473i, 527a, 536a. It has been held by a divided court that this does not authorize the review of proceedings upon the trial without a bill of exceptions upon the review of a judgment at common law although the return contains a transcript of the stenographer's minutes accompanied by a stipulation that this is a part of the record and by a certification of the clerk that the transcript is "a correct and complete transcript of the record." Buessel v. U. S., C. C. A., 258 Fed. 811. *Cf. supra*, § 479. Nor does it authorize a review of the whole case irrespective of exceptions. Storgard v. France & Canada S. S. Corporation, C. C. A., 263 Fed. 545.

§ 711h. Consideration of matter subsequent to proceedings brought up for review. A law passed after a judgment in the inferior court, which changes the rule governing the case, if constitutional, must be followed by the court of review.[1] Where the act authorizing an appeal is repealed pending an appeal, the appellate court loses jurisdiction of the appeal, unless the jurisdiction over pending appeals is reserved in the repealing act.[2] Where, pending a writ of error from a judgment entered upon a plea of *res adjudicata* by a former judgment between the same parties, such former judgment was reversed; the Supreme Court reversed the second. When by subsequent events the controversy between the judgment [3] parties has been settled or the questions

Nor allow a party in the court of review to assign another reason for his objection to a charge than that stated to the court below. Standard Oil Co. v. Allen, C. C. A., 267 Fed. 645. Nor authorize the review of a judgment or decree which was previously not appealable, Rumsey v. N. Y. Life Ins. Co., C. C. A., 267 Fed. 554; see *supra*, § 701. Formerly the well established rule was that a judgment could not be reversed because of erroneous instructions to the jury when no exception was taken to them at the time; Castle v. Bullard, 33 How. 172, 16 L. ed. 424; Burton v. West Jersey Ferry Co., 114 U. S. 474, 29 L. ed. 215; Seaboard Air Line v. Renn, 241 U. S. 290; Yazoo & M. V. R. Co. v. Wright, C. C. A., 207 Fed. 281; Lane v. Leiter, C. C. A., 237 Fed. 149; Examiner Printing Co. v. Aston, C. C. A., 238 Fed. 459; Am. Locomotive Co. v. Harris, C. C. A., 239 Fed. 234; Pennsylvania R. Co. v. Minds, C. C. A., 243 Fed. 53; Campbell v. Krauss, C. C. A., 249 Fed. 670; *supra*, §§ 473j, 479, 527b, 527d, 536a.

§ 711h. [1] U. S. v. The Peggy, 1 Cranch, 103, 2 L. ed. 49; Yeaton v. U. S., 5 Cranch, 281, 3 L. ed. 101; Kansas Pac. R. Co. v. Twombly, 100 U. S. 78, 25 L. ed. 550. Where, after a decree adjoining the execution of a statute, the statute was repealed, the appeal was dismissed. Flour Inspectors v. Glover, 160 U. S. 170, 40 L. ed. 382. But see Leathe v. Thomas, C. C. A., 97 Fed. 136. In a case where, after a sentence of condemnation, the sale of a vessel thereunder, and the payment of the proceeds to the United States, the act upon which the condemnation proceedings were based expired; the Supreme Court reversed the decree, and made a general order for the restitution of the property condemned, stating that the question whether the proceeds of the property should be paid over to the claimants was "a matter to be left to the consideration of the court below." The Rachel v. U. S., 6 Cranch, 329, 330, 3 L. ed. 239.

[2] Baltimore & P. R. Co. v. Grant, 98 U. S. 398, 25 L. ed. 231; *Ex parte* McCardle, 7 Wall. 506, 19 L. ed. 264.

[3] Butler v. Eaton, 141 U. S. 240, 35 L. ed. 713. *Supra*, § 692c. Where, pending an appeal from a decree on a creditor's bill founded upon a

raised by the appeal have otherwise become moot, the decree will be reversed or the appeal dismissed as has been previously described.[4] Since an appeal in admiralty is a retrial of the suit, changes in fact and in law subsequent to its institution may be considered by the appellate court.[5] Otherwise where, since the original decree, the rights of the parties have so changed as to make it improper to carry it into execution, relief can usually be had only through some form of original proceeding in the court in which the decree was rendered.[6]

§ 711i. Review of proceedings taken by consent or by default. Where a plaintiff has voluntarily become nonsuited, he cannot have the proceedings reversed by a writ of error.[1] On an appeal from a decree entered by consent, the only question which can be considered is whether the court below had jurisdiction of the

previous decree, the previous decree was reversed pending the appeal, the Supreme Court remanded the cause to the Circuit Court, with instructions to allow the appellant, the defendant below, to file such supplemental bill as he might be advised, in the nature of a bill of review, or for the purpose of suspending or avoiding the decree upon the new matter arising from the reversal of the decree in the former case. Ballard v. Searls, 130 U. S. 50, 56, 32 L. ed. 846, 848. Where, pending an appeal from a decree, a former decree in the same suit on which the latter was dependent was reversed, the Supreme Court held that the second decree was thereby nullified by operation of law, and dismissed the appeal therefrom with costs to the appellant. Chicago & V. R. Co. v. Fosdick, 106 U. S. 47, 84, 85, 27 L. ed. 47, 65. Where, pending a writ of error to a judgment on a "forthcoming bond" to a former judgment, the former judgment was reversed, the Supreme Court said that the reversal of the second judgment would follow as of course, but that a *certiorari* was necessary to bring up the execution upon which the bond was given, so as to show the connection between the judgments. Barton v. Petit, 7 Cranch, 288, 3 L. ed. 347. *Supra*, §§ 704, 709. When a question raised in a case in the Circuit Court of Appeals is involved in a case pending in the Supreme Court, the action of the latter will usually be awaited by the former court, but in the meantime an accounting may be ordered. International Curtis Marine Turbine Co. v. Wm. Cramp & Sons Ship & Engine Bldg. Co., 238 Fed. 564.

[4] *Supra*, §§ 705d, 709.

[5] Watts, Watts & Co., Limited, v. Unione Austriaca, &c., 248 U. S. 9.

[6] Mackall v. Richards, 116 U. S. 45, 29 L. ed. 558; The Vaughan and Telegraph, 14 Wall. 258, 20 L. ed. 807.

§ 711i. [1] U. S. v. Evans, 5 Cranch, 280, 3 L. ed. 101; Evans v. Phillips, 4 Wheat. 73, 4 L. ed. 516; Central Transp. Co. v. Pullman's P. C. Co., 139 U. S. 24, 39, 35 L. ed. 55, 61.

case so as to authorize it to enter any decree.[2] Where an appeal is taken from a decree entered upon an order taking a bill in equity as confessed by defendants for want of an answer, the only question for the consideration of the appellate court is whether the allegations of the bill and the proof of service are sufficient to support the decree.[3] The phrase, "pro forma," usually means that a decision was rendered, not upon the conviction that it was right, but merely to facilitate further proceedings.[4] Its insertion in a decree does not require a reversal where the record shows that the decree expresses the result of a consideration of the evidence and was not in fact pro forma.[5]

§ 711j. Errors not prejudicial. An error that could not have been prejudicial to the plaintiff in error or the appellant is no ground for a reversal.[1]

[2] Pacific R. Co. v. Ketchum, 101 U. S. 289, 25 L. ed. 932; U. S. v. Babbitt, 104 U. S. 767, 26 L. ed. 921. See also Mandeville v. Holey, 1 Pet. 136, 7 L. ed. 85.

[3] Masterson v. Howard, 18 Wall. 99, 21 L. ed. 764; Thomson v. Wooster, 114 U. S. 104, 29 L. ed. 105; Dobson v. Hartford Carpet Co., 114 U. S. 439, 29 L. ed. 177; O'Hara v. Mac Connell, 93 U. S. 150, 23 L. ed. 840.

[4] Harvey Hubbell v. General El. Co., C. C. A., 267 Fed. 564.

[5] *Ibid.*

§ 711j. [1] U. S. v. U. S. Fidelity & Guaranty Co., 222 U. S. 283, 56 L. ed. 200; Norfolk Southern R. Co. v. Talbott, C. C. A., 190 Fed. 737; Delaware, L. & W. R. Co. v. Lyne, C. C. A., 193 Fed. 984. Such as the erroneous admission or exclusion of evidence which could not have affected the result, Holmes v. Goldsmith, 147 U. S. 150, 37 L. ed. 118; Meeker v. Lehigh Valley R. R., 236 U. S. 434; U. S. v. Shapleigh, C. C. A., 54 Fed. 126, 137; Dorsheimer v. Glenn, 51 Fed. 404; Am. Mfg. Co. v. Bigelow, C. C. A., 188 Fed. 34; Post Pub. Co. v. Peck, C. C. A., 199 Fed. 6, 24; Atlantic Coast Line R. Co. v. Thompson, C. C. A., 211 Fed. 889; Chicago, St. P., M. & O. Ry. Co. v. Nelson, 226 Fed. 708; Missouri Valley Bridge & Iron Co. v. Blake, C. C. A., 231 Fed. 418; B. F. Sturtevant Co. v. Champion Fibre Co., C. C. A., 232 Fed. 2; Cooper v. Jewett, C. C. A., 233 Fed. 618; Chicago Rys. Co. v. Kramer, C. C. A., 234 Fed. 245; Tacoma Ry. & Power Co. v. Cothary, C. C. A., 235 Fed. 872; Ames v. Sullivan, C. C. A., 235 Fed. 880; Great Northern Ry. Co. v. Ennis, S. C. A., 236 Fed. 17; St. Louis Merchants' Bridge Terminal Ry. Co. v. Schuerman, C. C. A., 237 Fed. 1; Daigle v. U. S., C. C. A., 237 Fed. 159; Kalloch v. Hoagland, C. C. A., 239 Fed. 252; Akalitis v. Philadelphia & Reading Coal & Iron Co., C. C. A., 239 Fed. 299; Co-operative Raw Fur Co. v. American Credit Indemnity Co., C. C. A., 240 Fed. 67; Greer v. U. S., C. C. A., 240 Fed. 320; Chiarello Bros. Co. v. Pederson, C. C. A., 242 Fed. 483;

Delaware, L. & W. R. Co. v. Lanterman, C. C. A., 245 Fed. 548; Societé Nouvelle D'Armement v. Barnaby, C. C. A., 246 Fed. 68; Michigan Cent. R. Co., v. U. S., C. C. A., 246 Fed. 353; Central Iron & Coal Co. v. Hamacher, C. C. A., 248 Fed. 50; Holsman v. United States, C. C. A., 248 Fed. 193; Austro-American S. S. Co. v. Thomas, C. C. A., 248 Fed. 231; American Trading Co. v. North Alaska Salmon Co., C. C. A., 248 Fed. 665; Columbia-Knickerbocker Trust Co. v. Abbot, C. C. A., 247 Fed. 833; Buckeye Cotton Oil Co. v. Sloan, C. C. A., 250 Fed. 712; Sharples Separator Co. v. Skinner, C. C. A., 251 Fed. 25; Mullins Lumber Co. v. Williamson & Brown Land & Lumber Co., C. C. A., 255 Fed. 645; Vane v. United States, C. C. A., 254 Fed. 28; Alaska Treadwell Gold Mining Co. v. Crinis, C. C. A., 255 Fed. 810; McCurley v. National Savings & Trust Co., D. C. C. C. A., 258 Fed. 154; or an exclusion of evidence that was merely cumulative, when there was a considerable amount of evidence offered by the same party upon the same issue, Patterson v. Iaeger & S. Ry. Co., C. C. A., 178 Fed. 649. A judgment will not be reversed for an erroneous instruction to the jury where the evidence justified a direction in favor of the defendant in error. W. B. Grimes Dry Goods Co. v. Malcolm, 58 Fed. 670; Cook v. Foley, C. C. A., 152 Fed. 41, 48; Alwart Bros. Coal Co. v. Royal Colliery Co., C. C. A., 211 Fed. 313; Hornblower v. City of Pierre, C. C. A., 241 Fed. 450; Fricke v. International Harvester Co., C. C. A., 249 Fed. 869. Nor for an erroneous instruction inapplicable to the case. Crosby Lumber Co. v. Smith, C. C. A., 51 Fed. 63. Nor for an erroneous instruction which could have done no harm. Standard Oil Co. v. Brown, 218 U. S. 78, 86, 54 L. ed. 944, 945. *Cf.* Iron Silver Min. Co. v. Mike & S. G. & S. Min. Co., 143 U. S. 394, 36 L. ed. 201; Chicago, Rock Island & Pacific Railway Co. v. Wright, 239 U. S. 548; Kansas City, Ft. S. & M. R. Co. v. Stoner, 51 Fed. 649, 655; Betts v. Gahagan, C. C. A., 212 Fed. 120; Smith v. Robins, C. C. A., 236 Fed. 114; Stark Electric R. Co. v. McGinty Contracting Co., C. C. A., 238 Fed. 657; Pocahontas Consol Collieries Co. v. Johnson, C. C. A., 244 Fed. 369; Southern Trust Co. v. Lucas, C. C. A., 245 Fed. 286; Royal Ins. Co. v. Taylor, 254 Fed. 808. But see Deery v. Crary, 5 Wall. 795, 18 L. ed. 653; Smith v. Shoemaker, 17 Wall. 630, 21 L. ed. 717. Nor for overruling an objection that the plaintiff had an adequate remedy at law, where there was no issue of fact that could have been submitted to a jury. Southern Pac. Ry. Co. v. U. S., C. C. A., 186 Fed. 737. Nor for the denial of a motion to transfer a cause from the jury to the equity docket when the result must have been the same. Southern Ry. Co. v. Board of Com'rs of Public Works, C. C. A., 246 Fed. 383. Nor for dismissing a petition of intervention when the action was subsequently and rightly dismissed on the merits; Butler v. U. S., C. C. A., 261 Fed. 841. For rulings on pleadings held not to be prejudicial, see, Grant Bros. v. U. S., 232 U. S. 647; Lauderdale County v. Kittel, C. C. A., 229 Fed. 593; Westwater v. Murray, C. C. A., 245 Fed. 427;

By the Act of February 26, 1919, "In any case, civil or criminal, the court shall give judgment after an examination of the entire record before the court, without regard to technical errors, defects or exceptions which do not effect the substantial rights of the party."[2] It seems that it is now incumbent upon the plaintiff in error to show that a mistake in ruling is of such a nature that it is reasonable to believe it was prejudicial.[3] It

West Helena Consol. Co. v. McCray, C. C. A., 256 Fed. 753. For other rulings held not to be prejudicial, see O. W. Kerr Co. v. Corry, C. C. A., 211 Fed. 647; Breakwater Co. v. Donovan, C. C. A., 218 Fed. 340; Yates v. Whyel Coke Co., C. C. A., 221 Fed. 603; Panama R. Co. v. Beckford, C. C. A., 231 Fed. 436; Daigle v. United States, C. C. A., 237 Fed. 159; Minnesota Mut. Inv. Co. v. McGirr, C. C. A., 244 Fed. 847; Buckeye Cotton Oil Co. v. Sloan, C. C. A., 250 Fed. 712; Hughitt v. Wayne County Securities Co., C. C. A., 251 Fed. 57; Copper Process Co. v. Chicago Bonding & Ins. Co., C. C. A., 262 Fed. 66. As to objections to the admission and exclusion of evidence, see *supra*, § 711e.

[2] Ch. 48, 40 St. at L. 1181, amending Jud. Code, § 269; see *supra*, §§ 563a, 711g.

[3] Dimmitt v. Breakey, C. C. A., 267 Fed. 792, 794. This was formerly the rule in the Second Circuit. Press Pub. Co. v. Monteith, C. C. A., 180 Fed. 356; Canadian Pac. Ry. Co. v. Black, C. C. A., 230 Fed. 798; *Re* Soltman, C. C. A., 249 Fed. 455; Fraina v. U. S., C. C. A., 255 Fed. 28; Miller v. Continental Shipbuilding Corporation, C. C. A., 265 Fed. 158. See also, People v. Gilbert, 199 N. Y. 10, 20 Ann. Cas. 769; Savage v. Modern Woodmen, 84 Kan. 63, 33 L.R.A.(N.S.) 773; Harris v. State, 80 Neb. 195; Byers v. Territory, 1 Okla. Crim. Rep. 677; State v. Byrd, 41 Mont. 565; Yazoo & M. V. R. R. Co. v. Mullins, 249 U. S. 531. This rule has been approved by the American Bar Association, the New York Bar Association and the Bar Association of the City of New York. Report of Am. Bar Ass'n for 1912, Report of N. Y. State Bar Ass'n for 1912, Report of Law Reform Committee of N. Y. City Bar Ass'n, April 27, 1912, written by Henry A. Forster, Esq. It was the original rule of the common law, Tinkler's Case, R. & R. 133; Horford v. Wilson, 1 Taunton 12, 14; *per* Mansfield, C. J.; Rex v. Teal, 11 East 311, *per* Lord Ellenborough, C. J.; Tyrwhitt v. Winne, 2 B. & Ald. 554, 559, *per* Abbott, C. J.; afterwards Lord Tenterden; Doe v. Tyler, 6 Bingham 561; McLanahan v. Universal Ins. Co., 1 Peters 170, 183, *per* Storey, J. Unfortunately for the administration of justice a contrary rule arose and prevailed in the Federal courts as well as elsewhere, that if there be error apparent on the face of the record, a presumption of prejudice arises, which cannot be disregarded, unless the record affirmatively discloses that the error was not prejudicial. Crease v. Barrett, 1 C. M. & R. 919, A. D. 1835; Rutzen v. Farr, 4 A. & E. 53; Wright v. Tatham, 7 A. & E. 313, 330; R. v. Gibson, L.R.

has been held that the statute authorizes an affirmance in a criminal case, notwithstanding errors in the admission or rejection of evidence, when the guilt of the defendant is otherwise conclusively proved.[4] A decision based upon an erroneous ground will not be reversed when it can be properly sustained for another reason than that assigned by the court below.[5]

18 Q.B.D. 537, 540; Vicksburg & Meridian R. R. Co. v. O'Brien, 119 U. S. 99, 30 L. ed. 299; Mexia v. Oliver, 148 U. S. 664; 37 L. ed. 602; Cock v. Foley, C. C. A., 152 Fed. 41, 48; Mutual Reserve Life Ins. Co. v. Heidel, C. C. A., 161 Fed. 535; Norfolk & P. Traction Co. v. Miller, C. C. A., 174 Fed. 607; Consolidated Grocery Co. v. Hammond, C. C. A., 175 Fed. 641; Stewart v. Bruce, C. C. A., 189 Fed. 350; Keliher v. U. S., C. C. A., 193 Fed. 8, 20; Ayer v. Territory of New Mexico, C. C. A., 201 Fed. 497; Todd v. U. S., C. C. A., 221 Fed. 205. The history of the rule is set forth in Wigmore on Evidence, § 21, and in the report and proceedings above cited. For instructions presumed to be *prejudicial*, see Fillippon v. Albion Vein Slate Co., 250 U. S. 76; Chicago, St. P., M. & O. Ry. Co. v. Kroloff, C. C. A., 217 Fed. 525; Richards v. American Bank, C. C. A., 234 Fed. 300; American Smelting & Refining Co. v. Riverside Dairy & Stock Farm, C. C. A., 236 Fed. 510; New York & Ph. Coal & Coke Co. v. Meyersdale Coal Co., C. C. A., 236 Fed. 536; American Locomotive Co. v. Harris, C. C. A., 239 Fed. 234; Dr. J. H. McLean Medicine Co. v. United States, C. C. A., 252 Fed. 694. For the admission of evidence presumed to be prejudicial, see Chicago, B. & Q. R. Co. v. Gelvin, C. C. A., 238 Fed. 14; Klein v. Darnell, C. C. A., 239 Fed. 844; Illinois Central R. R. Co. v. Norris, C. C. A., 245 Fed. 926. An erroneous ruling cannot be treated as harmless where it was such that the trial was not according to due process of law, Union Pac. R. Co. v. Syas, C. C. A., 246 Fed. 561. The certificate or evidence of the trial judge that his decision was not affected by evidence erroneously admitted, will not cure the error. U. S. v. Leles, 236 Fed. 784.

[4] Fye v. U. S., C. C. A., 262 Fed. 6; Sheierson v. U. S., C. C. A., 264 Fed. 275. *Supra* § 536a.

[5] Priest v. Las Vegas, 232 U. S. 604; Newman v. Lynchburg Investment Corporation, 236 U. S. 692; Hamilton Shoe Co. v. Wolf Brothers, 240 U. S. 251; Guerini Stone Co. v. Carlin Constr. Co., 248 U. S. 334; Dean v. Davis, C. C. A., 212 Fed. 88; Prepayment Car Sales Co. v. Orange County Traction Co., C. C. A., 214 Fed. 576; U. S. v. Norris, C. C. A., 222 Fed. 14; Bunday v. Huntington, C. C. A., 224 Fed. 847; Dowd v. United Mine Workers of America, C. C. A., 225 Fed. 1; Gideon v. Hinds, C. C. A., 238 Fed. 140; Linde Air Products Co. v. Morse Dry Dock & Repair Co., C. C. A., 246 Fed. 834; U. S. v. Porter Fuel Co., C. C. A., 247 Fed. 769; Brown v. Denver & Omnibus & Cab Co., C. C. A., 254 Fed. 560; U. S. v. Board of Com'rs of

§ 712. Mandate. The judgment of the appellate court is embodied in a mandate which is sent down to the court whose proceedings have been reviewed by writ of error or appeal.[1] It is customary to issue but a single mandate.[2] When the judgment of a Circuit Court of Appeals is reviewed, the mandate should be addressed to the court of first instance;[3] unless some action by the Circuit Court of Appeals, such as the consideration of an appeal of which it had decided that it had no jurisdiction,[4] or the dismissal of an appeal, is directed, when the mandate is usually directed to that court alone.[5] Upon the issue of the mandate, the court of review loses jurisdiction until the mandate is recalled.[6] A mandate may be recalled from the inferior

Osage County; Ramsay v. Crevlin, C. C. A., 254 Fed. 813; Kalloch v. Hoagland, C. C. A., 239 Fed. 252. The same doctrine applies to the exclusion of evidence unless the proper objection was one which might have been obviated by additional proof.

§ 712. [1] 26 St. at L. 826, §§ 1, 11.

[2] *Ex parte* First National Bank, 207 U. S. 61, 64, 66, 52 L. ed. 103, 105, 106.

[3] 26 St. at L. 827, § 10; Louisville & Nashville R. R. Co. v. Behlmer, 169 U. S. 644, 648, 42 L. ed. 889, 890. Where, pending an appeal, a new district was created, to which the case would ordinarily belong; the Supreme Court remanded the case to the other district, because there were special circumstances, which made it proper that the facts should be investigated by the judge, before whom the first hearing was held. Hatfield v. King, 186 U. S. 178, 46 L. ed. 1112.

[4] Lutcher & Moore Lumber Co. v. Knight, 217 U. S. 257, 54 L. ed. 757. Where the directions as to further proceedings of the court of first instance are in a mandate addressed to the Circuit Courts of Appeals, they are not an order to issue an order to the District Court, but instructions are directions which the Circuit Court of Appeals should simply communicate to the court of first instance and which the latter should follow on the authority of the Supreme Court, not upon the authority of the Circuit Court of Appeals. *Ex parte* First Nat. Bank, 207 U. S. 61, 64, 66, 52 L. ed. 103, 105, 106.

[5] Am. Sugar Co. v. New Orleans, 181 U. S. 277, 283, 45 L. ed. 859, 862; Whitney v. Dick, 202 U. S. 132, 141, 50 L. ed. 963, 966; *Ex parte* First National Bank of Chicago, 207 U. S. 61, 64, 66, 52 L. ed. 103, 105, 106.

[6] Patents Selling & Exporting Co. v. Dunn, C. C. A., 213 Fed. 40. In a case in which the appellate court had no jurisdiction, it may of its own motion modify the judgment, recall a mandate of affirmance, pending the term at which it was issued, and dismiss the writ of error. U. S. v. Gomez, 23 How. 326, 16 L. ed. 552; Cannon v. U. S., 118

court, and corrected or set aside, at the term at which it is issued.[7] An application to recall and correct a mandate cannot be made after the close of the term.[8] Where there is no rule upon the subject a mandate does not issue without an order from the court of review which is usually granted only on consent or upon notice.[9] In the Supreme Court "mandates shall issue as of course, after the expiration of thirty days from the day the judgment or decree is entered unless the time is enlarged by order of the court, or of a justice thereof when the court is not in session, but during the term."[10] Where a party has died after argument,[11] or where an appeal or writ of error has been argued in ignorance of his death,[12] or in a case where it is

U. S. 355, 30 L. ed. 220; *Ex parte* Crenshaw, 15 Pet. 119, 10 L. ed. 682. By an order staying its mandate empending an appeal to the Supreme Court, a Circuit Court of Appeals retains its jurisdiction, so that a dismissal of such appeal leaves the cause still pending in the latter court which may revise of change its judgment at a term subsequent to the entry thereof. Omaha Electric Light & Power Co. v. City of Omaha, C. C. A., 216 Fed. 848.

[7] Killian v. Ebbinghaus, 111 U. S. 798, 28 L. ed. 593; *Ex parte* Crenshaw, 15 Pet. 119, 10 L. ed. 682; U. S. v. Gomez, 23 How. 326, 16 L. ed. 552; Waskey v. Hammer, C. C. A., 179 Fed. 273; Miocene Ditch Co. v. Campion Mining & Trading Co., C. C. A., 197 Fed. 497.

[8] Schell v. Dodge, 107 U. S. 629, 27 L. ed. 601; Killian v. Ebbinghaus, 111 U. S. 798, 28 L. ed. 593; Minn. Tribune Co. v. Associated Press, C. C. A., 84 Fed. 921; Hawkins v. Cleveland, C. C. & St. L. Ry. Co., C. C. A., 99 Fed. 322; s. c., C. C. A., 89 Fed. 266. In the Second Circuit it has been held: that at a term subsequent to the issue of a mandate upon an appeal from an interlocutory decree, the Circuit Court of Appeals may, upon the request of the District Court, before final decree, permit the latter court to open the interlocutory decree and take further testimony. Sundh Electric Co. v. Cutler-Hammer Mfg. Co., C. C. A., 244 Fed. 163. If there is any error in a decree of a District Court dismissing a bill on mandate from the Supreme Court, it can only be corrected at the term of its entry, or by proceedings for review under the rule, or on appeal; not by motion at a subsequent term, Campbell v. James, 31 Fed. 525.

[9] A. D. Howe Mach. Co. v. Dayton, C. C. A., 210 Fed. 801.

[10] S. C. Rule 39. So in the Court of Customs Appeals, C. C. Court, App. Rule 12. In the Circuit Court of Appeals for the Second Circuit fifteen days Rule 29 as amended December, 1921. For the rules in the other circuits, see *infra*, Appendix V.

[11] Clay v. Smith, 3 Pet. 411, 7 L. ed. 723.

[12] Bank of U. S. v. Weisiger, 2 Pet. 481, 7 L. ed. 492.

necessary to prevent an abatement which would cause injustice;[13] the judgment of the appellate court may be entered *nunc pro tunc* as of a date prior to his death.

Where a judgment for the payment of money is affirmed upon a writ of error, interest is awarded to the defendant in error from the day of the judgment until its payment, at the same rate that similar judgments bear interest in the courts of the State where such judgment is rendered.[14] The same rule applies to decrees for the payment of money in cases in equity, unless otherwise ordered by the appellate court.[15] "In cases in admiralty, damages and interest may be allowed if specially directed by the court."[16] In case interest is improperly allowed

[13] Coughlin v. District of Columbia, 106 U. S. 7, 27 L. ed. 74.

[14] S. C. Rule 23; C. C. A. Rule 30; U. S. R. S., § 1010; Perkins v. Fourniquet, 14 How. 328, 14 L. ed. 441; McNeil v. Holbrook, 12 Pet. 84, 9 L. ed. 1009. As to the power of the court of Appeals of the District of Columbia, see Washington & G. R. Co. v. Harmon's Adm'r, 147 U. S. 571, 589, 37 L. ed. 284, 291. In a suit upon an indemnity policy no recovery was allowed for interest accruing pending an appeal from the judgment against which indemnity was given, so far as this exceeded the face of the policy. Bowron v. Georgia Casualty Co., 223 Fed. 673.

[15] S. C. Rule 23; C. C. A. Rule 30; U. S. R. S., § 1010. Since the adoption of the rule just cited, it has been held that interest at the legal rate, in the State where the judgment was entered, should be allowed upon such affirmance in cases at common law and in equity, although not specified in the mandate. *Ex parte* The Republic of Colombia, 195 U. S. 604, 49 L. ed. 338; United Shoe Mach. Co. v. Dancel, C. C. A., Second Circuit 1906 (in which the author was counsel). *Contra*, Green v. Chicago, S. & C. R. Co., C. C. A., 6th Ct., 49 Fed. 907; Hagerman v. Moran, C. C. A., 9th Ct., 75 Fed. 97; Colsol. Rubber Tire Co., v. Diamond Rubber Co., D. C. S. D. N. Y., 232 Fed. 508, per Learned Hand, J., citing *Re* Washington & Georgetown R. R. Co., 140 U. S. 91, 11 Sup. Ct. 673, 35 L. ed. 339. The rule does not apply when the decree affirmed is substantially modified. Dresser v. Bates, C. C. A., 250 Fed. 525. In the absence of a rule of court upon the subject, it was held that, unless interest was included in the mandate, it could not be awarded after the affirmance. Boyce v. Gundy, 9 Peters, 276, 9 L. ed. 127; U. S. v. So. Pac. R. Co., 56 Fed. 865. See Ingersoll v. Coram, 174 Fed. 662. A direction in the mandate, that appellants pay "the expenses of the trustee, his fee, and costs," authorizes the allowance of a reasonable counsel fee to his attorney. Page v. Rogers, C. C. A., 149 Fed. 194. This practice still prevails in admiralty. The Glenochil, 128 Fed. 963.

[16] S. C. Rule 23; C. C. A. Rule

by the court below, and the amount of the interest is insufficient to warrant a writ of error, the court of review may compel the court below by a mandamus to vacate so much of the judgment as awards interest.[17] Where proceedings under the judgment or decree below have been stayed, and the court of review considers that the writ of error or appeal was taken merely for delay, damages at the rate of ten per cent. in addition to the interest may be awarded.[18] Where the mandate affirms a decree

30; U. S. R. S., § 1010. The District Court has discretion in the allowance of interest after the reversal of a decree in favor of one vessel when the mandate directs it "to proceed on the theory that both vessels were in fault." The Gladiator, 223 Fed. 381.

[17] *In re* Washington & G. R. Co., 140 U. S. 91, 35 L. ed. 339.

[18] S. C. Rule 23; C. C. A. Rule 30; U. S. R. S., § 1010; Barrow v. Hill, 13 How. 54, 14 L. ed. 48; Sutton v. Bancroft, 23 How. 320, 16 L. ed. 454; Kilbourne v. State Sav. Inst., 22 How. 503, 16 L. ed. 370; Sire v. Ellithorpe A. Br. Co., 137 U. S. 579, 34 L. ed. 801; Whitney v. Cook, 131 U. S. cxcvii, and 26 L. ed. 560; Insurance Co. v. Huchbergers, 12 Wall. 164, 20 L. ed. 364; Hennessy v. Sheldon, 12 Wall. 440, 20 L. ed. 446; Hall v. Jordan, 19 Wall. 271, 22 L. ed. 47; Peyton v. Heinekin, 131 U. S. ci, and 20 L. ed. 679; Jenkins v. Banning, 23 How. 455, 16 L. ed. 580; Prentice v. Pickersgill, 6 Wall. 511; Campbell v. Wilcox, 10 Wall. 421, 19 L. ed. 973; Amory v. Amory, 91 U. S. 356, 23 L. ed. 436; Texas & P. Ry. Co. v. Volk, 151 U. S. 73, 38 L. ed. 78; Watterson v. Payne, 154 U. S. 534, and 15 L. ed. 899; Wabash R. R. Co. v. Mathew, 199 U. S. 605, 50 L. ed. 329; Mutual Reserve L. Ins. Co. v. Birch, 200 U. S. 612, 50 L. ed. 620; Missouri Pac. Ry. Co. v. Larabee Flour Mills Co., 241 U. S. 649 (these three last cases arose upon writs of error to State Courts). A less sum than ten per cent may also be awarded for damages upon a writ of error or appeal. Wisconsin R. Co. v. Foley, 94 U. S. 100, 24 L. ed. 71. ($500 damages in addition to costs and interest upon a judgment for $26,333.) Southern Railway Co. v. Gadd, 233 U. S. 572 (five per cent); Southern Ry Co. v. Cooper, C. C. A., 245 Fed. 857 (five per cent). The power of the Supreme Court to award the damages for delay is not confined to money judgments. In one case five hundred dollars damages were awarded for delay on an appeal from a decree for specific performance. Gibbs v. Diekma, 131 U. S. clxxxvi, and 26 L. ed. 177. Where a supersedeas has been obtained this penalty may be imposed upon the dismissal of a writ of error or appeal for want of jurisdiction. Mo. Pac. Ry. Co. v. Larabee Flour Mills Co., 241 U. S. 649. *Contra*, Gregory Consol. Min. Co. v. Starr, 141 U. S. 222, 227, 35 L. ed. 715, 717; where no supersedeas had been obtained. It has been said that the penalty will not be imposed, where the question presented

in equity [19] or admiralty [20] with costs and gives no special direction upon this subject to the court below, the court of original jurisdiction has power to decide whether the costs therein should be awarded.[21] Where a judgment or decree which is reversed has been executed pending the writ of error or appeal, the mandate should include a direction to the court below to compel restitution.[22]

is one of statutory construction, which has not been decided by a State court, and is fairly in doubt under the authorities. Times-Democrat Pub. Co. v. Mozee, C. C. A., 136 Fed. 761. Nor where the previous decisions of the State Supreme Court and the Circuit Court of Appeals were in conflict. Joplin & P. Ry. Co. v. Payne, C. C. A., 194 Fed. 387.

[19] Romeike v. Romeike, C. C. A., 251 Fed. 273, 275. The costs of the Circuit Court of Appeals are collected by the District Court, Corn Products R. Co. v. Chicago Real Estate L. & T. Co., C. C. A., 185 Fed. 63.

[20] The Cuba, C. C. A., 255 Fed. 50.

[21] But see Am. Tr. & Sav. Bank v. Zeigler Coal Co., 165 Fed. 512; Ingersoll v. Coram, 174 Fed. 662; Morris v. U. S., C. C. A., 185 Fed. 73, a criminal case. As to costs upon writs of error, see *supra*, § 412. Where the mandate directed the reversal of a judgment at common law with costs in the Supreme Court to the plaintiff in error, the defendant below, and that judgment be entered for the defendant in error, the plaintiff below, for a less sum than that allowed him by the former judgment, it was held that the court of first instance might also allow the plaintiff below the costs of the case therein. Bartels v. Redfield, 47 Fed. 708.

[22] The Rachel v. U. S., 6 Cranch, 329, 3 L. ed. 239; Bank of U. S. v. Bank of Washington, 6 Pet. 8, 8 L. ed. 299; Morris's Cotton, 8 Wall. 507, 19 L. ed. 481; *Ex parte* Morris, 9 Wall. 605, 19 L. ed. 799.

This is so, even when the reversal is because of want of jurisdiction of the court below. Northwestern Fuel Co. v. Brock, 139 U. S. 216, 35 L. ed. 151. Instead of physical restitution, a party who has received property delivered in obedience to an order which has been reversed may be required to pay its value. St. Louis South Western Ry. Co. v. Consol. Fuel Co., C. C. A., 260 Fed. 638. Restitution may be enforced by contempt proceedings. *Ex parte* Morris, 9 Wall. 605, 19 L. ed. 799. Where a third person has received funds or property of which restitution is ordered, he may be obliged to return the same, provided he is within the territorial jurisdiction of the court, and no equities on his part would make restitution improper. *Ibid.* Restitution by the United States cannot be compelled. The Santa Maria, 10 Wheat. 431, 6 L. ed. 359. Where pending an appeal, costs awarded in the decree were paid by consent, it was held that their repayment would not be directed upon a re-

Upon the filing of the mandate in the court below, that court acquires jurisdiction of the case.[23] The inferior court is bound by a decree of the appellate court, and must carry it into execution according to the mandate.[24] It has been said that when

versal. Groves v. Sentell, 66 Fed. 179. See Miller v. Clark, 52 Fed. 900; Lamb v. Ewing, 54 Fed. 269; Robinson v. A. & G. M. Co., 67 Fed. 189. Where the person who is ordered to make restitution has paid duties or other charges thereon, he may be allowed the amount paid. *Ex parte* Morris, 9 Wall. 605, 19 L. ed. 799. See The Schooner Rachel v. U. S., 6 Cranch, 329, 3 L. ed. 239.

[23] It is too late to question the jurisdiction of the District Court after the cause has been sent back by a mandate. Skillern v. May, 6 Cranch, 267, 3 L. ed. 220; Whyte v. Gibbes, 20 How. 541, 15 L. ed. 1016; Billings v. Aspen M. & S. Co., 53 Fed. 561. In a case where the Supreme Court of the United States had reversed a judgment of the highest court of a State and directed that court to conform its judgment to the opinion of the Supreme Court, but the fact on which the judgment was reversed did not appear on the record from the lower State court from which the case was brought to the highest State court, and the latter court in consequence claimed it had no jurisdiction to reverse the judgment of the lower court, but instead dismissed its own writ of error to the lower court; the Supreme Court of the United States affirmed the latter judgment. Davis v. Packard, 8 Pet. 312, 8 L. ed. 957. After the whole case has been decided in the Supreme Court and remanded for final judgment, the State court has no power to dismiss a suit in equity on the ground that the plaintiff has a remedy at law. Tyler v. Magwire, 17 Wall. 255, 21 L. ed. 576. Upon an appeal from a decision denying a writ of *habeas corpus*, the State court is at liberty to act as soon as the judgment of the appellate court is entered and is not bound to wait until the mandate has been sent down. It does so at the risk that its orders may be controlled and, if need be, annulled, if the court of review, during the term, should suspend or set aside its own judgment. Harlan, J., *Re* Jugiro, 140 U. S. 291, 296, 35 L. ed. 510, 512. But see § 428, *supra*. It is doubtful whether this rule would be followed in a case that did not arise upon an application for the writ of *habeas corpus*. Burget v. Robinson, C. C. A., 123 Fed. 262, 265; Wilson v. Calculagraph Co., C. C. A., 153 Fed. 961. It has been held at circuit that the statute of limitations against the right of a purchaser of personal property to sue for a breach of warranty of title begins to run from the time his title is declared invalid by a decision of the court of last resort, not from the time when the mandate of such court is filed below. Nickles v. U. S., 42 Fed. 757.

[24] Sibbald v. U. S., 12 Pet. 488, 9 L. ed. 1167. See also Campbell v. James, 31 Fed. 525. As to the form of a mandate upon the affirm-

ance of an order or decree granting an injunction, see Goshen Sweeper Co. v. Bissell C. S. Co., C. C. A., 72 Fed. 67; Hadden v. Dooley, C. C. A., 74 Fed. 429. It has no further power so far as concerns matters subject to review upon the appeal or writ of error which has been decided. D'Arcy v. Jackson Cushion Spring Co., C. C. A., 212 Fed. 889; *Re* Bensel, 230 Fed. 932. It must apply the principles of law promulgated in the mandate or in the opinion of the court of review if the mandate thereto refers. Shapiro v. U. S., 235 U. S. 412; Farmer v. Atlantic Coast Line R. Co., 205 Fed. 319; Continental & Commercial Tr. & Sav. Bank v. North Platte Valley Irr. Co. et al., C. C. A., 237 Fed. 188. It cannot modify them in accordance with subsequent decisions of the Supreme Court, which are inconsistent with the mandate in the case. Gaines v. Caldwell, 148 U. S. 228, 37 L. ed. 432. See Shapiro v. U. S., 235 U. S. 412. Where a decree adjudging the invalidity of a patent was reversed, and the mandate directed the entry of a decree "declaring the validity of the patent and adjudging that claim one of said patent has been infringed by the defendant;" it was held that the Circuit Court had no discretion to vary therefrom by adjudging that claim one only of the patent was valid and infringed. Keasbey & Mattison Co. v. American Magnesia & C. Co., 148 Fed. 91. Where the Supreme Court had reversed a decree of the Circuit Court upon the ground that there was no equitable jurisdiction, a decree dismissing the bill absolutely was reversed upon a second appeal, with directions to enter a decree dismissing the bill without prejudice. Rogers v. Durant, 106 U. S. 644, 27 L. ed. 303. It must enter judgment in accordance with the mandate and authorize the issue of an execution if this is required. Harrison v. McPherson, C. C. A., 226 Fed. 198. The mandate only applies to the parties before the court. *Re* Metropolitan Tr. Co., 218 U. S. 312, 54 L. ed. 1051. After the reversal of an order dismissing the complaint as to the appellants, the court of first instance cannot vacate the judgment dismissing the complaint as to other defendants after the expiration of the term at which this was originally entered. Ibid. Where however the appeal was taken by part of the defendants before the time to apply for a rehearing had expired, after remand, the District Court was permitted to vacate its decree so far as it affected the defendants who did not appeal. Fifth Third Nat. Bank v. Johnson, C. C. A., 219 Fed. 89. It seems that upon the settlement of a decree upon a mandate of affirmance and modification the District Court cannot allow new parties to intervene. Olympia Mining & Milling Co. v. Kerns, 236 U. S. 211. It has been held: that an amendment cannot be allowed where further proceedings are not directed. Martin v. People's Bank, 115 Fed. 226. Nor can the District Court permit the defendant to file a supplemental answer to show the death of a party, and the abatement of the suit before the appeal, and the lack of a necessary party. *Ex parte* Story, 12 Pet. 339, 9 L. ed. 1108. After reply of the Supreme Court to a certificate of the Circuit Court of

Appeals, the latter court will not re-examine the evidence as to the facts set forth in such certificate. The Folmina, C. C. A., 173 Fed. 615. The court below has no power, after a case in equity has been decided by the appellate court and remanded with directions for execution, to grant a rehearing, *Re* Lennox, 181 Fed. 428; even in a patent case, where a disclaimer has been subsequently filed, Am. Soda Fountain Co. v. Sample, C. C. A., 185 Fed. 857. Where a decree after accounting was "reversed, and the cause remanded with instructions to strike out allowances for rental" for a certain date, and to allow subsequent rentals, it was held: that this in effect affirmed so much of the decree as allowed these subsequent rents; that the court below had no power to reopen the inquiry into the accounts; and that interest on the rents as allowed was properly awarded by such court in its decree on the mandate. Kneeland v. Am. Loan & Tr. Co., 136 U. S. 89, 103, 34 L. ed. 379, 385; s. c. 138 U. S. 509, 34 L. ed. 1052. Where the Supreme Court had affirmed a title to land in Florida according to a particular survey, it was held that the court below had no power to reopen the inquiry purpose of adopting another survey. Chaires v. U. S., 3 How. 611, 11 L. ed. 749. Where the Supreme Court, in dismissing an appeal, determined the value of the matter in dispute, the court below held that that was conclusive as to its jurisdiction, and upon a bill of review dismissed the bill. Miller v. Clarke, C. C. A., 52 Fed. 900. See Latta v. Granger, 167 U. S. 81, 42 L. ed. 85; *Ex parte* Washington & G. R. Co., 140 U. S. 91, 35 L. ed. 339; Gaines v. Caldwell, 148 U. S. 228, 37 L. ed. 432; Groff v. Boesch, 50 Fed. 660; Eastern Cherokees v. U. S., 225 U. S. 572, 56 L. ed. 1212. Where the mandate directs that an act be performed within thirty days of the filing thereof, the District Court has no power to direct its clerk to make an entry stating the filing as of a different date from that when the mandate was actually filed. Morris v. U. S., C. C. A., 185 Fed. 73. It was held at circuit that where the mandate directed the dismissal of a bill the Circuit Court had power to enter a decree dismissing an amended bill. Campbell v. James, 31 Fed. 525. Where a mandate of reversal permitted the appellee to apply to the District Court for leave to file a petition for a rehearing to enable him to introduce new evidence and the time to file such a petition had expired, it was construed as permitting a further examination of the issue referred to. Ellis v. Reed, C. C. A., 258 Fed. 919. Where the Supreme Court denies leave to file a petition for *habeas corpus* a motion for leave to apply to the District Court for the writ is not needed before the latter application. *Ex Parte* Tracy, 249 U. S. 551. When the mandate directed the dismissal of the bill without prejudice, the District Court retained jurisdiction to distribute funds in which strangers to the suit were interested, deposited as a condition of an injunction, and allowed such persons to intervene to protect their rights upon such distribution. St. Louis & S. F. R. Co. v. Barker, 210 Fed. 902. After an affirmance of an

a mandate dismisses a writ of error or appeal,[25] or affirms absolutely[26] or with modification,[27] a decree of the court below, that court can only record the order of the appellate court, and proceed with the execution of its own decree as affirmed. It seems that after a decree on appeal, leave to file a supplemental bill, setting up new defenses growing out of matters occurring after the mandate was sent down, should ordinarily be denied.[28] But after the mandate, a bill to enjoin the enforcement of the judgment may be sustained. Where a decree is reversed with a procedendo or directions that further proceedings be had in a conformity with, or not inconsistent with the opinion of the appellate court, or a new trial[29] is ordered; the court of first in-

action for ejectment, a new trial may be granted, when the court authorizes one as a matter of right, irrespective of error. Smale v. Mitchell, 143 U. S. 99, 109, 36 L. ed. 90, 93. After an affirmance of a judgment in an ordinary action at common law, a new trial can be granted, because of newly discovered evidence. Fuller v. U. S., 182 U. S. 562, 576, 45 L. ed. 1230, 1237; McCreery Realty Corporation v. Equitable Nat. Bank, 123 App. Div. (N. Y.) 358. *Cf.* Reynolds v. Newaygo Circuit Judge, 109 Mich. 403, 405. But see *Ex parte* Dubuque & Pacific R. R., 1 Wallace, 69, 17 L. ed. 514 (where the Supreme Court had expressly directed the District Court to enter judgment for the defendant). As to contempt proceedings after a mandate reversing an injunction, see Wilson v. Calculagraph Co., C. C. A., 153 Fed. 961.

[25] Hubbard v. Worcester Art Museum, C. C. A., 196 Fed. 871.

[26] Durant v. Essex County, 101 U. S. 555, 25 L. ed. 961. Where the judgment was affirmed "as in the declaration claimed," and the declaration claimed more than the judgment, it was held to be simply an affirmance. Balt. & P. R. Co. v. Mackay, 157 U. S. 72, 39 L. ed. 624.

[27] Harrison v. Clarke, C. C. A., 182 Fed. 765.

[28] Mackall v. Richards, 116 U. S. 45, 29 L. ed. 558; Harrison v. Clarke, C. C. A., 182 Fed. 765, 767; Fellows v. Borden's Condensed Milk Co., 188 Fed. 863.

[29] Brown v. Walker, 84 Fed. 532. It has been said: that when pending an appeal or writ of error new rights have intervened, such as, for example, accord and satisfaction, payment of the judgment debt, discharge in bankruptcy; such rights, if of equitable cognizance, not only justify, but require, the trial court to afford relief, either by bill in equity, or, possibly, by motion to stay the enforcement of the judgment itself. U. S. ex rel. Strictley v. Marshall, C. C. A., 122 Fed. 428, 430, per Adams, D. J. It seems that the affirmance of an interlocutory order or decree for an injunction does not deprive the court below of the power to suspend the injunction temporarily. Edison El. L. Co. v. U. S. El. L. Co., 59 Fed.

stance has plenary authority to allow amendments,[30] consolida-

501; s. c., C. C. A., 52 Fed. 300. Where a party to the appeal desires to file a bill of review after an affirmance, it is the safer practice to have included in the mandate a direction that the appellate court reserves to such party liberty to file in the District Court an application for leave to file a bill of review and to proceed thereon, and on such bill of review in the District Court as the District Court may determine. Watson v. Stevens, C. C. A., 53 Fed. 31; Smith v. Weeks, C. C. A., 53 Fed. 758; Suhor v. Gooch, C. C. A., 248 Fed. 870, certiorari denied, 247 U. S. 517, 38 Sup. Ct. 581, 62 L. ed. —; *supra*, §§ 447, 449. Such permission will not be granted unless the court of appeal has a strong impression that the decree ought to be opened and reviewed by the court below. Novelty Tufting Mach. Co. v. Buser, C. C. A., 158 Fed. 83. It does not preclude the District Court from denying such an application. Board of Councilmen of City of Frankfort v. Deposit Bank of Frankfort, 120 Fed. 165. It has been said: that ordinarily, the propriety of authorizing a bill of review should be determined by the appellate court; but that if material matters are involved, which have occurred in the court below since the decision of the case, or if there are other sufficient reasons, the court of review may remit the inquiry, in whole or in part, to the court of first instance. Keith v. Alger, C. C. A., 124 Fed. 32. It is no error, on the execution of the mandate of the inferior court, to permit a third person to become a party and set up rights not embraced in the former decree, when all parties consent thereto. Hawkins v. Blake, 108 U. S. 422, 27 L. ed. 775. See Balt. Bldg. & L. Ass'n v. Alderson, C. C. A., 99 Fed. 489. Where, pending an appeal, leave to file a supplemental bill was granted, it was held that a mandate of the appellate court ordering a dismissal of the original bill did not affect the supplemental bill. Berliner Gramophone Co. v. Seaman, C. C. A., 113 Fed. 750; *supra*, § 233. See as to the addition to the decree of a provision that it be without prejudice to the right to apply to the Supreme Court for a certiorari. *Re* Hudson River El. Co., 184 Fed. 970.

[30] Marine Ins. Co. v. Hodgson, 6 Cranch, 206, 3 L. ed. 200; Hawkins v. Cleveland, C., C. & St. L. Ry. Co., C. C. A., 99 Fed. 322; C. & A. Potts & Co. v. Creager, 71 Fed. 574; Edwards v. Bates County, 79 Fed. 56; Pennsylvania Steel Co. v. N. Y. City Ry. Co., C. C. A., 198 Fed. 731, 755. *Cf.* No. Pac. R. Co. v. Walker, 148 U. S. 391, 37 L. ed. 494. Where a decree is reversed for insufficient allegations of citizenship in the pleadings, the District Court may allow them to be corrected by amendment. Everhart v. Huntsville College, 120 U. S. 223, 30 L. ed. 623. When the mandate grants leave to both sides to adduce further evidence, leave to file supplemental pleadings may be granted. Rio Grande Dam & Irrigation Co. v. U. S., 215 U. S. 266, 54 L. ed. 190. See 38 St. at L. 956, Comp. St., § 1251c, quoted *supra*, § 206. Where a judgment in favor of defendant on a demurrer has been

tion with another case,[31] and further proof,[32] except in so far

reversed, the court below may enter judgment overruling the demurrer, and allow the defendant to answer. U. S. v. Boyd, 15 Pet. 187, 10 L. ed. 706. Under such a direction, the court denied a motion by the plaintiff for a dismissal without prejudice and ordered an absolute dismissal. U. S. v. Lehigh Valley R. Co., 176 Fed. 1015; Hawkins v. Cleveland, C., C. & St. L. Ry. Co., C. C. A., 99 Fed. 322. It was held: that the trial court might correct an error in computing the amount of the judgment; and that a party, whose attorney had induced the mistake, was estopped from objecting that the expiration of the term had deprived the court of jurisdiction to correct the error. *Ex parte* Marks, C. C. A., 136 Fed. 168. The better practice in such a case is to procure a modification of the mandate so as to affirm the judgment without prejudice to reopening the case for the single purpose of correcting such an error if the lower court so permits. Where the mandate reverses a decree for an injunction and authorizes further proceedings, the District Court may determine the liability of the complainant upon the injunction bond. Arkadelphia Milling Co. v. St. Louis Southwestern Ry. Co., 249 U. S. 134, 39 Sup. Ct. 237, 63 L. ed. 517. In such a case where the District Court had in its former decree vacated the injunction bond, released the sureties and retained jurisdiction for the purpose of making such further orders as might became necessary; it was permitted to set aside so much of such decree as gave the release, irrespective of the question whether the former mandate had directed its reversal. Ibid. It has been said that where there is a reversal the case is thereupon taken up in the court below at the point where the erroneous judgment was entered. Exchange Mutual Life Ins. Co. v. Warsaw-Wilkinson Co., C. C. A., 185 Fed. 487. The directions as to the further proceedings in the District Court, which are contained in a mandate addressed to the Circuit Court of Appeals, should be communicated to the District Court by the Court of Appeals, and do not authorize the latter court to exercise any further jurisdiction concerning them. *Ex parte* First National Bank of Chicago, 207 U. S. 61, 52 L. ed. 103. But where the Supreme Court stated, in its opinion, but one ground of reversal, the District Court is bound to follow the opinion of the Circuit Court of Appeals in the case. Hill v. Mutual Life Ins. Co., 113 Fed. 44.

[31] Booth v. U. S., C. C. A., 154 Fed. 836.

[32] C. & A. Potts & Co. v. Creager, 71 Fed. 574. The District Court may then exercise its own judgment upon questions of law not considered by the court of review. Schneider Granite Company v. Gast Realty & Investment Co., 245 U. S., 288; Arkadelphia Co. v. St. Louis S. W. Ry. Co., 249 U. S. 134. Where, upon the dismissal, the case was remanded for such further proceedings as "according to right and justice and the laws of the United States ought to be had;" it was held that, upon the filing of such mandate, the court below had the power to act upon a mo-

as the opinion or mandate specifically forbids. Although the mandate contains no direction for a new trial, it seems that a new trial may be ordered when there is a provision for a procedendo.[33] The mandate must be interpreted according to its subject-matter, and the decree of the court below as well as that of the appellate court may be taken into consideration in the interpretation thereof.[34]

§ 712a. Enforcement of mandate. Neither the Supreme Court nor the Circuit Court of Appeals has the power to issue execution on appeal from or error to the judgment or decree of a Federal court.[1]

Where the inferior court of the United States refuses to obey the mandate of the Supreme Court or of the Circuit Court of Appeals, the court of review may compel a compliance by a mandamus or other appropriate writ.[2] Upon the return to the application for a mandamus, the court, if it has the whole record

tion in abatement. U. S. v. Dunne, C. C. A., 173 Fed. 254. Where an appeal had been dismissed, and the mandate directed the court below to take such proceedings as might be according to right and justice, the said appeal notwithstanding, such court proceeded as if no appeal had been taken, and the time for an appeal specified in the decree had expired, The Sydney, 47 Fed. 260.

[33] Steinman v. U. S., C. C. A., 185 Fed. 47; Western Bank Note & Engraving Co. v. Slentz, C. C. A., 188 Fed. 57. The plaintiff may take a voluntary non-suit when otherwise entitled thereto, although the Circuit Court of Appeals has ruled that a verdict for the defendant should have been directed upon the evidence in the record. Cybur Lumber Co. v. Erkhart, C. C. A., 247 Fed. 284. Upon a new trial, directed by the court of review, the trial court may direct judgment upon the pleadings. Dodge v. U. S., C. C. A., 131 Fed. 849.

[34] Mitchell v. U. S., 15 Pet. 52, 10 L. ed. 658; Story v. Livingston, 13 Pet. 359, 10 L. ed. 200; Mackall v. Richards, 116 U. S. 45, 29 L. ed. 558.

§ 712a. [1] U. S. R. S., § 701, 26 St. at L. 826, §§ 10, 11.

[2] Sibbald v. U. S., 12 Pet. 488, 9 L. ed. 1167; Gaines v. Rugg, 148 U. S. 228, 37 L. ed. 432; City Bank of Fort Worth v. Hunter, 152 U. S. 512, 38 L. ed. 534; *supra*, § 457; No. Al. Dev. Co. v. Orman, C. C. A., 71 Fed. 764; L. Bucki & Son Lumber Co. v. Atlantic Lumber Co., C. C. A., 128 Fed. 332. But see *Ex parte* Humes, 149 U. S. 192, 37 L. ed. 698; *infra*, § 713. The writ may be addressed to a Circuit Court of Appeals if that has issued a mandamus to the District Court giving erroneous instructions concerning obedience to the mandate of the Supreme Court. *Ex parte* First National Bank of Chicago, 207 U. S. 61, 52 L. ed. 103; reversing s. c., C. C. A., 146 Fed. 742.

before it, may treat the proceeding as if it were taken on a writ of error and decide the whole case without compelling a second writ of error;[3] or the error may be corrected by a second appeal or writ of error.[4] Where a State court refuses to obey the mandate of the Supreme Court of the United States, the Supreme Court has power to award execution in the case.[5]

[3] L. Bucki & Son Lumber Co. v. Atlantic Lumber Co., C. C. A., 128 Fed. 332.

[4] Rogers v. Durant, 106 U. S. 644, 27 L. ed. 303; Nashua & L. Corp. v. Boston & L. R. Corp., 51 Fed. 929, 931. This is the more usual remedy; *infra*, § 713.

[5] U. S. R. S., § 709. The practice is, when a State court refuses to obey the mandate of the Supreme Court of the United States, to sue out a second writ of error. Martin v. Hunter, 1 Wheat. 304, 4 L. ed. 97; Roberts v. Cooper, 20 How. 647, 15 L. ed. 969; Tyler v. Magwire, 17 Wall. 253, 21 L. ed. 576. Where the trial court, after a reversal, construed the statute in accordance with the opinion of the Supreme Court of the United States, there was no reversal because the remittitur from the State court, to which the mandate was sent, did not specifically direct that further proceedings be had in accordance with such opinion. Schlemmer v. Buffalo, Rochester & Pittsburg Ry. Co., 220 U. S. 590, 55 L. ed. 596. Upon such second writ of error, when the cause has been remanded after final judgment, nothing is brought up for review except the proceedings of the State court subsequent to the mandate. Sizer v. Many, 16 How. 98, 14 L. ed. 861; Corning v. Troy I. & N. Factory, 15 How. 451, 466, 14 L. ed. 768, 774; Himely v. Rose, 5 Cranch, 513, 3 L. ed. 111; Martin v. Hunter, 1 Wheat. 304, 355, 4 L. ed. 97, 110; Roberts v. Cooper, 20 How. 467, 15 L. ed. 969; Tyler v. Magwire, 17 Wall. 253, 284, 21 L. ed. 576, 583. In one case, upon such a second writ to a State court, the Supreme Court entered a final decree, and issued a writ of possession to carry the same into effect. Tyler v. Magwire, 17 Wall. 253, 292, 21 L. ed. 576, 586. In another such case, without a second writ of error, it recalled its mandate, entered judgment, and awarded execution. Williams v. Bruffy, 102 U. S. 248, 26 L. ed. 135. The Supreme Court denied a motion that it should take action to cause the judgment of a State court to be reversed in accordance with a mandate of the Supreme Court previously issued, directing such reversal; where the petition alleged that the petitioner had placed the mandate in the hands of the presiding justice of the highest court of the State, and prayed that such proceedings might be taken as would cause the judgment of the inferior State court to be reversed, and that the highest court of the State had taken no action in the matter, and the judgment of the inferior court remained in full force and unreversed; but there were no other allegations showing that the petitioner had ever applied to the highest court of a State to carry the mandate of the Supreme Court into effect. *In re* Royall, 125 U. S. 696, 31 L. ed. 855.

§ 713. Second writ of error or appeal. A second appeal or writ of error may be taken when the first appeal or writ of error has been dismissed for a defect in form or failure to perfect the same, and the original time to appeal or bring error has not expired.[1] After a decision upon an appeal or a writ of error, a second appeal or writ of error will lie to bring up proceedings subsequent to the mandate, and not settled by the terms of the mandate itself.[2] After the final decree or judgment of the court below upon the mandate of an appellate court, the proceedings may be reviewed by appeal or writ of error in case it is claimed that the mandate has not been obeyed.[3] When a mandate has been sent down upon a prior writ of error or appeal, no second appeal or writ of error can be allowed, until the court below has made its final judgment or decree in the case.[4] A second appeal or writ of error will be dismissed if it appears that the decree below was entered in exact accordance with the mandate, and that no subsequent proceedings have been taken,[5] although the propriety of the taxation of costs, as be-

§ 713. [1] Yeaton v. Lenox, 8 Pet. 123, 8 L. ed. 889; Edmondson v. Bloomshire, 7 Wall. 306, 19 L. ed. 91; The Virginia v. West, 19 How. 182, 15 L. ed. 594; The Palmyra, 12 Wheat. 1, 6 L. ed. 531, *supra*, § 699. When a writ of error has been dismissed, because the Supreme Court decided that on the record before it the value of the matter in dispute was less than the jurisdictional amount, a second writ of error on further proof of value is not a writ of right. Red River Cattle Co. v. Needham, 47 Fed. 358. A decision of the Supreme Court upon a certificate of division of opinion, under the former practice, did not preclude a subsequent writ of error to the final judgment below. Ogle v. Lee, 2 Cranch, 33, 2 L. ed. 199.

[2] Hinckley v. Morton, 103 U. S. 764, 26 L. ed. 458; Mackall v. Richards, 112 U. S. 369, 28 L. ed. 737; Alaska-Treadwell Gold Min. Co. v. Cheney, C. C. A., 148 Fed. 808; Grotty v. Chicago Great Western Ry. Co., C. C. A., 169 Fed. 593; Beiseker v. Moore, C. C. A., 174 Fed. 368; Williams v. Am. Ass'n, C. C. A., 197 Fed. 500. See U. S. v. Carter, C. C. A., 102 Fed. 311; Great Northern Ry. Co. v. Western Union Tel. Co., C. C. A., 174 Fed. 321.

[3] Perkins v. Fournquet, 14 How. 328, 14 L. ed. 441; Martin v. Hunter, 1 Wheat. 304, 4 L. ed. 97; Roberts v. Cooper, 20 How. 467, 15 L. ed. 969; Cook v. Burnley, 11 Wall. 659, 20 L. ed. 29; Tyler v. Magwire, 17 Wall. 253, 21 L. ed. 576; Great Northern Ry. Co. v. Western Union Tel. Co., C. C. A., 174 Fed. 321.

[4] U. S. v. Fossatt, 21 How. 445, 16 L. ed. 186; U. S. v. Fremont, 18 How. 30, 15 L. ed. 302.

[5] Mackall v. Richards, 116 U. S. 45, 29 L. ed. 558; Stewart v. Salamon, 97 U. S. 361, 24 L. ed. 1044; Humphrey v. Baker, 103 U. S. 736,

tween party and party, is sought to be reviewed.[6] Upon a second writ of error or appeal by the same party,[7] subsequent to a mandate, no inquiry into the merits of the original judgment or decree, nor into any question before the appellate court on the first writ of error or appeal, can be considered.[8] Upon

26 L. ed. 456. See Walden v. Bodley's Heirs, 9 How. 34, 48, 13 L. ed. 36, 41; U. S. v. N. Y. Indians, 173 U. S. 464, 43 L. ed. 769; Tyler v. Last Chance Mine, C. C. A., 97 Fed. 394; *Re* Pike, C. C. A., 76 Fed. 400; Gregory v. Pike, C. C. A., 77 Fed. 241; Minnesota Moline Plow Co. v. Dowagiac Mfg. Co., C. C. A., 126 Fed. 746; Wright v. Gorman-Wright Co., C. C. A., 152 Fed. 408; Singer Mfg. Co. v. Adams, C. C. A., 185 Fed. 768. Even when the mandate was from the Circuit Court of Appeals and the case is one in which an appeal lies from the decision of that court to the Supreme Court. Merrill v. National Bank, C. C. A., 78 Fed. 208; s. c. 173 U. S. 131, 43 L. D. 640. A Circuit Court of Appeals cannot ordinarily review the proceedings in a District Court in obedience to the mandate of the Supreme Court. Texas & Pac. Ry. Co. v. Anderson, 149 U. S. 237, 37 L. ed. 717. A recall of the mandate sent by the Circuit Court of Appeals to the District Court is not required as a prerequisite condition or in aid of an appeal to the Supreme Court in a case where the decision of the Circuit Court of Appeals is not final; since the transcript of the record remains in the Circuit Court of Appeals. Ritter v. Mutual L. I. Co., C. C. A., 72 Fed. 567. *Cf.* Merrill v. Nat. Bank of Jacksonville, 173 U. S. 131, 43 L. ed. 640; s. c. as Merrill v. First Nat. Bank, C. C. A., 75 Fed. 148.

6 Wright v. Gorman-Wright Co., C. C. A., 152 Fed. 408.

7 Upon a second writ of error or appeal, taken by another party, the rulings upon the first trial may be reviewed, notwithstanding the fact that judgment was directed against him in the mandate upon the first writ of error or appeal. Guarantee Co. v. Phoenix Ins. Co., C. C. A., 124 Fed. 170.

8 Cook v. Burnley, 11 Wall. 659, 20 L. ed. 29; The Santa Maria, 10 Wheat. 431, 6 L. ed. 359; Washington Br. Co. v. Stewart, 3 How. 413, 11 L. ed. 658; Sizer v. Many, 16 How. 98, 14 L. ed. 861; Roberts v. Cooper, 20 How. 467, 15 L. ed. 969; Tyler v. Magwire, 17 Wall. 253, 21 L. ed. 576; Supervisors v. Kennicott, 94 U. S. 498, 24 L. ed. 260; The Lady Pike, 96 U. S. 461, 24 L. ed. 672; Ames v. Quimby, 106 U. S. 342, 27 L. ed. 100; Clark v. Keith, id. 464, 27 L. ed. 302; U. S. v. The Nuestra Senora De Regla, 108 U. S. 92, 27 L. ed. 662; Chaffin v. Taylor, 116 U. S. 567, 29 L. ed. 727. Upon a second appeal in a prize cause, no interest can be decreed which was not claimed upon the original hearing or upon the original appeal. Thompson v. Maxwell L. G. & Ry. Co., 168 U. S. 451, 42 L. ed. 539; Ala. G. S. R. Co. v. Carroll, C. C. A., 84 Fed. 772; The Santa Maria, 10 Wheat. 431, 6 L. ed. 359.

a second writ of error or appeal, taken by the same party, the law of the case first declared remains the law and should be followed,[9] although not recited in the mandate;[10] unless there

[9] Himely v. Rose, 5 Cranch, 313, 3 L. ed. 111; Roberts v. Cooper, 19 How. 373, 15 L. ed. 687; Johnson v. Jones, 1 Black, 209, 17 L. ed. 117; Thompson v. Maxwell, 168 U. S. 451; *Re* Louisville, 231 U. S. 639; Mathews v. Columbia Nat. Bank, C. C. A., 100 Fed. 393; Thatcher v. Gottlieb, C. C. A., 51 Fed. 373; Florida Cent. & P. R. Co. v. Cutting, C. C. A., 68 Fed. 586; Oregon R. R. & Nav. Co. v. Balfour, C. C. A., 10 Fed. 295; Patton v. Texas & P. Ry. Co., C. C. A., 95 Fed. 244; Standard Sewing Mach. Co. v. Leslie, C. C. A., 118 Fed. 557; The Fayer-weather Will Cases, 118 Fed. 943; Gilbert v. American Surety Co., C. C. A., 61 L.R.A. 253, 121 Fed. 499; Montgomery County v. Cochran, C. C. A., 126 Fed. 456; Empire State-Idaho Mining & Developing Co. v. Hanley, C. C. A., 136 Fed. 99; Smith v. Day, 136 Fed. 964; Mutual Reserve Fund Life Ass'n v. Ferrenbach, C. C. A., 7 L.R.A.(N.S.) 1163, 144 Fed. 342; Cramer v. Singer Mfg. Co., C. C. A., 147 Fed. 917; Burns v. Cooper, C. C. A., 153 Fed. 148; *Re* Waterloo Organ Co., C. C. A., 154 Fed. 657; Anderson v. Messenger, C. C. A., 158 Fed. 250; Toledo, St. L. & W. R. Co. v. Reardon, C. C. A., 159 Fed. 366; Good v. Central Coal & Coke Co., C. C. A., 170 Fed. 416; Development Co. v. King, C. C. A., 170 Fed. 923; Great Northern Ry. Co. v. Western Union Tel. Co., C. C. A., 174 Fed. 321; Nat. Surety Co. v. Kansas City Hydraulic Press Brick Co., C. C. A., 182 Fed. 54; Columbia Chemical Co. v. Duff, C. C. A., 184 Fed. 876, the construction of a written contract; Toledo, St. L. & W. R. Co. v. Sellers, C. C. A., 184 Fed. 885; St. Louis & S. F. R. Co. v. Cundieff, C. C. A., 184 Fed. 891; Baldwin v. Chicago, R. I. & P. Ry. Co., C. C. A., 192 Fed. 554; U. S. v. Axman, C. C. A., 193 Fed. 644; St. Louis & S. F. R. Co. v. Herr, C. C. A., 193 Fed. 950; Simon v. Southern Ry. Co., C. C. A., 195 Fed. 56, where the Circuit Court of Appeals held itself bound by the former decision of the Supreme Court as to the jurisdiction, Town of Fletcher v. Hickman, C. C. A., 208 Fed. 118; D'Arcy v. Jackson Cushion Spring Co., C. C. A., 212 Fed. 889; Bell v. Arledge, 219 Fed. 675; Chesapeake & O. Ry. Co. v. McKell, C. C. A., 221 Fed. 934; Woodruff v. Yazoo Co., C. C. A., 222 Fed. 29; McClelland v. Rose, C. C. A., 222 Fed. 67; National Bank of Commerce v. U. S., C. C. A., 224 Fed. 679; Coal & Iron Ry. Co. v. Reherd, C. C. A., 226 Fed. 441; U. S. v. Ash Sheep Co., 229 Fed. 479; Caledonian Ins. Co. v. Levy, C. C. A., 233 Fed. 92; Ferrell v. Prame, C. C. A., 236 Fed. 727; U. S. Fidelity & Guaranty Co. v. Eichel, C. C. A., 241 Fed. 357; Linkous v. Virginian Ry. Co., C. C. A., 242 Fed. 916; Tillar v. Cole Motor Car Co., C. C. A., 246 Fed. 831; Sun Co. v. Vinton Petroleum Co., C. C. A., 248 Fed. 623; Ash Sheep Co. v. U. S., C. C. A., 250 Fed. 591; Lesamis v. Greenberg, C. C. A., 250 Fed. 848; U. S. Press Ass'n v. Nat'l Newspaper Ass'n, C. C. A., 254 Fed. 284; City of Omaha v. Omaha Electric Light & Power Co., C. C. A., 255

Fed. 801; United Mine Workers of America v. Coronado Coal Co., C. C. A., 258 Fed. 829; Gooch v. Buford, C. C. A., 262 Fed. 894; Whitfield v. Hanges, C. C. A., 266 Fed. 69. In Simons v. Cromwell, C. C. A., 2nd Ct. Jan'y 18, 1922 in which the author was counsel upon a former appeal the same court had reversed the dismissal of a complaint and ordered a new trial. The second trial resulted in a verdict in favor of the plaintiff for $53,898.84; Judge Rogers said "The majority of the court, as constituted at the present hearing, are convinced that the conclusion reached on the first hearing was erroneous, and one of the majority dissented at that time and the other of the two was not then a member of the court. The majority of the court as constituted at the former hearing took an exactly opposite view, one of that majority still sitting and adhering to the conclusion he then reached while the other has since retired from the court. This change of personnel in the court although it changed the minority view of the former hearing into the majority view at this hearing does not in itself warrant the court in disregarding 'the law of the case' as it was determined by the court when the case was here before. So far as this court's relation to the case is concerned we recognize the rule that the former decision under well established law laid down in a multitude of cases extending over a long period of years settled the question as between these immediate parties to this litigation. *Res judicata inter partes jus facit.* The rule is undoubtedly based on sound considerations of public policy which we would not be justified in disregarding. In Johnson v. Cadillac Motor Car Company, 261 Fed. 878, this court declined to be bound by the decision rendered by the court when the same case was here on a former occasion and we reversed the judgment obtained at the second trial which involved only a fifth of the amount which is here involved. We have no desire to discredit in the least the decision then made or to depart from the principle then laid down. That principle was that under exceptional circumstances where a former decision in the same case is clearly erroneous and announces a wrong rule and one mischievous in its practical operations of which might readily affect many persons adversely the court should reverse its earlier decision. It is not probable and certainly cannot be foreseen that exactly such a state of the evidence, as in the case now before us, will be presented again in some subsequent litigation. After the first decision in Johnson v. Cadillac Motor Car Co., it transpired that the New York Court of Appeals decided MacPherson v. Buick Motor Co., 217 N. Y. 382, which established the law of the State in a manner contrary to the rule first announced. While we arrived at our conclusion quite independently of that decision which was not controlling upon this court the attitude of the New York court was of great importance. And in the case at bar since the earlier decision, there has been no decision of the Supreme Court of the United States or of the New York Court of Appeals having any bearing upon the question before us. The Johnson v. Cadillac Motor Car Co.

is clearly exceptional, and is distinguishable from the case before the court. In the incase when it was here before le or principle of law was own which can affect adversely persons than those before the the only question being as to r the particular evidence proat the trial justified the subn of the case to the jury.'' en the cause is taken to the me Court upon new constitutquestions raised after the reof a mandate from the Circuit Court of Appeals; Shapiro v. U. S., 235 U. S. 412; and it has been held, where new questions are suggested, which might have been, but were not brought to the attention of the court upon the former appeal. Ibid.; Sun Co. v. Vinton Petroleum Co., C. C. A., 248 Fed 623; Iowa Cent. Ry. Co. v. Walker, C. C. A., 255 Fed. 648. *Contra Ex parte* Union Steamboat Co., 178 U. S. 317, 44 L. ed. 1084; Balch v. Haas, C. C. A., 73 Fed. 974; Chase v. U. S., C. C. A., 261 Fed. 833 (as regards a statute not previously brought to the attention of the court of review); Alexander v. Fidelity Trust Co., 255 Fed. 690. But not when questions were left open by the former opinion, F. M. Davies & Co. v. Porter, C. C. A., 248 Fed. 397. Where the decision is based upon two grounds, either of which is sufficient to sustain it, neither is *obiter*. Union Pac. R. R. Co. v. Mason City R. R. Co., 222 U. S. 237, 56 L. ed. 180; Ontario Land Co. v. Wilfong, 223 U. S. 543, 56 L. ed. 544; Florida Central R. R. Co. v. Schutte, 103 U. S. 118, 26 L. ed. 327. This is not true of all the dicta in the opinion. Barney v. Winona & St. P. R. Co., 117 U. S. 228, 29 L. ed. 858; The E. A. Packer, C. C. A., 58 Fed. 251; Gleason v. Thaw, C. C. A., 234 Fed. 570. The same doctrine applies when an application for the writ of prohibition or mandamus in connection with the same case was previously before the court of review and the merits were then considered. Griggs v. Nadeau, C. C. A., 25 Fed. 781. A *per curiam* affirmance with no opinion means only that the decree on the facts proved in the record is correct. John Deere Plow Co. v. Anderson, C. C. A., 174 Fed. 815. A denial by the Supreme Court of a writ of *certiorari* is not equivalent to an affirmance. Anderson v. Moyer, 193 Fed. 499. When a new trial is directed, the rule is confined to questions actually discussed and decided by the opinion, E. E. Taenzer & Co. v. Chicago, R. I. & P. Ry. Co., C. C. A., 191 Fed. 543. Where the Circuit Court of Appeals upon a writ of error, taken by the defendant, affirmed a judgment in favor of the plaintiff, and subsequently upon a cross-writ sued out by the plaintiff, reversed the same upon different questions and ordered a new trial; it was held: that, although the effect of the latter decision was to reverse the former, the opinions filed upon the two hearings, which had not been withdrawn, constituted the law of the case; and that the questions therein determined would not be reconsidered upon a writ of error from a second judgment. Montana Min. Co. v. St. Louis Min. & Mill. Co., C. C. A., 147 Fed. 897. Upon the second appeal the court of review may determine whether its mandate was

has been an intervening decision of a higher court [11] or in case of a State statute of a State court upon the subject inconsistent with the former rulings.[12] But in an extraordinary case the court of review may reverse its former ruling.[13] The same doctrine applies where the former appeal is from an interlocutory decree granting an injunction and an accounting, and the latter from a final decree after such accounting,[14] except as to the matters relating solely to the accounting.[15] Upon a second appeal, the Supreme Court is not bound by the decision of an appellate court below.[16] Where the Circuit Court of Appeals has dismissed the case for want of jurisdiction,[17] or reversed a

misconstrued by the court below. Continental & Commercial Tr. & Sav. Bank v. North Platte Valley Irr. Co., C. C. A., 237 Fed. 188. In construing its own mandate a court may take into consideration the knowledge of its members as to what they thereby intended; Steinfeld v. Zeckendorf, 239 U. S. 26. Citing Hengham as to the statute as of Westm. II *"Ne Glosez point le Statut; nous le savoms meuz de vous, car nous les feimes."* Y. B. 33 Ed. I. Mich., Rolls Ed., 83.

[10] Empire State-Idaho Mining & Developing Co. v. Henley, C. C. A., 136 Fed. 99; Gloucester Water Supply Co. v. Freeman, 211 Fed. 349; F. M. Davies & Co. v. Porter, C. C. A., 248 Fed. 397; and authorities cited in preceding note. When the mandate directs further proceedings in accordance with the opinion of the court, such opinion is in effect therein incorporated. Metropolitan Water Co. v. Kaw Valley Drainage District, 223 U. S. 519, 56 L. ed. 533.

[11] Utah Power & Light Co. v. U. S., C. C. A., 242 Fed. 924. It was formerly held that an intermediate Court of Appeals, upon a second appeal, should not follow the intervening decision of a higher court between different parties inconsistent with the former rulings. District of Columbia v. Brewer, Court of Appeals D. C. January 5, 1909, 37 Wash. L. Rep. 65. See Ogle v. Turpin, 8 Ill. App. 453, Harv. Law Rev., xxii, 438. But see Hastings v. Foxworthy, 45 Neb. 676, 34 L.R.A. 321; Smith v. Neufeld, 61 Neb. 699.

[12] Messenger v. Anderson, 225 U. S. 436, 56 L. ed. 1152, reversing C. C. A., 171 Fed. 785; Johnson v. Cadillac Motor Car Co., C. C. A., 261 Fed. 878.

[13] Johnson v. Cadillac Motor Car Co., C. C. A., 261 Fed. 878.

[14] Brown v. Lanyon Zinc Co., C. C. A., 179 Fed. 309; Moss v. Ramey, 239 U. S. 538; Wolf Bros. & Co. v. Hamilton-Brown Shoe Co., C. C. A., 206 Fed. 611; Kalamazoo Loose-Leaf Binder Co. v. Proudfit Loose-Leaf Co., C. C. A., 243 Fed. 895.

[15] Racine Engine & Machinery Co. v. Confectioners' Machinery & Mfg. Co., C. C. A., 234 Fed. 876.

[16] Zeckendorf v. Steinfeld, 225 U. S. 445, 56 L. ed. 1156; Buster v. Wright, C. C. A., 135 Fed. 947.

[17] Metropolitan Water Co. v.

decree of the District Court directing such a dismissal,[18] the District Court cannot certify that question to the Supreme Court of the United States. It has been said that where the question of jurisdiction was not presented upon the former writ of error, it did not prevent a reversal upon that ground after a second trial.[19] Where new evidence or new pleadings have presented new questions subsequent to the mandate, they will be considered upon a subsequent appeal.[20] The rulings by the appellate court

Kaw Valley Drainage District, 223 U. S. 519, 56 L. ed. 533.

[18] Brown v. Alton Water Co., 222 U. S. 325, 56 L. ed. 221.

[19] *Ex parte* Harlan, 180 Fed. 119.

[20] Alaska-Treadwell Gold Min. Co. v. Cheney, C. C. A., 162 Fed. 593; Crotty v. Chicago Great Western Ry. Co., C. C. A., 169 Fed. 593; Beiseker v. Moore, C. C. A., 174 Fed. 368; Williams v. Am. Ass'n, C. C. A., 197 Fed. 500; Patterson v. Stroecker, C. C. A., 245 Fed. 732; Board of Com'rs of Muddy Bottom Swamp Land Dist. No. 1 v. Equitable Surety Co., C. C. A., 246 Fed. 633; Washington & Berkeley Bridge Co. v. Pennsylvania Steel Co., C. C. A., 252 Fed. 487; U. S. v. Murphy, 253 Fed. 404; Iowa Cent. Ry. Co. v. Walker, C. C. A., 255 Fed. 648. An order for a new trial, because of an error in refusing a motion to direct a verdict in favor of the defendant, does not entitle him to such a direction upon a second trial, when the evidence is substantially different. Denver & R. G. R. Co. v. Arrighi, C. C. A., 141 Fed. 67. Where the evidence is substantially the same, a verdict should be directed, if the court of error has held that this should have been done before. Cramer v. Singer Mfg. Co., C. C. A., 147 Fed. 917; United Press Ass'ns v. National Newspapers Ass'n, C. C. A., 254 Fed. 284. Where a judgment upon a directed verdict was reversed, because the question of fact should have been submitted to the jury, it was held that the trial court could not set aside a verdict for the same party, found by the jury, upon a subsequent trial, on substantially the same evidence. Philadelphia v. Atlantic & P. Tel. Co., 127 Fed. 370. See Toledo, St. L. & W. R. Co. v. Reardon, C. C. A., 159 Fed. 366. Additional facts which only tend to strengthen the inferences that might have been drawn from the facts presented at the first trial do not warrant the trial court in declining to follow the opinion of the court of review. Connelley v. Pennsylvania R. Co., 221 Fed. 508, an action for damages for negligence; Woodruff v. Yazoo & M. V. R. Co., C. C. A., 222 Fed. 29. Where the mandate directed a new hearing "on the evidence submitted and such additional testimony as may be offered," the previous evidence is entitled to no greater weight than that taken after the mandate. Westinghouse Electric & Mfg. Co. v. Wagner Electric Mfg. Co., 233 Fed. 752, reversing 218 Fed. 646. Where an appeal from an order granting or denying an interlocutory injunction has been decided, the

are not *res adjudicata* in another suit, when the first case has been dismissed for want of prosecution.[21] Where the mandate of the appellate court on the original appeal was that the damages be divided, and the respondent then claimed no damages, he cannot make such claim for the first time in the appellate court on a second appeal.[22]

A motion to extend the time for returning an appeal previously granted, and an order granting such motion, cannot be considered as a second appeal.[23] After a dismissal of one appeal no second appeal can be docketed until after an allowance thereof.[24] Proceedings by representatives of a deceased appellant to become parties to the appeal do not constitute a new appeal.[25] A second writ of error taken after the death of the original plaintiff in error is void; the action must first be revived in the court below, and the writ of error must then issue in the name of the representative of the original plaintiff in error.[26]

The court of review may award a *supersedeas* upon a second writ of error[27] or appeal[28] but not ordinarily in a case where a prior writ of error has been dismissed, unless it appears that the first writ of error was accompanied by a *supersedeas* duly obtained in the court below, and perhaps not then unless it appears that the dismissal of the first writ was not due to the neglect or fault of the plaintiff in error.[29]

perpetual injunction upon final hearing should be denied or granted in accordance with such decision unless the testimony is substantially changed, Puritan Cordage Mills v. Sampson Cordage Works, C. C. A., 241 Fed. 671; but an affirmance of such an interlocutory decree which also directs a reference for an accounting does not prevent the District Court from a modification thereof giving directions to the master as to the principles upon which he shall proceed. A. D. Howe Mach. Co. v. Dayton, C. C. A., 210 Fed. 801.

[21] Gilbert v. American Surety Co., C. C. A., 61 L.R.A. 253, 121 Fed. 499; *supra*, § 186.

[22] The Sapphire, 18 Wall. 51, 21 L. ed. 814.

[23] U. S. v. Curry, 6 How. 106, 12 L. ed. 363.

[24] Rogers v. Law, 21 How. 526, 18 L. ed. 835.

[25] Edmonson v. Bloomshire, 7 Wall. 306, 19 L. ed. 91.

[26] McClane v. Boon, 6 Wall. 244, 98 L. ed. 835.

[27] Hardeman v. Anderson, 4 How. 640, 11 L. ed. 1138.

[28] Southern Bldg. & Loan Ass'n v. Carey, 117 Fed. 325, 329.

[29] Hagan v. Ross, 11 How. 294, 13 L. ed. 702; Hardeman v. Anderson, 4 How. 640, 11 L. ed. 1138.

APPENDIX

I

FORMS.

The following forms have been selected and copied almost *verbatim* from precedents which have been actually used in the court, many of them in cases in which the author was counsel. Some have been approved by the most distinguished lawyers in the United States. The author, however, disclaims responsibility for their correctness. The alterations of the originals are marked in brackets.

FORMS IN CIVIL CASES AT COMMON LAW AND IN EQUITY.

FORMS IN EQUITY

FORM I.—MOTION FOR LEAVE TO FILE BILL IN SUPREME COURT.

[253 U. S. 350.]

Supreme Court of the United States.

October Term, 1919.

No..... Original.

STATE OF RHODE ISLAND, Complainant,
vs.
A. MITCHELL PALMER, Attorney General and DANIEL C. ROPER, Commissioner of Internal Revenue, Defendants.

Now comes the State of Rhode Island, by its Attorney General, Herbert A. Rice, and moves the court for leave to file the bill of complaint herewith exhibited, in a suit between the State of Rhode Island and citizens of other States and arising under the Constitution and laws of the United States, for the purpose of enjoyning the defendants from enforcing within the State of Rhode Island such titles and sections of an Act of Congress,

commonly called the Volstead Act, as apply and are designed to give effect to the so-called Eighteenth Amendment; and that proper process may issue thereon, notifying the defendants of the filing of said bill and that they appear in answer thereto and defend the same.[1]

STATE OF RHODE ISLAND,
by HERBERT A. RICE,
Attorney General.

FORM II.—ORIGINAL BILL IN EQUITY IN SUPREME COURT.

[253 U. S. 350.]

Supreme Court of the United States.

October Term, 1919.

No..... Original.

STATE OF RHODE ISLAND,
Complainant,
vs.
A. MITCHELL PALMER, Attorney General and DANIEL C. ROPER, Commissioner of Internal Revenue,
Defendants.

To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States:

The State of Rhode Island, complainant, brings this bill of complaint, for itself and on behalf of the people of said State, against the defendants above named and respectfully shows unto this Honorable Court:

I. That the State of Rhode Island is one of the States of the United States and that the defendants, A. Mitchell Palmer, is a citizen of the State of Pennsylvania, and a resident of Washington, in the District of Columbia, and is the Attorney General of the United States, and Daniel C. Roper, is a citizen of the State of South Carolina, and a resident of Washington, in the District of Columbia, and is the United States Commissioner of Internal Revenue.

II. That this is a suit in equity of a civil nature by the State of Rhode Island against citizens of other States of the United States, and arises under the Constitution and laws of the United States, especially under Article V of the Constitution and Article X of the Amendments to the Constitution, and is for the purpose of enjoining the defendants from enforcing within the State of Rhode Island such titles and sections of an Act of Congress, commonly called the Volstead Act, as apply and are designed to give effect to the so-called Eighteenth Amendment. This suit is instituted pursuant to a resolution of the General Assembly of the State of Rhode Island. (Exhibit A.)

[1] For Form of Subpoena ad Respondendum, see supra, § 161.

III. And in support of its bill complainant alleges:

(1) That as a colony, Rhode Island was settled by subjects of the British Crown in 1636, and that said colonists from the beginning exercised and enjoyed the inherent right of self-government, in the management and control of their own affairs as a community and in the establishment of their civil institutions for the protection of the rights and liberties of the individual under and in accordance with the common law so far as the same was applicable to their new conditions and circumstances.

(2) That on March 14, 1643-4, Robert Earl of Warwick, constituted and ordained by an Ordinance of the Lords and Commons, "Governor in Chief, and Lord High Admiral of all those Islands and other Plantations inhabited or planted by, or belonging to any His Majesty the King of England's Subjects, (or which hereafter may be inhabited and planted by, or belonging to them) within the Bounds, and upon the Coasts of America," and the Commissioners appointed in Aid and Assistance of the said Earl, did, by the authority of the aforesaid Ordinance of the Lords and Commons, "give, grant, and confirm, to the aforesaid Inhabitants of the Towns of Providence, Portsmouth, and Newport, a free and absolute Charter of Incorporation, to be known by the Name of the Incorporation of Providence Plantations, in the Narraganset-Bay, in New England,—Together with full Power and Authority to rule themselves, and such others as shall hereafter inhabit within any part of the said Tract of land, by such a Form of Civil Government, as by voluntary consent of all, or the greater Part of them, they shall find most suitable to their Estate and Condition; and, for that End, to make and ordain such Civil Laws and Constitutions, and to inflict such punishments upon Transgressors, and for Execution thereof, so to place, and displace Officers of Justice, as they, or the greatest Part of them, shall by free Consent agree unto. Provided nevertheless, that the said Laws, Constitutions, and Punishments, for the Civil Government of the said Plantations, be conformable to the Laws of England, so far as the Nature and Constitution of the place will admit." (Exhibit B.) And the General Assembly first organized under said Warwick patent, declared "that the forme of Government established in Providence Plantations is Democraticall; that is to say, a Government held by ye free and voluntarie consent of all, or the greater parte of the free Inhabitants." (Exhibit C.)

(3) That on July 8, 1663, by the Charter granted by King Charles II, the free inhabitants of said Colony were created "a body corporate and politic, in fact and name, by the name of the Governor and Company of the English Colony of Rhode Island and Providence Plantations, in New England, in America," with perpetual succession; and that under said Charter the said Governor and Company and their successors were authorized and empowered "from time to time, to make, ordain, constitute or repeal, such laws, statutes, orders and ordinances, forms and ceremonies of government and magistracy, as to them shall seem meet, for the good and welfare of the said Company, and for the government and ordering of

the lands and hereditaments, hereinafter mentioned to be granted, and of the people that do, or at any time hereafter shall, inhabit or be within the same; so as such laws, ordinances and constitutions, so made, be not contrary and repugnant unto, but as near as may be, agreeable to the laws of this our realm of England, considering the nature and constitution of the place and people there." (Poore's Constitutions, vol. 2, pg. 1595.) That the colonists of Rhode Island and Providence Plantations, under the liberal provisions of said Charter, possessed, exercised and enjoyed full powers of legislation and self-government in all matters and concerns relating to the internal affairs of said Colony, and so continued in their rights under said Charter and as loyal subjects of the British Crown for more than one hundred years.

(4) That in consequence of the assertion by the colonists of Rhode Island and Providence Plantations that they of right possessed full legislative powers in all matters and concerns relating to the internal affairs of said Colony, and the denial thereof by Great Britain, the said colonists severed their connection with Great Britain and abrogated their allegiance to the British Crown; and on the 4th day of May, 1776, the General Assembly of the Colony of Rhode Island passed "An Act repealing an act, entitled 'An act for the more effectually securing to His Majesty, the allegiance of his subjects, in this his colony and dominion of Rhode Island and Providence Plantations'"; wherein it provided "that in all commissions for officers, civil and military; and in all writs and processes in law, whether original, judicial or executory, civil or criminal, wherever the name and authority of the said King (George III) is made use of, the same shall be omitted; and in the room thereof, the name and authority of the Governor and Company of this colony, shall be substituted, in the following words, to wit: 'The Governor and Company of the English Colony of Rhode Island and Providence Plantations,'" (Exhibit D); and thereupon the Colony of Rhode Island and Providence Plantations became a free, independent and sovereign State, and succeeded to those public rights, belonging by prerogative to the British Crown or exercised by Parliament, that in any way related or pertained to the government and affairs of said State.

(5) That the State of Rhode Island maintained its right to exercise complete legislative powers over its internal affairs and its existence as a free, independent and sovereign State by force of arms, and at the conclusion of war its freedom and independence was acknowledged by Great Britain in the Treaty of Peace signed at Paris, September 3, 1783. That in March, 1781, said State united with the other American States in a league of friendship for the "security of their liberties" under the Articles of Confederation; that under said Articles the State of Rhode Island did not yield or surrender or delegate any legislative power over its internal affairs and civil institutions, and it was expressly provided by Article II of said Articles of Confederation that "each State retains its sovereignty, freedom and independence, and every power, jurisdiction and

right, which is not by this Confederation expressly delegated to the United States, in Congress assembled."

(6) That by the ratification of the Constitution of the United States by the ninth State, on June 21, 1788, the United States of America under the Articles of Confederation ceased to exist, and the United States of America under the Constitution of the United States came into being and the government thereof was organized in March, 1789; that upon the dissolution of the United States of America under the Articles of Confederation the State of Rhode Island resumed again its position as a free, independent and sovereign State without association in government with those States which had formed the United States under the Constitution of the United States, or with those States which had then failed to ratify said Constitution of the United States; that the State of Rhode Island continued as a free, independent and sovereign State from the dissolution of the government under the Articles of Confederation on June 21, 1788, until the 29th day of May, 1790, when the people of said State in convention called for that purpose, "by an explicit and authentic act of the whole people," ratified the Constitution of the United States, and said State thereby became the thirteenth State of the United States, and that said act of ratification by the people of the State of Rhode Island was in good faith and with full assurance that said State and the people thereof relinquished only such portion of sovereign power as was necessary and essential for the creation and establishment of a limited national government for the purposes and with the powers enumerated in the several articles of said Constitution, and that all other powers, not delegated nor prohibited to the State of Rhode Island, were reserved to the State of Rhode Island or to the sovereign people thereof.

(7) That although the people of the Colony of Rhode Island abrogated their allegiance to the British Crown on the 4th day of May, 1776, they continued their form of government, as the sovereign people of the State of Rhode Island, upon the basis of the liberal Charter granted to them by King Charles II in 1663, and upon the basis of said Charter continued to possess, exercise and enjoy all the rights and power of self-government in all matters and concerns relating to the internal affairs of said State until May 2, 1843, when the people of said State, in the exercise of their sovereign authority, ordained and established a new Constitution of government (Poore's Constitutions, vol. 2, pg. 1603), wherein it was declared that "the basis of our political systems is the right of the people to make and alter their constitutions of government; but that the constitution which at any time exists, till changed by an explicit and authentic act of the whole people, is sacredly obligatory upon all"; and further, that since the ratification of the Constitution of the United States by the people of the State of Rhode Island, on the 29th day of May, 1790, the people of said State, both under the Charter of 1663 and under the Constitution of 1843, have ever possessed, exercised and enjoyed, as of right, and do now possess, exercise and enjoy, as of right, full powers of self-

government in all matters and concerns relating to the internal affairs of said State.

IV. And complainant is advised and therefore avers that the Constitution of the United States does not delegate to the government of the United States, nor to the people of the United States, any power of police and economy with respect to the internal affairs of the State of Rhode Island, nor is said power with respect to the internal affairs of the State of Rhode Island prohibited by said Constitution to the State of Rhode Island, but is expressly reserved to the State of Rhode Island and the sovereign people thereof; and further, that neither the power of police and economy with respect to the internal affairs of the State of Rhode Island nor the discretion in the exercise thereof can be bargained away, surrendered, yielded or transferred effectually to bind the people of said State and their posterity, if at all, without "an explicit and authentic act of the whole people" of said State.

V. And complainant is advised and believes, and therefore alleges on information and belief, that the Sixty-fifth Congress of the United States of America at its Second Session begun and held at the City of Washington on Monday, the third day of December, A. D. one thousand nine hundred and seventeen, assuming a power not delegated to Congress by any provision of the Constitution of the United States, and in derogation of the constitution and laws of the State of Rhode Island, and of the rights of the people thereof, enacted a "Joint Resolution Proposing an Amendment to the Constitution of the United States," pretending to submit thereby to the Legislatures of the several States of the United States a so-called Eighteenth Amendment to the Constitution of the United States, whereby it was provided that the manufacture, sale and transportation of intoxicating liquors for beverage purposes within the State of Rhode Island should be prohibited; said "Joint Resolution Proposing an Amendment to the Constitution of the United States" is hereunto annexed, marked Exhibit E and made a part hereof, and reference thereto is hereby prayed.

VI. And complainant is advised and therefore avers that the power exercised by Congress in enacting the said Joint Resolution, pretending to submit thereby to the Legislatures of the several States of the United States the so-called Eighteenth Amendment to the Constitution of the United States, as aforesaid, was not delegated to Congress by the provisions of Article V of the Constitution of the United States, and the exercise by Congress of the power to enact such Joint Resolution, as aforesaid, was a proceeding unconstitutional and revolutionary; and further, that the proposal of the so-called Eighteenth Amendment to the Constitution of the United States, as aforesaid, is not a proposal of an amendment to the Constitution of the United States within the intent, purview and scope of Article V of the Constitution of the United States, but is an unconstitutional and revolutionary proposal to the Legislatures of the several States of a revision and addition to the Constitution of the United States that is destructive of the fundamental principles of said Constitu-

tion and of the government established thereby under the form and guise of a proposal of a valid amendment to the Constitution of the United States and under the form and pretense of complying with constitutional procedure; and further, that the proposal of the so-called Eighteenth Amendment, for the reasons aforesaid and otherwise, was unconstitutional, inoperative and void.

VII. And complainant is advised and believes, and therefore alleges on information and belief, that although the proposal of the so-called Eighteenth Amendment to the Constitution of the United States, as aforesaid, was unconstitutional, inoperative and void, on the 28th day of December, A. D. 1917, the Honorable Robert Lansing, Secretary of State of the United States, without authority in law and under the form and pretense of complying with constitutional procedure, forwarded a certified copy of said "Joint Resolution Proposing an Amendment to the Constitution of the United States," Exhibit E, to the Governor of each State of the United States, substantially in the form set forth in Exhibit F, hereunto annexed, and made a part hereof. And that the Governors of the several States of the United States thereafter submitted the so-called Eighteenth Amendment to the Constitution of the United States, as set forth in the Joint Resolution of Congress, Exhibit E, as aforesaid, to their respective Legislatures, and thereafter the Legislatures of three-fourths of the several States of the United States, assuming a power not delegated to said Legislatures by any provision of the Constitution of the United States, and in derogation of the constitution and laws of the State of Rhode Island, enacted resolutions of alleged ratification of the so-called Eighteenth Amendment to the Constitution of the United States as submitted by Congress, as aforesaid, under the form and pretense of complying with constitutional procedure provided in the case of a valid amendment to the Constitution of the United States, and thereafter certified copies of the resolution of alleged ratification of the so-called Eighteenth Amendment by the aforesaid Legislatures were forwarded to the State Department of the United States, the certification of the alleged ratification from each State illegally and erroneously setting forth that the so-called Eighteenth Amendment to the Constitution of the United States had been adopted as an amendment to the Constitution of the United States by the Legislature of said State according to the provisions of the Constitution of the United States. (Exhibit G.)

VIII. And complainant is advised and therefore avers that the power exercised by each of the Legislatures of the several States of the United States in enacting an alleged ratification of the so-called Eighteenth Amendment to the Constitution of the United States, as aforesaid, was not delegated to the Legislatures of the several States of the United States by the provisions of Article V of the Constitution of the United States, and the exercise by each of the Legislatures of the several States of the power to enact a resolution of alleged ratification of the so-called Eighteenth Amendment, as aforesaid, was a proceeding unconstitutional and revolutionary; and further, that the alleged ratification of the so-called Eighteenth

Amendment to the Constitution of the United States by each of the Legislatures of the several States, as aforesaid was not a ratification of an amendment to the Constitution of the United States within the intent, purview and scope of Article V of the Constitution of the United States, but was an unconstitutional and revolutionary proceeding in reference to a revision of and addition to the Constitution of the United States that is destructive of the fundamental principles of said Constitution and of the government established thereby under the form and guise of a ratification of a valid amendment to the Constitution of the United States, and under the form and pretense of complying with constitutional procedure; and further, that the alleged ratification of the so-called Eighteenth Amendment to the Constitution of the United States by each of the Legislatures of the several States, for the reasons aforesaid and otherwise, was unconstitutional, inoperative and void.

IX. And complainant is advised and therefore avers that the Congress of the United States and the Legislatures of the several States of the United States are the representatives and agents of the people of the United States in proposing and ratifying amendments to the Constitution within the intent, purview and scope of Article V of the Constitution of the United States, and within the intent, purview and scope of the original delegation of powers to the people of the United States under the Constitution of the United States; and that the alleged proposal by Congress, as aforesaid, and the alleged ratification by the Legislatures of the several States, as aforesaid, were not within the scope of the original delegation of powers to the people of the United States and were not within the power and authority of Congress and the Legislatures as agents of the people of the United States; and further, that the Congress of the United States and the Legislatures of the several States, as aforesaid, are neither the judges of their respective powers nor of the limitations thereof under the Constitution of the United States.

X. And complainant shows and alleges that the Governor of the State of Rhode Island submitted the proposal of the so-called Eighteenth Amendment, Exhibit E, as aforesaid, to two successive General Assemblies of the State of Rhode Island, said General Assembly being the Legislature of the State of Rhode Island, and both of said General Assemblies refused to enact any resolution in alleged ratification of the so-called Eighteenth Amendment to the Constitution of the United States, and refused to regard or entertain the proposal of said so-called Eighteenth Amendment to the Constitution of the United States as a valid proposal of amendment, and the General Assembly of the State of Rhode Island has ever asserted and now asserts that the proposal of the so-called Eighteenth Amendment to the Constitution of the United States is not a valid proposal of amendment to said Constitution, and that the General Assembly has no power or authority to ratify or approve said so-called Eighteenth Amendment as a valid amendment to the Constitution of the United States; and further, that the General Assembly of the State of Rhode Island on the 3rd day of April, A. D. 1919, enacted a "Resolution Authorizing and Directing

Attorney General to Commence such Suits and Proceedings, or to take other steps as may be Necessary for the Purpose of Securing a Determination of the Supreme Court of the United States upon the Question of the Constitutionality of the Action of Congress in Proposing the Eighteenth Amendment to the Constitution of the United States," a copy of which resolution is hereunto annexed, marked Exhibit A, and made a part hereof, reference thereto being hereby prayed.

And complainant is advised and believes, and therefore alleges on information and belief, that although the proposal of the so-called Eighteenth Amendment to the Constitution of the United States, Exhibit B, as aforesaid, was unconstitutional, inoperative and void, and although the alleged ratification by each of the Legislatures of the several States of the United States of the so-called Eighteenth Amendment to the Constitution of the United States, Exhibit G, as aforesaid, was unconstitutional, inoperative and void, on the 29th day of January, A. D. 1919, the Honorable Frank L. Polk, Acting Secretary of State of the United States, without authority in law and under the form and pretense of complying with constitutional procedure, made promulgation that said so-called Eighteenth Amendment to the Constitution of the United States, as aforesaid, had been ratified by the Legislatures of three-fourths of all the States of the United States, and had become valid to all intents and purposes as a part of the Constitution of the United States; a copy of said promulgation being hereunto annexed and marked Exhibit H, and made a part hereof, reference thereto being hereby prayed.

XII. And complainant is further advised and believes, and therefore alleges on information and belief, that although the so-called Eighteenth Amendment is not a valid amendment to the Constitution of the United States and is inoperative and void, the Sixty-sixth Congress of the United States of America at its First Session begun and held at the City of Washington on Tuesday, the fourth day of March, A. D. one thousand nine hundred and nineteen, illegally and erroneously assuming that a power had been delegated to Congress by the provisions of the so-called Eighteenth Amendment, passed an act entitled "An Act to Prohibit Intoxicating Beverages and to Regulate the Manufacture, Production, Use and Sale of Highproof Spirits for other than Beverage Purposes and to Insure an Ample Supply of Alcohol and Promote its Use in Scientific Research and in the Development of Fuel, Dye, and other Lawful Industries," herein referred to as the Volstead Act, with the intent and purpose of enforcing the so-called Eighteenth Amendment within the State of Rhode Island, reference to said Act as an Act of Congress being hereby prayed; and that in and by Section I of Title II of said Act it is provided that "intoxicating liquor shall be construed to include alcohol, brandy, whisky, rum, gin, beer, ale, porter and wine, and in addition thereto any spirituous, vinous, malt or fermented liquor, liquids and compounds, whether medicated, proprietary, patented, or in and by whatever name called, containing one-half of one per centum or more of alcohol by volume which are fit for use for beverage purposes,"

and in and by Section 3 of Title II of said Act it is provided that "no person shall on or after the date when the Eighteenth Amendment to the Constitution of the United States goes into effect manufacture, sell, barter, transport, import, export, deliver, furnish or possess any intoxicating liquors" within the State of Rhode Island, such alleged offenses and crimes being punishable by heavy fines, imprisonments and forfeitures, as set forth in other portions of Title II of said Act; and complainant is advised and therefore avers that such portion of said Volstead Act as relates and applies to the enforcement of the so-called Eighteenth Amendment is unconstitutional and void insofar as the same relates to the manufacture, sale, barter, transport, delivery, furnishing or possession of any intoxicating liquor within the State of Rhode Island, or the making of any of said acts within the State of Rhode Island a crime against the United States, said acts within the State of Rhode Island being lawful and authorized under the constitution and laws of the State of Rhode Island.

XIII. And complainant further shows and alleges that the State of Rhode Island in the exercise of its inherent and exclusive right to manage and control its internal affairs as a separate community and independent State, and to pursue such legislative policy as will provide adequate revenue by developing the resources and encouraging the industries within its territorial limits, has permitted and caused to be legally established within the State extensive and numerous manufactories for the production of intoxicating liquors for beverage purposes, and that many thousands of dollars are invested therein and in the business of retailing the products thereof, and said manufactories and business have greatly added to the value of the ratable property within the State; that there are within the State at the present time large quantities of intoxicating liquors that were manufactured for beverage purposes both prior and subsequent to the alleged ratification of the so-called Eighteenth Amendment, and said liquors are of great value as ratable property, incapable of estimation, and hitherto have been and now are a considerable source of revenue to complainant; and that should the aforesaid provisions of the Volstead Act be enforced within the State of Rhode Island, the extensive business of manufacturing and selling intoxicating liquors for beverage purposes within the State of Rhode Island will be entirely destroyed and the value of the property especially adapted for use in said business will be greatly depreciated, and the intoxicating liquors now within the State, manufactured for beverage purposes both prior and subsequent to the alleged ratification of the so-called Eighteenth Amendment, will become of no value, whereby the revenue to the State from all said property, based upon the valuation thereof, will be seriously impaired, to the great and irreparable injury of complainant.

XIV. And complainant further shows and alleges that under Chapter 123, of the General Laws of Rhode Island, 1909, as amended by Chapter 1740, of the Public Laws of 1919, the material portions of which are hereunto annexed and marked Exhibit I, reference thereto being hereby

prayed, the State of Rhode Island, through its municipal subdivisions, grants licenses for the manufacture and sale of non-intoxicating liquors for beverage purposes, said non-intoxicating liquors including "all distilled or rectified spirits, wines, fermented and malt liquors, which contain one per centum and not more than four per centum by weight of alcohol," said non-intoxicating liquors being intoxicating liquors within the intent and meaning of said Volstead Act; and that the State of Rhode Island and its municipal subdivisions have for many years derived and now derive extensive revenue from the fees for said licenses, said revenue amounting to the following sums:

Year.	*Revenue.*
1910	$646,364.84
1911	645,640.72
1912	682,463.56
1913	649,888.48
1914	681,279.80
1915	623,223.52
1916	689,519.00
1917	639,486.48
1918	625,083.52

That complainant has received and now receives one-fourth of all the revenue from all licenses issued in the State of Rhode Island for the manufacture and sale of intoxicating or non-intoxicating liquors for beverage purposes, as aforesaid, and that should the aforesaid provisions of the Volstead Act be enforced within the State of Rhole Island all said revenues to the State of Rhode Island and to its municipal subdivisions will be entirely lost, to the great and irreparable injury of complainant.

XV. And complainant further shows and alleges that the so-called Volstead Act provides that the Commissioner of Internal Revenue and the Attorney General of the United States, their assistants, subordinates, agents and servants are authorized and directed to enforce such portion of said Act as relates and applies to the enforcement of the so-called Eighteenth Amendment, from and after the date when said so-called Eighteenth Amendment is alleged to go into effect, to wit, on or about the 16th day of January, 1920; and although the so-called Eighteenth Amendment is unconstitutional and void, and although such portion of the so-called Volstead Act as relates and applies to the enforcement of the so-called Eighteenth Amendment is unconstitutional and void, it is nevertheless the purpose, intent and threat of said Commissioner of Internal Revenue and the Attorney General of the United States, their assistants, subordinates, agents and servants to enforce the fines, imprisonments and forfeitures provided in said Volstead Act, as aforesaid, against the people of the State of Rhode Island, on the ground that the manufacture, sale, barter, transport, delivery, furnishing or pos-

session of intoxicating liquor within the State of Rhode Island is contrary to law and a crime against the United States, although all said acts within the State of Rhode Island are lawful and authorized under the constitution and laws of said State; and further, that the enforcement of the so-called Eighteenth Amendment and of the provisions of the so-called Volstead Act, as aforesaid, as proposed, intended and threatened by the said Commissioner of Internal Revenue and the Attorney General of the United States, their assistants, subordinates, agents and servants, will deprive the people of the State of Rhode Island of that liberty of self-government in the management and control of their domestic affairs as a community, which it was the very purpose of the Constitution of the United States to secure to them, and will also deprive them in their sovereign capacity of that power of police and economy in the regulation of the civil institutions of said State, adapted for the internal government thereof, which the people of said State have possessed, exercised and enjoyed for nearly three centuries, a power never delegated to the United States, but expressly reserved to the people of Rhode Island by the Constitution of the United States; all of which is to the irreparable injury and damage of the people of the State of Rhode Island, and of this complainant.

Forasmuch therefore as complainant is without remedy at law and its only protection in the premises must arise from the equitable jurisdiction of this Court, wherein is vested the duty and the power to interpret and enforce the provisions of the Constitution of the United States, and to the end that it may obtain the relief to which it is by right in equity entitled,

WHEREFORE, complainant respectfully prays this Honorable Court to grant unto it a writ of subpoena to be directed to the said A. Mitchell Palmer, Attorney General of the United States, and to the said Daniel C. Roper, United States Commissioner of Internal Revenue, the defendants herein named, demanding and requiring them to appear and answer hereto, but not under oath, the answer under oath being hereby expressly waived; and that the so-called Eighteenth Amendment be declared unconstitutional, usurpatory and void; and that such portion of said Volstead Act as applies or relates to the enforcement of the so-called Eighteenth Amendment, enacted by Congress under the assumed authority of said so-called Eighteenth amendment, be declared unconstitutional and void; and that said defendants, their assistants, subordinates, agents and servants, and each and every of them, be enjoined and restrained from in any manner enforcing, or attempting to enforce, or causing to be enforced, the aforesaid provisions of the Volstead Act within the territory of the State of Rhode Island, or from in any manner interfering with the manufacture, sale, barter, transport, delivery, furnishing or possession of intoxicating liquors for beverage purposes within the State of Rhode Island, for or on account of any alleged violation of the aforesaid provisions of the Volstead Act, on the ground or claim that any such manufacture, sale, barter, transport, delivery, furnishing or pos-

session of intoxicating liquors for beverage purposes within the State of Rhode Island is contrary to law; and that complainant may have such other and further relief as to this Court may seem just and equitable in the premises.

STATE OF RHODE ISLAND,
by HERBERT A. RICE,
Attorney General.

STATE OF RHODE ISLAND,
PROVIDENCE, SC.

I, Herbert A. Rice, being duly sworn, depose and say that I am the Attorney General of the State of Rhode Island; that I have read the foregoing bill of complaint and know the contents thereof; that so far as the same are allegations of fact they are true of my own knowledge, and so far as they are allegations upon advice, information and belief, I believe them to be true.

(Signed) HERBERT A. RICE.

Subscribed and sworn to in the City of Providence, in said County and State, this day of December, 1919.

(SEAL) (Signed) J. FRED PARKER,
Secretary of State.

[Annexed were the exhibits.]

FORM III.—BILL FOR INJUNCTION AGAINST DISTRICT ATTORNEY, AND COLLECTOR OF INTERNAL REVENUE.

[259 Fed. 525; 251 U. S. 264.]

District Court of the United States, Southern District of New York.

JACOB RUPPERT, *a corporation*, Complainant,
against

FRANCIS G. CAFFEY, United States Attorney for the Southern District of New York, and RICHARD J. MCELLIGOTT, Acting and Deputy Collector of Internal Revenue of the Third District of New York, Defendants. } In Equity.

To the Honorable the Judges of the District Court of the United States for the Southern District of New York sitting in Equity:

The complainant, Jacob Ruppert, a corporation, brings this, its bill of complaint, against the above-named defendants, and respectively shows unto this Honorable Court as follows:

I. The complainant, Jacob Ruppert, is a corporation organized and existing under the laws of the State of New York, and its principal

place of business is located in the city and county of New York in said State. All of its officers, directors and stockholders are citizens of the United States by birth. The defendant, Francis G. Caffey, is the duly appointed and acting United States Attorney in and for the Southern District of New York, and the defendant, Richard J. McElligott, is the Acting and Deputy Collector of Internal Revenue in and for the Third District of New York.

II. This is a suit of a civil nature arising under the Constitution of the United States. The matter in controversy exceeds the sum of three thousand dollars ($3,000) in value, exclusive of interest and costs. The complainant is advised by its counsel and therefore avers that subdivision "Fourth" of section 1 of the act of Congress of November 21, 1918, providing for so-called war prohibition, and title I of the act of Congress of October 28, 1919, duly called and known as the "National Prohibition Act," are unconstitutional and void because beyond the powers vested in the Congress, in that they seek to provide for and enforce national prohibition of malt liquors during the period which will elapse before the Eighteenth Article of Amendment to the Constitution of the United States will become effective for any purpose whatever, as therein expressly provided, and thereby deprive the complainant of its liberty and property without due process of law and without just compensation, and in that, therefore, violate both the Fifth and Tenth Articles of Amendment to the Constitution of the United States.

III. The complainant was incorporated in 1910 as a manufacturing corporation for the purpose of carrying on and conducting the business of manufacturing and brewing lager beer and other malt liquors and of doing such other business as might be necessary, incidental, or convenient for the operation of the business of such manufacture and the sale of its products. It succeeded to the extensive and valuable business of and the property theretofore used therein by one Jacob Ruppert and the good-will established by him from about the year 1867, at which time he entered upon said business of brewing, manufacturing, producing and selling malt liquors, until about 1910, when he transferred the said business and property to the complainant corporation, which has ever since owned, managed, carried on and conducted said business. The complainant has a capital stock of the par value of one hundred thousand dollars ($100,000), divided into one thousand (1,000) shares of the par value of one hundred dollars ($100), each, all of which stock has been duly issued for full value and is now outstanding.

IV. The complainant further alleges as follows:

(1) That, in addition to other valuable real estate, it owns three plots of real estate comprising sixty-five (65) lots in the City of New York which are used by it solely for the purpose of its aforesaid brewery business, and that these plots of real estate have an aggregate assessed valuation of over one million, eight hundred and forty thousand dollars ($1,840,000).

(2) That, after allowing for depreciation and exclusive of buildings, the present book value of its fixtures, plant and other personal property used in its said business is in excess of ten million, seven hundred thousand dollars ($10,700,000), and that such personal property comprises, among other things, machinery, wagons, trucks, leases, chattel mortgages, real estate mortgages, horses, office furniture, fixtures, stock and supplies on hand and accounts receivable, the latter aggregating several hundred thousand dollars in value.

(3) That it is now and since the year 1910 has been actively engaged in manufacturing and selling large quantities of malt liquors; that the business thus conducted by it amounted in 1916, 1917 and 1918 to over six million dollars ($6,000,000), eight million dollars ($8,000,000) and ten million dollars ($10,000,000), respectively, and that its goodwill was then of large and growing value and exceeding one million dollars ($1,000,000) in value and earning capacity.

(4) That it has during the last three years sold its wares to about four thousand (4,000) customers each year, and that during said period its yearly sales of beer manufactured by it were approximately as follows:

YEAR	BARRELS
1916	1,105,000
1917	1,206,000
1918	904,000

(5) That it employs in its said business over seven hundred (700) men with a total monthly payroll of approximately eighty-eight thousand dollars ($88,000) and that the great majority of them are highly trained and skilled workmen.

(6) That, during the three years from 1916 to 1918, both inclusive, it paid approximately the following sums as taxes and license fees to the following governmental authorities, including advances for account of its customers to be repaid to it by the latter, to wit:

YEAR	UNITED STATES INTERNAL REVENUE TAXES	STATE AND CITY OF NEW YORK TAXES
1916	$1,664,000	$879,000
1917	2,189,000	822,000
1918	2,715,000	505,000

(7) That the average net profits of its business during the three years from 1916 to 1918, both inclusive, were in excess of one million dollars ($1,000,000) per annum.

(8) That, as required by statute of Congress in such case made and provided and by the Internal Revenue Regulations, complainant has duly given and filed a brewer's bond in the penal sum of one million, three hundred and fifty thousand dollars ($1,350,000), binding it faith-

fully to comply with all the requirements of law relating to the manufacture and sale of malt liquors.

V. Prior to the enactment and approval of the act of Congress of August 10, 1917, entitled "An Act to provide further for the national security and defense by encouraging production, conserving the supply, and controlling the distribution of food products and fuel," and the making and promulgation of a certain proclamation by the President thereunder, dated December 8, 1917, to which reference is hereby prayed for its terms and provisions, the complaint manufactured and sold for beverage purposes fermented malt liquors which were known as and commercially called "lager beer" and which contained about four per cent. of alcohol by weight, being equal to about five per cent. by volume, the weight of alcohol being approximately one-fifth less than the volume and the ratio of weight to volume being as 4 is to 5. But that since January 1, 1918, the complainant has discontinued the manufacture and sale of the beer theretofore manufactured and sold by it and from said date has in all things strictly conformed to the proclamations of the President under said act of Congress and has produced, manufactured and sold no malt liquor containing to exceed two and three-quarters per cent. (2.75 p. c.) of alcohol by weight; and all and singular the malt liquor so produced, manufactured and sold by it since January 1, 1918, and sold by it for beverage purposes, was and is known as and commercially called "war beer," and contained and still contains less than 2.75 per cent. of alcohol by weight, that is to say, less than 3.4 per cent. by volume. The President under said act of Congress made and promulgated certain other proclamations dated respectively September 16, 1918, January 30, 1919, and March 4, 1919, to which reference is hereby prayed for their terms and provisions.

The complainant further alleges that said war beer so produced, manufactured and sold by it for beverage purposes, which contains not to exceed two and three-quarters (2.75) per cent. of alcohol by weight, is not intoxicating when used for beverage purposes.

The complainant further alleges that on October 28, 1919, it had and still has on hand a large number of barrels of said war beer, heretofore duly and lawfully produced and manufactured by it in the ordinary course of its business as aforesaid, to be sold for beverage purposes, and of the value of over one million dollars, and which contain not to exceed two and three-quarters per cent. of alcohol by weight, but more than one-half of one per cent. of alcohol by volume.

VI. Heretofore and on the 28th day of October, 1919, the act passed by the Congress of the United States (H. R. 6810) entitled "An Act to prohibit intoxicating beverages, and to regulate the manufacture, production, use, and sale of high-proof spirits for other than beverage purposes, and to insure an ample supply of alcohol and promote its use in scientific research and in the development of fuel, dye and other lawful industries," was passed by the Congress over the disapproval and veto of the President. The short title of said act as therein pro-

vided is the "National Prohibition Act." A copy of the portions of said act of Congress dealing with the subject of war prohibition and so far as material to the present cause of action, is hereunto attached, marked Exhibit I, and reference thereto is prayed as fully as if here set forth at length.

The complainant is advised and therefore avers that it was the intent and purpose of the term "War Prohibition Act" used in title I of said act of Congress of October 28, 1919, to refer to the provisions of that part of the act of Congress approved by the President November 21, 1918, entitled "An Act to enable the Secretary of Agriculture to carry out, during the fiscal year ending June thirtieth, nineteen hundred and nineteen, the purposes of the Act entitled 'An Act to provide further for the national security and defense by stimulating agriculture and facilitating the distribution of agricultural products,' and for other purposes," which are hereunto attached, marked Exhibit II, being subdivision "Fourth" of section 1 of said act of Congress, to which reference is prayed as fully as if here set forth at length.

The complainant is advised and therefore avers that the defendants above named are by law expressly charged with the duty of enforcing the terms and provisions of the portions of said acts of Congress hereto annexed as Exhibits I and II, within that portion of the city and state of New York wherein the complainant has its principal place of business and does and carries on its said business.

VII. The complainant is advised and therefore avers that by the terms of said portions of said acts of Congress, Exhibits I and II hereto, expressly purporting to provide for the enforcement of so-called war prohibition, the defendant United States Attorney is vested with the power and charged with the duty of prosecuting criminally for the crimes denounced and defined therein, any person who uses grains, cereals, fruit, or any other food product in the manufacture or production of beer, wine, or other malt or vinous liquor containing one-half of one per cent. or more of alcohol by volume, for beverage purposes, or who sells any of said beverages; and is further vested with the power and charged with the duty of prosecuting criminally, as a maintainer of a public and common nuisance or an abettor thereof, any person who maintains or assists in maintaining any room, house, building, boat, vehicle, structure, or place of any kind where any of said liquors is sold, manufactured, kept for sale, or bartered; and is further vested with the power and charged with the duty of having such place and all such liquor and all property kept and used in maintaining such place declared a public and common nuisance and abated as such in a suit to be brought by him in equity, and the persons concerned in conducting the same enjoined and restrained from conducting or permitting the continuance of said alleged nuisance, and enjoined and restrained from manufacturing, selling bartering, or storing any of said liquors in such place for a period of one year or during the war and the period of demobilization; and is further vested with the power and charged with

the duty of subjecting to a lien the property of any person which is used or occupied to the knowledge of the latter in violation of the provisions of said portions of said acts of Congress in the amount of all fines and costs assessed against the occupant thereof for all such violations, and to cause such property to be sold therefor; and is further vested with the power and charged with the duty of prosecuting any person who manufactures any fermented liquor containing one-half of one per cent. or more of alcohol by volume for the misdemeanors, penalties and forfeitures denounced and defined in section 3340 of the Revised Statutes of the United States, and of causing seizures to be made of the property of such person at the commencement of said suits for said forfeitures.

The complainant is further advised and therefore avers by the terms and provisions of said portions of said acts of Congress, Exhibits I and II hereto, the defendant Acting Collector of Internal Revenue is vested with the power and charged with the duty of reporting to the defendant United States Attorney all violations of said portions of said acts of Congress and of causing the latter to prosecute or take proceedings in accordance therewith; and is further vested with the power and charged with the duty of swearing out warrants for the apprehension of such offenders and of conducting the prosecution at the committing trial for the purpose of having said offenders held for the action of a grand jury; and is further vested with the power and charged with the duty of suing the surety upon the bond of any brewer who violates the provisions of said portions of said acts of Congress for breach of the conditions of the bond heretofore given by said brewer as required by law, as well as of enforcing and suing for the penalties and forfeitures denounced and defined in section 3340 of the Revised Statutes of the United States, and thus bringing about seizures of the property to be forfeited under said section.

The complainant is further advised and therefore avers that by the terms and provisions of said portions of said acts of Congress, Exhibits I and II hereto, both defendants are, in addition to the aforesaid powers, granted all the powers for the enforcement of said portions of said acts or any provision thereof, which are conferred by law for the enforcement of existing laws relating to the manufacture or sale of intoxicating liquors under the laws of the United States.

The complainant alleges that about three thousand of its customers conduct their business of selling its aforesaid war beer upon leased premises, and that under the provisions of said portion of said National Prohibition Act, title I, Exhibit I hereto, a violation by a lessee or occupant of leased premises permits the lessor to forfeit the lease.

VIII. The complainant is advised and therefore alleges as matter of fact that on October 28, 1919, and for more than six months prior thereto no war emergency or necessity whatever existed or has since existed to warrant or render necessary and proper the prohibition by Congress of the manufacture and sale of non-intoxicating malt liquors;

that there was then and for more than six months prior thereto had been and ever since there has been an abundant supply of all food products used in the production or manufacture of said beer or malt liquor; that no war emergency whatever then or for more than six months prior thereto existed or has since existed for the conservation of such food products; that there was not then contemplated and there has not been at any time since then any emergency or necessity whatever, whether military or otherwise, calling for or justifying any of the prohibitions against non-intoxicating beverages contained in said portions of said acts of Congress, Exhibits I and II, and that no part or provision of said war prohibition was necessary or proper within the intent and meaning of the Constitution of the United States for carrying into execution any powers vested by the Constitution in the Government of the United States or in any department or officer thereof, and particularly that such prohibition was not necessary or proper for actually prosecuting or carrying on war or for raising or supporting armies, or for providing or maintaining a navy, or for conserving the man power of the Nation, or for increasing efficiency in the production of arms, munitions, ships, food and clothing for the army and navy of the United States; but, on the contrary thereof, said prohibition was not necessary or proper and was and is arbitrary, and was not enacted in contemplation and in pursuance of any existing war emergency or necessity, or of any purpose to carry on the war, or to raise or support armies, or to provide or maintain a navy, in any manner whatsoever, and that on October 28, 1919, and ever since the national security and defense were and have been in no danger by reason of actual war or otherwise.

IX. The complainant is further advised and therefore alleges as matter of fact that prior to October 28, 1919, the Armistice of November 11, 1918, to which reference is prayed, had been signed on behalf of the United States and Germany and was immediately thereafter accepted and acted upon both by Germany and Austria; that thereupon the President of the United States proclaimed and declared to the Congress that the object of the war had been attained, that having accepted the terms of said Armistice it would be thereafter impossible for Germany to renew hostilities, and that the war had thus come to an end; that on January 30, 1919, the President in and by his proclamation of said date, a copy of which is hereto annexed as Exhibit III, proclaimed that he had found that the prohibition of the use of grain in the manufacture of beverages which are not intoxicating was no longer essential in order to assure an adequate and continuous supply of food; that on March 4, 1919, the President in and by his proclamation of said date, a copy of which is hereto annexed as Exhibit IV, proclaimed that there was then an abundant supply of food products other than grain, and permitted the use thereof in the manufacture of non-intoxicating beverages, including non-intoxicating beer; that on May 20, 1919, in a Message to the Congress, the President proclaimed that the demobilization of the military forces of the country had progressed to such a point that

it seemed to him entirely safe then to remove the ban upon the manufacture and sale of wines and beers, and that thereafter and on October 27, 1919, in a Message to the Congress, of which a copy is hereto annexed as Exhibit V, the President proclaimed that the army and navy had been demobilized and that the objects of the prohibition embodied in said act of Congress of November 21, 1918, arising out of the emergencies of the war had been satisfied in such demobilization. The complainant further alleges that since November 11, 1918, hostilities between the United States and the enemy have in fact ceased, and the enemy by virtue of its compliance with the terms and conditions of said Armistice and the pending Treaty of Peace, has been shorn of substantially all its military power and physically and materially incapacitated from renewing hostilities; that both Germany and Austria have been practically disarmed; that the greater part of the German navy has been surrendered and sunk; that more than three months prior to October 28, 1919, commercial relations had been authorized and resumed between the people of the United States and the peoples of Germany and Austria and now continue; that prior to said date the demobilization of the army and navy of the United States had been completed and such forces reduced to the peacetime establishment; that prior to said date all the war activities of the United States had ceased, and most of the boards, bodies and other governmental instrumentalities appointed or created to carry on such war activities and to meet the emergencies of war had been disbanded or discharged or had ceased to function; and that prior to said date most of the executive and administrative regulations and restrictions imposed upon the people of the United States growing out of the war had been cancelled or removed and substantially all of the excess or surplus war materials and food supplies had been disposed of and substantially all of its excess or surplus war servants, both civil and military, had been discharged.

X. The complainant further alleges that if it should hereafter comply with the terms and provisions of the portions of said acts of Congress, Exhibits I and II, by discontinuing the manufacture and sale of non-intoxicating beer as aforesaid, containing not to exceed 2.75 per cent. of alcohol by weight, or if the terms and provisions thereof should be enforced against it so as to prevent such manufacture and sale, its valuable business and good-will would be destroyed, all profit therefrom would be rendered impossible, the value of its property as a going concern would be destroyed and dissipated, its staff of skilled employees would be disorganized, and the value of its intricate and costly plant and physical assets would be at once depreciated to its junk or salvage value only, and that the great and irreparable injury and damage to the complainant and its stockholders caused thereby would be incapable of being admeasured and adjudicated in an action at law, and it further alleges that if its property used in connection with its business is seized or interfered with, or if its officers, employees, or customers are arrested or prosecuted, or otherwise harassed by legal proceedings, for alleged

violations of said portions of said acts of Congress, Exhibits I and II, such seizures, interference, arrests, prosecutions, or other proceedings would immediately involve it in a multiplicity of suits and legal proceedings and would long before any judgment or decision could be had in such suits and proceedings compel it to cease the conduct of its business, to its great damage and irreparable injury.

The complainant further alleges that beer containing less than one-half of one per cent. of alcohol by volume cannot be successfully or profitably substituted by it in its business for the war beer it is now manufacturing and selling; that the great majority of its customers would not purchase such beer at all, and that the others would purchase it only in quantities much smaller than their present and ordinary purchases of said war beer; that the market for beer with an alcoholic content of less than one-half of one per cent. by volume is and will be much smaller than the present market for said war beer; and that the complainant cannot convert its present stock of said war beer into beer containing less than one-half of one per cent. of alcohol by volume without being compelled to lose the largest part of the profit which the sale thereof as war beer would earn for the complainant.

XI. The complainant alleges that beer or malt liquor containing only one-half of one per cent. of alcohol by volume is not and cannot under any conditions produce intoxication, and that a determination to the contrary by the Congress or any other officer or official body of the Government of the United States is and will be without any basis in fact and unreasonable and arbitrary.

The complainant further alleges that the same amount and kind of materials are used and required to produce and manufacture beer or other malt liquor containing but one-half of one per cent. of alcohol by volume, as are used and required to produce and manufacture an equal quantity of beer or other malt liquor containing two and three-quarters per cent. (2.75 p. c.) of alcohol by weight.

XII. The complainant is informed and believes and therefore alleges on information and belief that there are 1250 establishments in the United States brewing malt liquors containing more than one-half of one per cent. of alcohol by volume; that they employ 75,404 persons; that their actual capital investment equals $792,914,000; that their annual pay-rolls total $80,246,000; that the aggregate value of their product is $442,149,000 annually; that on a total barrelage of 50,287,121, they paid to the United States taxes in the year ended June 30, 1918, amounting to $126,285,857, and that it is estimated that at the present rate of $6 per barrel the total amount of their taxes payable to the United States for the year 1919 will be over $301,722,000; that closely related to said business of brewing such malt liquors are industries such as the malt, hop-growing, glass-blowing and cooperage industries, which in large part, if not in whole, are closely related to and largely dependent thereon, and that the total capital invested in said brewing and depend-

ent industries to the extent to which they are dependent thereon, is in excess of one billion dollars.

XIII. The complainant further alleges that, unless restrained by this Honorable Court, the said defendants intend to and will enforce against complainant, its officers, agents, servants, employees and customers, the various pains, penalties, seizures and forfeitures provided for in said act of Congress of November 21, 1918, and said National Prohibition Act and other laws made applicable thereby, and intend to and will commence and prosecute the various prosecutions, proceedings and suits in said acts of Congress purported to be authorized or required; and that such action on the part of the defendants or either of them, will necessarily and inevitably involve the complainant, its officers, agents, servants, employees and customers in a multiplicity of legal proceedings, and involve and threaten it with the arrest and dispersion of its staff of skilled and trained employees or coerce them into quitting its employ in order to avoid prosecution. possible punishment, and other harassment under color of legal proceedings, and threaten and involve the destruction of its business, the seizure of its property, the loss of its customers and the destruction of its good-will and property, all to the irreparable damage of the complainant and its stockholders, and that all and singular the damages resulting from such acts and proceedings would be incapable of admeasurement and adjudication at law.

XIV. The complainant is further informed and verily believes and therefore alleges on information and belief that the defendants herein are not, either jointly or severally, possessed of sufficient means to satisfy a judgment against them for the large and substantial damages which would accrue to complainant if this Honorable Court does not restrain and enjoin said defendants and each of them, as hereinafter prayed, from interfering with complainant's business and property as aforesaid.

FORASMUCH, therefore, as your complainant is without remedy in the premises except in a court of equity, and to the end that it may obtain from this Honorable Court the relief to which it is by right and equity entitled, it respectfully prays that the above defendants, and each of them, be directed full, true and perfect answer to make to this bill of complaint, but not under oath, the answer under oath of each of them being hereby expressly waived, and that the said defendants and each of them, their agents, servants, employees and subordinates, and each and every of them, be enjoined and restrained from in any manner enforcing or attempting to enforce or causing to be enforced, against complainant, its officers, agents, servants, employees and customers, or any of them, any of the pains, penalties, seizures and forfeitures provided in and by said portions of said acts of Congress, Exhibits I and II hereto, and other applicable laws, and from arresting or prosecuting, or causing to be arrested or prosecuted, the complainant, its officers, agents, servants, employees and customers, or any of them, for or on account of any alleged violation by them, or any of them, of the terms and provisions of said portions of said acts of Congress, Exhibits I and II, if such violation consist solely of the manufacture or sale of non-intoxicating beer, and

from in any manner or to any extent seizing, attempting or causing to be seized, or otherwise interfering with the property, business and affairs of the complainant for or on account of the manufacture or sale of non-intoxicating beer in alleged violation of said portions of said acts of Congress; and that the complainant may have such other and further relief as to the Court may seem just and equitable in the premises.

Complainant further prays that it be granted a restraining order and preliminary injunction pending the final hearing and decision of this cause, whereby the said defendants, their agents, servants, subordinates and employees, and each and every of them, be enjoined and restrained as hereinbefore prayed, and that upon final hearing the said injunction shall be made perpetual.

Wherefore the complainant prays that a writ of subpœna issue herein directed to the above named defendants and each of them, commanding them on a day certain to appear and answer this bill of complaint.

JACOB RUPPERT, a corporation,
by JACOB RUPPERT, President,
Complainant.

ROOT, CLARK, BUCKNER & HOWLAND,
31 Nassau Street,
New York City.
and
FITCH & GRANT,
32 Nassau Street,
New York City.
Solicitors for complainant.
ELIHU ROOT,
WILLIAM D. GUTHRIE,
WILLIAM L. MARBURY,
Of counsel for complainant.

State and County of New York,
UNITED STATES OF AMERICA, } ss.:

JACOB RUPPERT, being duly sworn, deposes and says:

I am and for over four years last past have been the president of Jacob Ruppert, the complainant corporation above-named. I have read the foregoing bill of complaint and know the contents thereof, and the same is true of my own knowledge, except as to those matters therein stated to be alleged on information and belief, and as to those matters I believe it to be true.

JACOB RUPPERT.

Subscribed and sworn to before me this 29th day of October, 1919.

BYRON CLARK, JR.,
[NOTARIAL SEAL] Notary Public,
Kings County, N. Y.
Certificate filed in New York County.

FORM IV.—BILL FOR INJUNCTION AGAINST DISTRICT ATTORNEY TO RESTRAIN ENFORCEMENT OF UNCONSTITUTIONAL ACT OF CONGRESS.

[Injunction granted 247 U. S. 251.]

In the District Court of the United States for the Western District of North Carolina.

ROLAND H. DAGENHART, and REUBEN DAGENHART and JOHN DAGENHART, by ROLAND H. DAGENHART, their *prochien ami*,
Plaintiffs,
vs.
FIDELITY MANUFACTURING COMPANY and WILLIAM C. HAMMER, United States Attorney for the Western District of North Carolina,
Defendants.

To the Honorable, the Judge of the District Court of the United States for the Western District of North Carolina:

Plaintiffs, citizens and residents of the United States and of the Western District of the State of North Carolina, bring this, their bill of complaint, against the Fidelity Manufacturing Company, a corporation of the State of North Carolina, with its principal office at Charlotte, in the Western District of North Carolina, and William C. Hammer, a citizen and resident of the United States and of the Western District of North Carolina, duly appointed, qualified and acting United States Attorney for the Western District of North Carolina, and thereupon complain and respectfully represent and allege as follows:

I. Plaintiffs are citizens and residents of the United States and of the Western District of North Carolina; plaintiffs Reuben Dagenhart and John Dagenhart are minors, the sons of and residing with their father Roland H. Dagenhart; said Roland H. Dagenhart is their *Prochien Ami*, duly appointed and authorized by order of this Court to bring this suit on their behalf; defendant Fidelity Manufacturing Company is a corporation of the State of North Carolina, with its principal office at Charlotte in the Western District of said state; defendant William C. Hammer is a citizen and resident of the United States and the Western District of North Carolina, and is the duly appointed, qualified and acting United States Attorney for said Western District of North Carolina.

II. Defendant Fidelity Manufacturing Company is engaged in the operation of a cotton mill at Charlotte, in Mecklenburg County, North Carolina, for the manufacture of cotton yarns and cloths; employed in said factory are the said Reuben Dagenhart and John Dagenhart, plain-

tiffs, minor sons of Roland H. Dagenhart; plaintiffs are advised and believe that the Legislature of North Carolina has made provision regulating the employment of minors in mills and factories, including cotton mills, and that the employment of each of said minor plaintiffs and his work have been and are in strict compliance with these legislative enactments, and therefore in accordance with the law that obtains in the State of North Carolina; said minor Reuben Dagenhart is over the age of fourteen years, but under the age of sixteen years, and said minor John Dagenhart is under the age of fourteen years; each of said minor plaintiffs has been and is now in good health, and entirely capable of performing the services required of him; the work of each of said minors has been and is altogether in the production of manufactured goods, and has nothing whatsoever to do with the sale or other disposition or the transportation of the products of the factory, whether interstate or intra-state commerce; Roland H. Dagenhart is also an employee in said factory of the Fidelity Manufacturing Company; plaintiff Roland H. Dagenhart is advised and believes that he is, under the law of North Carolina, entitled to the services of each of said minors until such minor shall have reached the age of twenty-one years, with the right to direct such services and to receive and enjoy any compensation arising from the rendition of said services; plaintiff Roland H. Dagenhart is a man of small means, with a large family, and the receipt and use of the compensation arising from the services of each of said minors is essential to the comfortable support and maintenance of said family, including said minors; the compensation to the plaintiff Roland H. Dagenhart for the services of the said minor Reuben Dagenhart has been and is on the basis of piece work; that is, a stipulated amount for each unit of labor performed, while the compensation for the services of the said minor John Dagenhart is on the basis of daily labor; compensation for the services of each of said minor sons so arrived at has been and is paid to plaintiff Roland H. Dagenhart periodically.

III. Each of said minor plaintiffs has rendered efficient and satisfactory service to the defendant Fidelity Manufacturing Company, and the said defendant has made no complaint of the service rendered by either of said minor plaintiffs or the compensation paid plaintiff Roland H. Dagenhart for said services; each of said minor plaintiffs, particularly the plaintiff Reuben Dagenhart has acquired skill and competency in said work, and it has been the purpose of the said Roland H. Dagenhart and of each of said minor plaintiffs that they should continue in cotton mill work as their life vocation, plaintiff Roland H. Dagenhart receiving compensation for said services until they respectively attain their majority, said minors fitting themselves respectively, during these years, to follow an honorable and suitable vocation for life.

IV. In August, 1916, the Congress of the United States passed, and there was approved as the law, on September 1st, 1916, a certain statute, it being Chapter 432 of the United States Statutes of the Sixty-fourth

Congress, in words and figures as set forth in Exhibit "A" hereto attached, and hereby made a part of this Bill of Complaint as fully as if herein set out.

V. The defendant Fidelity Manufacturing Company constantly makes many shipments of its products in interstate commerce, as do also all other cotton mills of which plaintiffs have any knowledge, and the said defendant Fidelity Manufacturing Company, and all of such mills, are in constant operation; plaintiffs have been informed by defendant Fidelity Manufacturing Company that, upon the going into effect of the Statutes aforesaid, to-wit, at the close of business on August 31st, 1917, and solely by reason of said statute and because the officers and managers of said corporation fear to incur the punishment and penalties provided by said statute if they violated any of the terms and provisions thereof, it would discharge the minor plaintiff John Dagenhart from its employment altogether, and would curtail the hours of employment of the minor plaintiff Reuben Dagenhart from the present basis of sixty hours, as is permitted by the laws of North Carolina and as said Reuben Dagenhart is now employed, to eight hours per day; with the result that there will be an entire loss of the earnings of the minor John Dagenhart and a corresponding reduction of the earnings of the minor Reuben Dagenhart, received by the plaintiff Roland H. Dagenhart.

VI. Plaintiffs are advised and believe that the statute aforesaid is not in truth and in fact law, and cannot properly be enforced one year after its approval, to-wit, September 1, 1917, nor thereafter, but that the said pretended law is unconstitutional, because:

(1) It is not a regulation of commerce with foreign nations or among the several states or with the Indian tribes, such as Congress is empowered to make by Section 8 of Article 1 of the Constitution of the United States;

(2) Its provisions forbidding a producer, manufacturer or dealer to ship or deliver for shipment in interstate or foreign commerce any product of the factory wherein, within thirty (30) days prior to the time of the removal of such product therefrom children under fourteen years of age had been employed to work, or children under the age of sixteen years had been employed or permitted to work more than eight hours in any day, is without the power of Congress, because it is not a regulation of interstate or foreign commerce, but an attempt to regulate conditions and methods of manufacture.

(3) It is within none of the powers delegated to the Congress of the United States by the Constitution of the United States or any of its amendments.

(4) Its enactment by Congress is an attempted usurpation of the powers reserved in the Constitution of the United States to the states respectively, or to the people, and is therefore in violation of the Tenth Amendment to the Constitution of the United States.

(5) Its enforcement would deprive plaintiffs of their liberty and property without due process of law, in violation of the Fifth Amendment to the Constitution of the United States.

VII. Plaintiffs verily believe and allege that, unless the enforcement of the said pretended, but unconstitutional, law is prevented, defendant Fidelity Manufacturing Company will carry out its threat and determination hereinbefore, in Article V hereof, alleged, and thus deprive the plaintiff Roland H. Dagenhart of his property in the labor of his sons and the compensation arising therefrom, and deprive each of said minor plaintiffs of his right to engage freely in a proper and wholesome vocation as authorized by the law of his state.

VIII. The defendant William C. Hammer, being as hereinbefore alleged, the duly appointed, qualified and acting United States Attorney for the Western District of North Carolina, is charged by law with the duty to prosecute all violations of the law of the United States committed within his District, and by the terms of said pretended law itself, to cause appropriate proceedings to be commenced and prosecuted in the proper courts of his District, without delay, for the enforcement of the penalties therein provided; plaintiffs believe and aver that he, the said William C. Hammer, unless restrained from so doing, will cause proceedings to be commenced and prosecuted for the enforcement of the penalties provided for by the said pretended law against the defendant Fidelity Manufacturing Company and other cotton manufacturers; plaintiffs further believe and aver that the said Fidelity Manufacturing Company and its officers and managers also believe that the said William C. Hammer will cause such proceedings to be commenced and prosecuted, with the claim that each of the many shipments in interstate commerce constitutes a separate offense, and upon that belief have taken the action aforesaid, and will carry out their threats.

Plaintiff's now aver on information and belief that, by reason of the Act of Congress aforesaid, and the purpose of the District Attorney aforesaid to enforce the same against the defendant Fidelity Manufacturing Company, they will be deprived of their rights and property;—the minor plaintiff John Dagenhart will be deprived altogether of his right to work in the mill of said defendant corporation, and the minor Plaintiff Reuben Dagenhart will be deprived of his right to work in said mill for more than eight hours in any one day; rights being accorded under the laws of North Carolina, and further, by reason thereof, the plaintiff Roland H. Dagenhart will be deprived of the earnings of his two sons as aforesaid, to which he is justly entitled under the laws of the State of North Carolina.

IX. Plaintiffs are without adequate remedy at law in the premises and only in a suit of this nature and by the injunctive processes of this Court can they be fully protected in the enjoyment of their property and rights as aforesaid; the granting of the injunctive process as hereinafter prayed will prevent a multiplicity of suits and prosecutions, and the questions here involved can be adequately determined only in a suit of this nature.

IN CONSIDERATION WHEREOF PLAINTIFFS PRAY:—

First: That the aforesaid Act of Congress be declared to be in violation and contravention of the rights of these plaintiffs, because not author-

ized by, but in violation of, the Constitution of the United States and the amendments thereof.

Second: That the defendant Fidelity Manufacturing Company be temporarily and permanently enjoined from, in any way or manner, by reason of the apparent force of said Act of Congress, discharging the minor plaintiff John Dagenhart from its service, or curtailing the employment of the minor plaintiff Reuben Dagenhart to eight hours per day.

Third: That the said W. C. Hammer and his successors, assistants, deputies and agents, be temporarily and permanently enjoined from, in any way or manner, enforcing against said defendant Fidelity Manufacturing Company, or attempting to enforce, the provisions of the aforesaid statute or any part thereof, and from instituting or causing to be instituted any prosecution or proceeding as against said defendant Fidelity Manufacturing Company, under the aforesaid statute or any of the provisions thereof.

Fourth: That after due notice, temporary restraining orders be granted because of the fact, as alleged herein, that irreparable loss or damage would result to these plaintiffs unless such temporary restraining order be granted.

Fifth: That plaintiffs have such other and further relief as is just and reasonable.

Sixth: And may it please Your Honor to grant unto plaintiffs a writ of subpoena of the United States of America directed to said Fidelity Manufacturing Company and to the said W. C. Hammer, United States Attorney for the Western District of North Carolina, as aforesaid, therein to be named, requiring them to appear before this Honorable Court, then and there to answer, but not under oath (the answer under oath being expressly waived), all and singular the premises, and to stand to, perform, and abide by, such order, direction and decree as may be made against them in the premises.[1]

(Signed) R. H. DAGENHART.

WM. P. BYNUM,
Greensboro, N. C.
O'BRIAN, BOARDMAN, PARKER & FOX,
120 Broadway, N. Y.
MANLY, HENDREN & WOMBLE,
Winston-Salem, N. C.
Solicitors for Plaintiffs.

STATE OF NORTH CAROLINA,
County of Forsyth.

Before me, a Notary Public duly commissioned and sworn, personally appeared Roland H. Dagenhart, who being duly sworn deposes and says:

[1] The attention of the court does not seem to have been called to the omission of allegations showing that the value of the matter in dispute exclusive of interest and costs exceeded $3,000.

That he is named as one of the plaintiffs in the foregoing bill of complaint and that he has read the said bill and signed the same; that he knows that the said bill is true, except as to the matters and things therein stated upon information and belief, and as to all such matters he verily believes it to be true.

(Signed) R. H. DAGENHART.

Subscribed and sworn to before me this 9th day of August, 1917.

(Signed) B. WURRESCHKE, N. P.

My commission expires June 21st, 1919.

FORM V.—BILL OF COMPLAINT AGAINST CABINET OFFICER.

[250 U. S. 360; 255 Fed. 99.]

In the District Court of the United States, Southern District of New York.

THE COMMERCIAL CABLE COMPANY, Complainant,
versus
ALBERT S. BURLESON, Defendant.
} Bill of Complaint

To the Judges of the District Court of the United States, Southern District of New York:

THE COMMERCIAL CABLE COMPANY, a citizen and resident of the City, County and State of New York, brings this, its bill of complaint, against Albert S. Burleson, a citizen of the State of Texas and a resident of the District of Columbia.

And thereupon your orator complains and says: That during all the times hereinafter mentioned it has been and still is a corporation duly organized under the laws of the State of New York and has its principal place of business in the City of New York, in the Southern District of New York, and is a resident therein, and is engaged among other things in the ownership, maintenance and operation of a system of submarine cables in the Atlantic Ocean extending from the United States of America to Canada, Newfoundland, Azores Islands, United Kingdom, and France. That said system of cables includes cables from New York City in New York State and Rockport, near the City of Boston, Massachusetts, to Canso, Nova Scotia, Canada, and St. Johns, Newfoundland, and also includes submarine cables from Canso, Nova Scotia, to the Azores Islands, and from the Azores Islands to Ireland, United Kingdom, and also cables from Canso, Nova Scotia, to Ireland, United Kingdom, and also includes cables from Newfoundland to Ireland, United Kingdom, and a cable from Ireland, United Kingdom, to Havre, in the Republic of France. And cables from Ireland, United Kingdom, to Weston Super Mare, England. And a cable from New York to Cuba. That for over thirty years last past your orator has been and still is operating its system of submarine cables in

the Atlantic Ocean in the transmission of cablegrams, and that the same constitutes interstate and international commerce, and your orator further says that it also transmits messages for the Government of the United States at one-half of the regular public rate therefor, although under no legal obligation so to do, this being the practice and custom in the operation of cables generally.

That on or about the 16th day of July, 1918, the Congress of the United States by Joint Resolution of the Senate and House of Representatives passed a resolution authorizing and empowering the President during the continuance of the present war whenever he should deem it necessary for the national security or defense to supervise or take possession and assume control of telegraph, telephone, marine cable or radio system or systems or any part thereof and operate the same for the duration of the war but not beyond the date of the proclamation by the President of the United States of the exchange of ratifications of the Treaty of Peace. That a copy of the aforesaid Joint Resolution of the Congress, is attached hereto and made a part hereof and marked Exhibit "A."

That on or about the 11th day of November, 1918, an armistice was signed suspending hostilities of the present war, and thereupon immediately the duration of the war ceased within the letter, purpose and spirit of said Joint Resolution, so far as said Joint Resolution purported to authorize the taking of possession and control of the systems therein described. That on November 11, 1918, the President officially addressed the two Houses of the Congress in joint session, and formally and officially announced the termination of the war. That in such address the President, after stating the terms of the armistice, said:

> "The war thus comes to an end; for, having accepted these terms of armistice, it will be impossible for the German command to renew it."

That the defendant is, and during all the times hereinafter mentioned has been Postmaster-General of the United States. That on or about the 16th day of November, 1918, the defendant, assuming to act as Postmaster-General, announced informally through the public press that he had taken possession and assumed control of all marine cable system or systems owned or operated by any and all American corporations, including not only your orator's cables hereinbefore specified, but also including the cable of the Commercial Pacific Cable Company from San Francisco to China, Japan and the Philippine Islands, and also including the two cables of the Central and South American Telegraph Company from New York City to and through the Isthmus of Panama and thence down the western coast of South America and across the mountains to the Argentine Republic, and including also six British owned cables leased to the Western Union Telegraph Company, and two American owned cables leased to that company, and including also cables from the United States to Cuba and from the United States to Mexico. That his action was based on a proclamation of the President of the United States dated November 2nd, 1918, (the actual

date of execution being unknown to your orator, but your orator alleges upon information and belief that it was subsequent to November 11th, 1918,) a copy of which is attached hereto and made a part hereof and marked Exhibit "B." That on or about the 16th day of November defendant issued an order, without date, assuming to take control of said cable system, a copy of which is attached hereto and is made a part hereof and is marked Exhibit "C." That the defendant claims to have taken possession and assumed control of your orator's aforesaid cable system and to be now operating the same, and claims to be entitled to the income of your orator's said cable system, which is more than ten thousand dollars a day.

That the said seizure or attempted seizure of your orator's said cable system is unconstitutional, unauthorized, ultra vires, illegal and void, for the reasons that the war within the meaning of said Resolution had terminated prior to the time of said seizure and the alleged authorization thereof; that the Congress had no power or authority under the Constitution to authorize the taking possession and control and operation of said cable system under the circumstances existing at the time of said seizure; and that said seizure was not reasonably necessary for the national security or defense; and that said seizure deprived your orator of its property without due process of law; and that said seizure took your orator's private property for public use without just compensation to your orator; and that said seizure was an unreasonable and arbitrary seizure; and that said seizure was not for public use; and that defendant is not an impartial tribunal to determine your orator's compensation for the use of said marine cables; and that proper and legal provision has not been made for the payment to your orator of said compensation, not even for the keeping by your orator of the regular profits of its own property; and finally that purpose, plan and effect of said seizure to unite, consolidate and unify your orator's said cable system with that of your orator's competitor, the Western Union Telegraph Company, is in violation of the Anti-Trust Act of Congress of July 2, 1890, both in its immediate effect of suppressing competition now existing and in its effect in disorganizing your orator's organization, plant and equipment, so as to disqualify your orator from taking up and resuming such competition, when said cable system is returned to your orator on the signing of a treaty of peace and the proclamation thereof.

That the recent war referred to in said joint resolution, is no longer in continuance, it having been terminated beyond possibility of renewal on November 11, 1918, by an armistice. That said Proclamation dated November 2nd, 1918, did not become a proclamation and was not proclaimed or announced, signed, countersigned, made public or effective until after November 11th, 1918, namely, about November 16th, 1918, and that no seizure or possession of said cables was attempted, claimed or made until on or about November 16th, 1918.

That it is not necessary for the national security or defense that your orator's system of marine cables shall be seized, or taken possession of,

or assumed control of by the defendant or anyone else. That the national security or defense will not be furthered in the slightest degree by defendant taking possession and assuming control of your orator's marine cables. That the national security or defense was fully attained by the signing of said armistice and by the discontinuance of hostilities under the said present war. That a full, adequate, complete, quick and correct cable service has been during the period of the war and still is being given by your orator on its cable system to the Government of the United States and that all government messages are given precedence over all other messages, and that there has been no complaint or occasion for complaint on the part of the Government in regard to the quick and accurate transmission of its messages, and that your orator's cables are worked and operated to their utmost capacity by a most competent staff of officers and cable operators, and that said service could not be increased or bettered, and that the operation of said cable lines by or under the control of the defendant would be less efficient and satisfactory not only to the Government in the transmission of its cablegrams, but to the public in the transmission of public messages generally and that the seizure of said cables on the ground that they were or are necessary for the national security or defense was and is a mere pretext without substance or basis of fact whatsoever.

That ever since the United States entered the present war the American ends of said marine cables of your orator have been and still are under the absolute control of the officials of the United States Government and particularly the control of the Director of Naval Communications, and that nothing has been done by your orator relative to the operation of said cable lines without the knowledge and approval of said Director of Naval Communications. That every request and even suggestion made at any time by said Director of Naval Communications or his representatives, who was stationed and established in your orator's cable office in New York City, has been promptly complied with and carried out in every particular. That a most rigid censorship was established by the United States Government over your orator's cables, and that your orator has heartily cooperated in said censorship. That all the demands and even requests of the Government on your orator in behalf of the national security and defense have been promptly, fully and cheerfully complied with by your orator, notably a request on October 29th, 1918, by the State Department of the Government at Washington that your orator place at the disposal of that Department and the President a special cable across the Atlantic so that there might be instantaneous communication between the Government at Washington and its American representatives at Paris. That thereupon your orator promptly set aside one of its Trans-Atlantic cables for that purpose and furnished a through circuit from Washington to Paris which has ever since been at the disposal of the State Department of the Government.

That the transmission of cablegrams for the next few months between America and Europe did not and does not necessitate or justify the seizing

of the ten thousand miles of cable from San Francisco to China, Japan, and the Philippines (as has been done); nor the seizing of two cables from New York to Panama, thence down the west coast of South America, thence over the mountains to the Argentine Republic (as has been done); nor the seizing of cables to Cuba and Mexico (as has been done); nor the seizing of thirteen cables across the Atlantic (as has been done). That all of said thirteen cables have been and are devoted first to the transmission of government messages, relative to peace negotiations or any other government business, and then press messages and commercial messages; that the seizing of said thirteen cables by the Government does not facilitate or better in the slightest degree the transmission of government peace messages or any other messages, and has not except in one instance for a short time when the influenza raged, which, however, did not affect the service on Government messages, said cables being already worked to their utmost capacity by most expert operators and staff, and that both cable companies, having cables in the Atlantic Ocean, have been and are working their cables first for the Government as fully and efficiently as they possibly could be worked, if actually owned and operated by the Government itself for Governmental purposes. That one of said thirteen cables has heretofore been set aside by your orator for the use of the Government, as hereinbefore alleged, and others would have been so set aside also if any request so to do had been made. That your orator was not consulted as to the necessity or even advisability of said seizure of said cables, although your orator could have given more competent expert advice on that subject than anyone else conversant with cable affairs.

That said joint resolution of Congress and all acts of defendant thereunder are unconstitutional, illegal and void, in that the compensation therein provided for is not to be determined by an impartial jury or commission, but under the authority given to the President is intended to be, and will be, determined by the defendant and that the authority conferred upon the President under said Resolution is exercised and will be exercised through the defendant. That in the case of the Postal Telegraph-Cable Company the system of which was heretofore seized under said Resolution, the fixing of the compensation therefor was committed to the defendant; that the determination of your orator's compensation will thus be left to the arbitrary caprice and prejudiced mind of defendant, who is interested personally and officially in giving an unfair and unreasonably low, insufficient and inadequate compensation to your orator, because the less he gives your orator the more he keeps for the Government to its profit at your orator's expense and to the personal renown of defendant. That for many years last past the defendant as Postmaster-General has advocated government ownership of telegraphs and cables and that defendant is not an impartial tribunal to determine the compensation, operation, competition and policy of complainant in regard to its said system of marine cables.

That your orator's right to appeal to the Court of Claims is an illusory right, in that no provision has been made for paying any judgment that

your orator may obtain in that court. That no adequate or safe fund has been provided from which your orator may at some future time be compensated for the seizure and use of its said submarine cables, and that the only recourse for your orator to collect any judgment given by the Court of Claims will be an application to the Congress to appropriate the money therefor, which application may be disregarded absolutely, and thereupon your orator would receive no compensation whatsoever. That the seizure of your orator's marine cables is not the seizure merely of physical property or of the use thereof exclusively for governmental purposes as distinguished from commercial purposes, but is a seizure of the same with all future income therefrom so long as the seizure continues, thereby seizing the monies, income and profits of your orator in addition to the physical property itself, and thereby depriving your orator of such monies, income and profits and jeopardizing your orator's payment of interest and dividends in case the defendant should exercise his discretion to withhold the same as he has power under said Joint Resolution so to do, and that your orator's only recourse to repossess and obtain such monies, income and profits would be a suit in the Court of Claims without any certainty or reasonable expectation that a judgment therefor would be paid within a certain time, if, in fact, paid at all, and that this constitutes an unreasonable seizure, and the taking of private property for public use without just compensation, and deprives your orator of its property without due process of law, in violation of the Constitution of the United States. That there is no compulsory process by which a judgment of the Court of Claims can be collected and that it is entirely voluntary with the Congress whether any such judgment shall be paid or not, and that one of the component parts of your orator's system, namely, the Commercial Pacific Cable Company on September 21st, 1907, had one of its cables disrupted by one of the warships of the United States and presented a claim for damages in the Court of Claims and obtained a judgment June 2nd, 1913, for $35,894.47, subsequently reduced to $35,838.22 and that although the Congress has been repeatedly requested to pay said claim it never has done so and the same is still unpaid and there are no means of enforcing payment. That defendant claims that he is entitled to take all of your orator's daily profits and return a small portion thereof to your orator and keep the remainder in violation of the decisions of the Supreme Court of the United States and of the Constitution of the United States. That this is confiscatory, communistic and in violation of established principles of law. That recently the Postal Telegraph system, with which your orator connects and is intimately associated, had its land telegraph lines seized by defendant and although that system in the year 1917 made a profit of $4,269,547.61, the defendant awarded that system only $1,680,000 as compensation, being 6% on $28,000,000, which defendant's committee said was the physical value of the system's plant. That defendant through a committee proceeds on a fundamentally wrong principle in determining compensation, namely, 6% an arbitrarily fixed physical value of the plant without any allowance for earning power and without any correct method

even of arriving at said appraised value. That all this is the taking of property without due process of law and without proper compensation being made or provided for. That the power to fix the compensation to be paid your orator has been illegally delegated.

That defendant proposes and intends to so intermingle, unite, consolidate and merge your orator's business, good will, staff, organization, employees, plants and equipment with that of said Western Union Telegraph Company that the separate identity, business and good will of your orator will disappear, so that your orator may be forced or persuaded to abandon competition hereafter, and acquiesce in defendant's plans for government ownership of the same, or an amalgamation of all cables in the Atlantic Ocean. That defendant has called in as assistant and adviser Theodore N. Vail, President of the American Telephone and Telegraph Company, to work out a plan for a "universal wire service" including all wire communications of the United States, namely, cables, telegraph lines and telephone lines. That all this is and would be in violation of the Anti-Trust Act of Congress of July 2, 1890, which applies in full force to defendant as well as your orator, now that the war has terminated.

That your orator's said marine cables are private property and have been taken by defendant not for public use, and that this is in violation of the Constitution of the United States and that there is no necessity for the exercise of the power of the Government in taking the said marine cables, and that no provision has been made for any judicial inquiry as to the necessity for the seizure and taking of said marine cables, and that said seizure is arbitrary, all in violation of the Constitution of the United States, guaranteeing due process of law. That this suit in equity is brought to enforce a claim to real or personal property within the Southern District of New York.

That the continued interference of the defendant with the business of your orator as aforesaid is causing and likely to cause great money damage to your orator which will largely exceed the sum of three thousand dollars exclusive of interest and costs.

That the defendant in carrying out his unlawful possession and control of your orator's marine cable system and business will use the military power of the United States, against which as a matter of course your orator has no adequate means of resistance, and that great and irreparable injury is being done to your orator, its property and business, and the cable communication of the public.

WHEREFORE your orator prays that the defendant, his officers and agents, may answer the premises according to law (answer under oath being hereby waived), and that he may, by a writ of injunction to be issued out of and under the seal of this Honorable Court, be enjoined from carrying out his claim that he has taken possession and assumed control of your orator's said marine cable system, and that the defendant, his officers and agents, may be enjoined from interfering with your orator's property or business aforesaid or from taking any steps or making any demands on your orator in connection therewith.

AND YOUR ORATOR PRAYS that pending the determination of this suit, this Court will grant and issue a temporary injunction or restraining order, forbidding all of said actions on the part of the defendant as to which a final injunction as hereinbefore prayed, in order to preserve your orator from great injury to its business and to prevent the injury that would occur to the public interest by reason of the threatened acts aforesaid while this suit is pending.

AND YOUR ORATOR FURTHER PRAYS that it may have such other and further relief in the premises as the nature of the circumstances of the cause may require and to your Honors may seem meet.

Your orator prays that process of subpoena against the defendant, may be issued out of and under the seal of this Honorable Court, commanding him, to appear and make answer, plead or demur to your orator's bill of complaint at a day to be named therein and under certain penalty to be therein expressed.

WILLIAM W. COOK,
Solicitor of complainant.

CHARLES E. HUGHES,
Of Counsel with complainant.

STATE OF NEW YORK,
City and County of New York. } ss.:

CLARENCE H. MACKAY, being duly sworn, deposes and says: That he is the President of the Commercial Cable Company, the complainant in the above entitled suit in equity; That he has read the foregoing Bill of Complaint; that the statements contained therein are true to the best of his knowledge and belief and so far as made of his own knowledge they are true and so far as they are made from information derived from others he believes them to be true.

CLARENCE H. MACKAY.

Subscribed and sworn to before me this fourth day of December, 1918.

THOMAS G. BARKER,
Notary Public, Kings County, No. 419.
Certificate filed in N. Y. Co. No. 529

(L. S.) My commission expires March 20, 1919.

FORM VI.—STOCKHOLDER'S BILL FOR INJUNCTION AGAINST PAYMENT OF INCOME TAX.

[Injunction granted, 157 U. S. 429.]

In the [District] Court of the United States, Southern District of New York.

CHARLES POLLOCK,
Complainant,
versus
THE FARMERS' LOAN & TRUST COMPANY, SAMUEL SLOAN, WILLIAM WALDORF ASTOR, WILLIAM REMSEN, ISAAC BELL, JAMES ROOSEVELT, THOMAS RUTTER, WILLIAM H. WISNER, DARIUS O. MILLS, PERCY R. PYNE, EDWARD R. BELL, CHARLES H. THOMPSON, HENRY A. C. TAYLOR, ROBERT C. BOYD, ALEXANDER T. VAN NEST, JAMES STILLMAN, MOSES TAYLOR PYNE, HENRY VAN RENSSELAER KENNEDY, EDWARD R. BACON, CHARLES L. COLBY, CLEVELAND H. DODGE, CHARLES A. PEABODY, JR., HENRY HENTZ, ROSEWELL G. ROLSTON, ROBERT F. BALLANTINE, JAMES NEILSON, and FRANKLIN D. LOCKE,
Defendants.
} In Equity.

In Equity.

To the Judges of the District Court of the United States for the Southern District of New York, Sitting in Equity:

Charles Pollock, a citizen of the State of Massachusetts, and a resident of the city of Boston in said State, brings this his bill of complaint, in behalf of himself and all other stockholders who are similarly situated, and who shall be entitled to avail themselves of the benefit of this suit, against the Farmers' Loan & Trust Company, a corporation created and existing under and by virtue of the laws of the State of New York, located and having its principal office for the transaction of business in the city of New York, in the southern district of New York; Samuel Sloan, William Waldorf Astor, William Remsen, Isaac Bell, James Roosevelt, Thomas Rutter, William H. Wisner, Darius O. Mills, Percy R. Pyne, Edward R. Bell, Charles H. Thompson, Henry A. C. Taylor, Robert C. Boyd, Alexander T. Van Nest, James Stillman, Moses Taylor Pyne, Henry Van Rensselaer Kennedy, Edward R. Bacon, Charles L. Colby, Cleveland H. Dodge and Charles A. Peabody, Jr., all citizens of the State of New York and residents of the southern district of said State, and Henry Hentz and Rosewell G. Rolston, citizens of the State of New York and residents of the eastern district of said State, and Robert F. Ballantine and James Neilson, citizens of the State of New Jersey and residents of the district of New Jersey, and Franklin D. Locke, a citizen of the State of New York

and a resident of the northern district thereof, and thereupon your orator complains and says as follows:

First—Your orator shows that the defendant, The Farmers' Loan & Trust Company, is a corporation duly organized and existing under and by virtue of the provisions of an act of the legislature of the State of New York, entitled "An act to incorporate the Farmers' Fire Insurance and Loan Company," passed February 28th, 1822, as amended by certain acts of the legislature of the State of New York, namely: An act entitled "An act relative to the Farmers' Fire Insurance and Loan Company," passed April 17th, 1822; an act entitled "An act to alter the name of the Farmers' Fire Insurance and Loan Company and to classify its directors," passed April 30, 1836; an act entitled "An act to confirm certain securities and conveyances of land," passed March 28th, 1850; an act entitled "An act to amend an act entitled 'An act relative to the Farmers' Fire Insurance and Loan Company,' " passed on or about the 30th day of March, 1852; an act entitled "An act relative to the Farmers' Loan & Trust Company," passed April 30th, 1875 (being chapter 217 of the Laws of 1875); an act entitled "An act to amend chapter 217 of the Laws of 1875, and entitled 'An act relative to the Farmers' Loan and Trust Company,' " passed May 13th, 1880 (being chapter 277 of the Laws of 1880); and an act entitled "An act to amend chapter 277 of the Laws of 1880, entitled 'An act to amend chapter 217 of the Laws of 1875, entitled "An act relative to the Farmers' Loan and Trust Company," ' " passed May 24th, 1890 (being chapter 433 of the Laws of 1890). Reference is prayed to each and all of said acts for the powers and duties of the said defendant trust company and of its directors. The capital stock of said corporation now consists and for over ten years last past has consisted of the sum of one million dollars ($1,000,000), divided into forty thousand shares of the par value of twenty-five dollars ($25) each, and, as your orator is informed and verily believes, the capital stock, surplus and accumulated profits of said corporation now exceed the sum of five million dollars ($5,000,000).

Second—Your orator further shows that the said defendant trust company was and is authorized in and by the statutes above mentioned to invest its assets in public stocks and bonds of the United States or any individual State, or in the stock and bonds of any incorporated city or county, or in such real or personal securities as the company might deem proper, and was and is also authorized and empowered to take, accept and execute all such trusts of every description as might be committed to said company by any person or persons or any corporation by grant, assignment, devise, or bequest, or which might be committed or transferred to or vested in said company by order of the supreme court of the State of New York, or by a surrogate or any of the courts of record of said State, and to receive and take any real estate which might be the subject of any such trust.

Third—Your orator further shows, on information and belief, that the property and assets of said defendant trust company now amount to more

than the sum of five million dollars ($5,000,000), as aforesaid, and that at least $1,000,000 thereof is invested in real estate owned by said company in fee, and at least $2,000,000 thereof in bonds of the city of New York, and at least $1,000,000 thereof in the bonds and stocks of other corporations in the United States.

Fourth—Your orator further shows that the net profits or income of the defendant trust company during the year ending December 31st, 1894, amounted, to the best of your orator's knowledge, information and belief, to more than the sum of three hundred thousand dollars ($300,000) above its actual operating and business expenses, including therein losses and interest on bonded and other indebtedness; that the real estate above referred to belonging to the defendant trust company consists of numerous parcels of land situated in the State of New York; that said trust company derives therefrom income and rents of about $50,000 per annum, after paying or deducting all national, State, county, school and municipal taxes, and that said company derives an income or profit of about $60,000 from its investments in said municipal bonds.

Fifth—Your orator further shows, on information and belief, that under and by virtue of the powers conferred upon said defendant trust company, it has from time to time taken, accepted and executed, and at all the times referred to in this bill of complaint, has held and been executing, and still holds and is executing, numerous trusts committed to said trust company by numerous persons, copartnerships, unincorporated associations and corporations, by grant, assignment, devise and bequest, and by orders of various courts, and that said trust company now holds as trustee for many minors, individuals, copartnerships, associations and corporations too numerous to mention, resident in the United States and elsewhere, many parcels of real estate exceeding one hundred (100) in number, situated in the various States of the United States, and amounting in the aggregate to a value in excess of $5,000,000, the rents and income of which real estate collected, received and held by said defendant in its numerous fiduciary capacities annually exceed the sum of two hundred thousand dollars.

Sixth—Your orator further shows that in and by said acts of the legislature of the State of New York above referred to, it is, among other things, provided that the stock, property, affairs and concerns of said defendant trust company should be managed and wholly conducted by twenty-seven directors, that such directors should hold office until others were chosen in their stead, and that such directors should be stockholders of the company in their own right, and likewise citizens of the United States. As your orator is informed and verily believes, the defendants above named, Samuel Sloan, William Waldorf Astor, William Remsen, Isaac Bell, James Roosevelt, Thomas Rutter, William H. Wisner, Darius O. Mills, Percy R. Pyne, Edward R. Bell, Charles H. Thompson, Henry A. C. Taylor, Robert C. Boyd, Alexander T. Van Nest, James Stillman, Moses Taylor Pyne, Henry Van Rensselaer Kennedy, Edward R. Bacon, Charles L. Colby, Cleveland H. Dodge and Charles A. Peabody, Jr., are

citizens of the State of New York and residents and inhabitants of the southern district of said State, and Henry Hentz and Rosewell G. Rolston are citizens of the State of New York and residents and inhabitants of the eastern district of said State, and Robert F. Ballantine and James Neilson are citizens of the State of New Jersey and residents and inhabitants of the district of New Jersey, and Franklin D. Locke is a citizen of the State of New York and a resident and inhabitant of the northern district thereof, and said defendants are the directors of the said defendant trust company, duly elected as such, and are now acting in that capacity and managing and conducting all and singular the stock, property, affairs and concerns of said defendant trust company.

Seventh—Your orator further shows that he is a citizen of the State of Massachusetts and a resident of the city of Boston in said State; that he became the owner and registered holder of ten shares of the capital stock in said defendant trust company on or about the 20th day of May, 1892, and that he ever since has been and still is a stockholder therein, owning and holding in his own right said ten shares of its capital stock, the value of which ten shares exceeds the sum of $5,000. The capital stock of said trust company is divided among a large number of different persons, who, as such stockholders, constitute a large body, and this suit is for an object common to them all. Many of such stockholders are not citizens or residents of the United States. Your orator, therefore, brings this suit in his own name and in his own behalf as a stockholder in said trust company, and also as a representative and on behalf of such of the other stockholders similarly situated and interested as may choose to intervene and become parties hereto.

Eighth—Your orator further shows that, as he is informed and verily believes, the defendant trust company and a majority of its directors who are managing and conducting its stocks, property, affairs and concerns as aforesaid, claim and assert that under and by virtue of the alleged authority of the provisions of an act of Congress of the United States, entitled "An act to reduce taxation, to provide revenue for the Government and for other purposes," passed August 15th, 1894, the trust company is liable and that they intend to pay to the Federal Government before the first day of July, 1895, a tax of two per centum on the net profits or income of said defendant trust company for the calendar year ending December 31st, 1894, above actual operating and business expenses, including the income derived from the said real estate and the said bonds of the city of New York; and that the said directors claim and assert that a similar tax must be paid upon the amount of the income, gains and profits in excess of four thousand dollars of all minors and others for whom the said trust company is acting in a fiduciary capacity.

Ninth—Your orator further shows that, as he is informed and verily believes, in alleged compliance with the requirements of the act of Congress aforesaid, the defendant trust company and its said directors have avowed their intention and propose voluntarily to make and file with the collector of internal revenue of the second district of the city of New

York, prior to the 1st day of March, 1895, a list, return, or statement, showing the amount of net profits or income received by said trust company during the calendar year 1894, as aforesaid, and have likewise avowed their intention and propose voluntarily to make and render a list or return to the said collector of internal revenue, prior to said date, of the amount of the income, gains and profits of all minors and other persons having incomes in excess of three thousand five hundred dollars for whom the said trust company is acting in a fiduciary capacity.

Tenth—Your orator avers that the provisions of said income tax, incorporated in said act of Congress, as aforesaid, are unconstitutional, null and void in that the said income tax is a direct tax in respect of the real estate held and owned by the defendant trust company in its own right and in its fiduciary capacities as aforesaid, by being imposed upon the rents, issues and profits of said real estate, and is likewise a direct tax in respect of its personal property and the personal property held by it for others for whom it acts in its fiduciary capacities aforesaid, which direct taxes are not in and by said act apportioned among the several States, as required by section 2 of article I of the Constitution of the United States.

Eleventh—Your orator further avers that if the said income tax, so incorporated in said act of Congress, as aforesaid, be held not to be a direct tax, then its provisions are nevertheless unconstitutional, null and void in that they are not uniform throughout the United States, as required in and by section 8 of article I of the Constitution of the United States.

Twelfth—Your orator further avers that the said income tax is not uniform as to property, class or subject in that, as he is informed and verily believes, the net profits or income above actual operating and business expenses of many corporations in the United States too numerous to mention, organized under the laws of the various States, amount to less than four thousand dollars per annum, and did not equal said sum during the whole of the last calendar year, namely, 1894, and that said tax is imposed on such corporations although individuals carrying on and transacting similar business under like conditions, and having like property, values, quantities, and income, are exempted by said act from the payment of said tax.

Your orator further avers that the said income tax is not uniform in that, as he is informed and verily believes, numerous holders of said shares of stock in the defendant trust company and other corporations have annual incomes of less than $4,000, including the interest and dividends received upon shares therein, and during said calendar year actually received gains, profits and income amounting in the aggregate to less than $4,000, and that if the defendant trust company and other corporations shall pay the said tax to the collector of internal revenue as aforesaid, the effect of such payment will be to lessen and diminish the dividends of such shareholders, and to lessen and diminish the value of their shares, and compel such holders, having incomes less than $4,000 per annum, to bear and pay said tax, although other parties of the same class similarly sit-

uated in the United States, whose incomes are less than $4,000 per annum, received or resulting from investments in other property of like values and quantity, are exempted by said act from the payment of said tax.

Your orator further avers that the said income tax is not uniform in that, as he is informed and verily believes, it is imposed upon only about two per centum of the population of the United States, namely, those who have incomes in excess of $4,000 per annum, and that the remaining population, namely, ninety-eight per centum thereof, are by said act exempted from the payment of said tax although they hold the greater portion of all property, real and personal, in the United States, as will appear by reference to the reports and returns of the Superintendent of Census of the United States, duly made and published under the provisions of the Revised Statutes of the United States in such case made and provided.

Your orator further avers that the said income tax is not uniform in that it imposes a tax of two per centum upon all money and the value of all personal property acquired by gift or inheritance, while no similar tax is imposed by said act upon real estate of like values and quantities acquired under similar conditions by either gift or inheritance.

Your orator further avers that the said income tax is not uniform in that the principal of every estate consisting of personal property which passes by gift or inheritance to any person or persons during the pendency of said act is taxed at the rate of two per centum upon the amount of such principal, although other like estates which do not pass by gift or inheritance until after such limited period or which during said period pass by gift or inheritance to corporations are not so taxed.

Your orator further avers that the said income tax is not uniform in that it is not laid at the same rate or percentage upon all incomes derived from like property, values and quantities, but varies according as the property, real or personal, from which the incomes, gains, and profits are derived belongs to an individual, or to more than one individual, or to members of one family.

Your orator further avers that the said income tax is not uniform in that by its provisions the salaries due to State, county or municipal officers are exempted from the payment of the income tax; all corporations or associations for charitable, religious, educational or beneficial purposes, and all building and loan associations which loan to their shareholders only and very many insurance companies and savings institutions, as therein specified, are exempted from the payment of the income tax; and the income from bonds of the United States, the principal and interest of which are by the law of their issuance exempt from Federal taxation, is also exempted from the payment of said income tax.

And your orator further avers that the said income tax is not uniform as required by section 8 of article I of the Constitution of the United States in many other respects, besides those specifically mentioned in this bill of complaint, and that its provisions are, therefore, unconstitutional, null and void.

Thirteenth—Your orator further avers that the said provisions of said

income tax, incorporated in said act of Congress as aforesaid, are likewise unconstitutional, null and void, in that they impose a tax upon income not taxable under the Constitution of the United States and likewise income derived from the stocks and bonds of the States of the United States of America and counties and municipalities therein, which stocks and bonds are among the means and instrumentalities employed for carrying on their respective governments, and are not proper subjects of the taxing power of Congress, and which States and their counties and municipalities are independent of the General Government of the United States, and the respective stocks or bonds of which are, together with the power of the States to borrow in any form, exempt from Federal taxation.

Your orator further shows that, as he is informed and verily believes, the stocks and bonds of the States and counties and municipalities of the United States which are thus exempted from Federal taxation under the Constitution of the United States, amount in the aggregate to about the sum of $1,243,268,000, on which the income, interest, or charge amounts to over the sum of $65,541,000 per annum, as likewise will appear by reference to said reports and returns of the Superintendent of Census, and that it was the intention of Congress and is essential and necessary to accomplish the purposes and general scope of said legislation to lay and collect such tax upon income derived from State, county and municipal stocks and bonds.

Fourteenth—Your orator further avers that the provisions of said income tax, incorporated in said act of Congress as aforesaid, are unconstitutional, null and void in that they impair property rights vested prior to the passage of said act, and in that they impose a tax of two per centum upon incomes of persons, associations and corporations which accrued prior to August 28th, 1894, the date upon which said act became a law, as well as upon property received by gift or inheritance prior to said date.

Fifteenth—Your orator further avers that the provisions of said income tax, incorporated in said act of Congress as aforesaid, are unconstitutional, null and void in that all persons or corporations thereby taxed may, under and by virtue of its terms and provisions, be deprived of their property without due process of law in violation of article V of the Constitution of the United States.

Sixteenth—Your orator further avers that the provisions of said income tax, incorporated in said act of Congress as aforesaid, are unconstitutional, null and void, in that all persons or corporations thereby taxed may be compelled to produce and disclose their private books and papers in order to make them liable for a penalty or to forfeit their property, in violation of articles IV and V of the Constitution of the United States.

Seventeenth—Your orator further shows that this suit is not a collusive one to confer on a court of the United States jurisdiction of a case of which it would not otherwise have cognizance, and that he has duly requested the defendant trust company and its directors and each of them in writing to omit and refuse to pay and to refrain from paying said income tax, and to contest the constitutionality of said act, and to refrain

from voluntarily making lists, returns and statements on its own behalf and on behalf of the minors and other persons for whom it is acting in its fiduciary capacities aforesaid, and to apply to a court of competent jurisdiction to determine its liability under said act, and that a copy of said request is hereto annexed as "Exhibit A," and made a part of this bill of complaint; but that said defendant trust company and a majority of its directors, after a meeting of the directors at which the matter and said request "Exhibit A" were formally laid before them for action, have, as your orator is informed and verily believes, refused and still refuse and intend omitting to comply with your orator's demand, and, as your orator is informed and verily believes, have resolved and determined and intend to comply with all and singular the provisions of said act of Congress, and to pay said tax upon all its net profits or income as aforesaid, including therein its rents from real estate and its income from municipal bonds. A copy of the refusal of said defendant trust company is hereto annexed as "Exhibit B" to this complaint.

Eighteenth—Your orator further shows that if the defendant and its directors, as they propose and have declared their intention to do, pay said tax out of the gains, income and profits of the defendant trust company or out of the gains, income and profits of the property, held by it in its fiduciary capacities, they will thereby diminish the assets of said trust company, and lessen the dividends thereon and the value of all its shares.

Nineteenth—Your orator further shows that the voluntary compliance with the provisions of said income tax, so incorporated in said act of Congress aforesaid, will expose the defendant trust company to a multiplicity of suits not only by and on behalf of its numerous shareholders, but by and on behalf of numerous minors and other persons for whom it acts in its several fiduciary capacities, and that such numerous suits will work irreparable injury to the business of the company and involve it in great and irreparable damage, and subject the trust company to liability to the beneficiaries aforesaid—all to the irreparable damage of your orator and all of its shareholders.

Twentieth—Your orator further shows that this is a suit of a civil nature in equity; that the matter in dispute exceeds, exclusive of interest and costs, the sum or value of five thousand dollars, and arises under the Constitution or laws of the United States, and that this is furthermore a controversy between citizens of different States.

All of which actings, doings and pretenses of the said defendants are contrary to equity and good conscience, and tend to the manifest wrong, injury and oppression of your orator in the premises.

Wherefore, and in consideration whereof, and forasmuch as your orator is remediless in the premises at and by the strict rules of the common law, and is relievable only in a court of equity, where matters of this nature are properly cognizable and relievable:

Your orator prays:

I. That it may be adjudged and decreed that the said provisions known

as the income tax incorporated in said act of Congress passed August 15th, 1894, are unconstitutional, null and void.

II. That the defendants be restrained from voluntarily complying with the provisions of said act and making the lists, returns and statements above referred to or paying the tax aforesaid.

III. And that your orator may have such other or further or different relief in the premises as to a court of equity may seem meet.

To the end, therefore, that the said defendants may, if they can, show why your orator should not have the relief herein and hereby prayed, and may full, true, direct and perfect answer make to the best and utmost of their knowledge, remembrance, information and belief, the said The Farmers' Loan and Trust Company, under its corporate seal, and the said individual defendants, not under oath—an answer under oath being hereby expressly waived—to each and all of the matters and things in this bill of complaint contained, and that as fully and particularly as if the same were here repeated, paragraph by paragraph, and they were specially interrogated thereunto: may it please your honors to grant unto your orator a *subpœna ad respondendum* issuing out of and under the seal of this honorable court, to be directed to the said defendants, The Farmers' Loan and Trust Company, Samuel Sloan, William Waldorf Astor, William Remsen, Isaac Bell, James Roosevelt, Thomas Rutter, William H. Wisner, Darius O. Mills, Percy R. Pyne, Edward R. Bell, Charles H. Thompson, Henry A. C. Taylor, Robert C. Boyd, Alexander T. Van Nest, James Stillman, Moses Taylor Pyne, Henry Van Rensselaer Kennedy, Edward R. Bacon, Charles L. Colby, Cleveland H. Dodge, Charles A. Peabody, Jr., Henry Hentz, Rosewell G. Rolston, Robert F. Ballantine, James Neilson and Franklin D. Locke, commanding them and each of them on a certain day and under a certain penalty to be therein inserted, to appear before your honors in this honorable court, and then and there full, true, direct and perfect answer make to all and singular the premises; and, further, to perform and abide by such further order and decree as to your honors shall seem meet; and also a writ of provisional and a writ of perpetual injunction to the same purport, tenor and effect as is hereinbefore set forth and prayed.

And your orator, as in duty bound, will ever pray, etc.

SEWARD, GUTHRIE, MORAWETZ & STEELE,
Solicitors for Complainant,
29 Nassau Street, New York City.

JOSEPH H. CHOATE,
CLARENCE A. SEWARD,
WILLIAM D. GUTHRIE,
CHARLES STEELE,
DAVID WILLCOX,
Of Counsel.

UNITED STATES OF AMERICA, *Southern District of New York.* } ss.:

William D. Guthrie, being duly sworn, doth depose and say that he is one of the solicitors for the complainant Charles Pollock, named in the foregoing bill of complaint; that the reason why this verification is not made by said Pollock is that he is absent from the southern district of New York and in the State of Massachusetts; that deponent has read said bill and knows the contents thereof; that the same is true to his own knowledge, except as to the matters therein stated to be alleged on information and belief, and that, as to those matters he believes it to be true. The sources of deponent's information and belief as to all matters therein not stated upon his knowledge are communications with the plaintiff through the Boston correspondents of deponent's firm, who have conferred with said Pollock; reports published by the defendant trust company and Exhibits A and B in the possession of deponent's firm.

WILLIAM D. GUTHRIE.

Subscribed and sworn to before me, this 19th day of January, 1895.

CARL A. DE GERSDORFF,
[NOTARIAL SEAL] Notary Public, New York County (99).

EXHIBIT A

New York, January 5, 1895.

To Samuel Sloan, William Waldorf Astor, William Remsen, Isaac Bell, James Roosevelt, Thomas Rutter, William H. Wisner, Darius O. Mills, Percy R. Pyne, Edward R. Bell, Charles H. Thompson, Henry A. C. Taylor, Robert C. Boyd, Alexander T. Van Nest, James Stillman, Moses Taylor Pyne, Henry Van Rensselaer Kennedy, Edward R. Bacon, Charles L. Colby, Cleveland H. Dodge, Charles A. Peabody, Jr., Henry Hentz, Rosewell G. Rolston, Robert F. Ballantine, James Neilson, and Franklin D. Locke, directions of the Farmers' Loan & Trust Company.

Sirs: I am a shareholder in the Farmers' Loan & Trust Company, and am informed that the company intends to voluntarily comply with the requirements of the provisions relating to income tax contained in the act of Congress of the United States entitled "An act to reduce taxation, and to provide revenue for the Government, and for other purposes," which became a law August 28th, 1894, and is known as the tariff act.

I claim that the provisions of said act of Congress in respect to income tax are unconstitutional. As a shareholder in said trust company, I hereby protest against any action of the company and its directors in voluntarily complying with said income tax provisions, and I request that said trust company and its directors shall refrain from voluntarily

complying with any of said provisions, and from voluntarily paying the tax provided for therein, and from voluntarily making lists, returns, and statements in its own behalf and in behalf of minors and other persons for whom it is acting in a fiduciary capacity. I further request that said company and its directors shall contest the constitutionality of said act and protect its shareholders and beneficiaries, and apply to a court of competent jurisdiction to determine its liability under the same, or take such steps as may be necessary to protect the rights of the trust company's shareholders and those for whom it acts in its numerous fiduciary capacities.

Yours very truly,
CHARLES POLLOCK,
By SEWARD, GUTHRIE, MORAWETZ & STEELE, His Attorneys.

EXHIBIT B.

The Farmers' Loan and Trust Company,
16, 18, 20 & 22 William St.,
New York, January 18th, 1895.

Charles Pollock, Esq., c. o. Messrs. Seward, Guthrie, Morawetz & Steele,
31 Nassau Street, City.

Dear Sir: Referring to your circular letter of the 5th inst., addressed to the directors of this company, we have to say that the board of directors, at a meeting held this day, considered the matter, and we hand you herewith a certified copy of the resolution which they passed in relation to your request.

Very truly yours,
THE FARMERS' LOAN & TRUST CO.,
(Enc.) By E. S. MARSTON, Sec'y.

(Enclosure referred to in foregoing letter:)
The Farmers' Loan and Trust Company,
16, 18, 20, and 22 William St.
New York, January 18th, 1895.

At a regular meeting of the board of directors of the Farmers' Loan and Trust Company, held this day, the following resolution was passed:

"Resolved, That the board of directors deem it inexpedient to comply with the demand of Mr. Pollock, on the ground that the failure to comply with the provisions of the income-tax law would subject the company to litigation with the United States, and the risk of incurring penalties, and of clouding the title to all the real estate held by it on its own behalf and in its fiduciary capacity."

I hereby certify that the foregoing is a true and correct copy of the resolutions approved by the board of directors of the Farmers' Loan and Trust Company.

EDWIN S. MARSTON, Sec'y. [Corporate Seal]

FORM VII.—STOCKHOLDERS' BILL FOR INJUNCTION AGAINST TRANSFER OF ASSETS AND DISCOVERY WITH INTERROGATORIES.

[154 Fed. 140.]

To the Honorable the Judges of the District Court of the United States for the District of Maine:

HENRY B. SNYDER, a resident and citizen of the Borough of Manhattan, City, County and State of New York, and the Southern District of New York, in his own right and on behalf of all other stockholders of the DeForest Wireless Telegraph Company who may come in and contribute to the expenses of this action, presents this, his Bill of Complaint against the DeForest Wireless Telegraph Company, a corporation organized and existing under the laws of the State of Maine, and a citizen and resident of the State of Maine; and the American DeForest Wireless Telegraph Company, a corporation organized and existing under the laws of the State of Maine, and a citizen and resident of the State of Maine; and the Atlantic DeForest Wireless Company, a corporation organized and existing under the laws of the State of Maine, and a citizen and resident of the State of Maine, all of which corporations are citizens and residents of the City of Portland and State of Maine; and thereupon your orator complains and says:

I. Prior to the 1st day of April, 1903, the plaintiff had been continually, and still is, the sole owner, in his own right, for value paid to the persons to whom said stock was originally issued, of 27,000 shares of the capital stock of the defendant, the DeForest Wireless Telegraph Company, of the par value of $10.00 each, amounting to the sum of $270,000, in all, which stock prior to the sale, conveyance and transfer hereinafter mentioned was worth, at least the said sum of $270,000.

II. The defendant, the DeForest Wireless Telegraph Company, which is hereinafter usually described as the DeForest Company, was organized under the laws of the State of Maine on or about the 7th day of February, 1902, with a nominal capital of $3,000,000, which was originally divided into three million shares of the par value of one dollar per share, but which, by a resolution of the stockholders thereof, adopted on or about March 25th, 1902, and filed in the office of the Secretary of the State of Maine on or about March 25th, 1902, was divided into 300,000 shares of the par value of $10.00 per share. The purposes of said corporation as set forth in the certificate of organization thereof, were amongst others, as follows: To transmit messages by the various systems or devices of electricity or otherwise, that are now known, or that may hereafter be discovered, and particularly by the system popularly known as wireless telegraphy, from the City of Portland to South Harpswell in the County of Cumberland, in the State of Maine, by the usual lines of travel, and elsewhere; not contrary to the laws of the State of Maine. To manufacture, purchase, construct or otherwise acquire, to hold, own, control, operate or otherwise dispose of electrical

or any other contrivances, works and all necessary instruments and machinery for transmitting messages by signals or any other devices, electrical or otherwise. To apply for, purchase or otherwise acquire, hold and own inventions, and processes secured under letters patent of the United States and elsewhere. To construct, purchase, lease or otherwise acquire, to maintain, operate and control, electric ship lines, steamship lines or other water craft for transportation purposes. To equip vessels, ships or other boats or buildings with any systems or devices for receiving and transmitting messages. To carry on said business in any State, Territory, Colony or possession of the United States of America or foreign country, as principals, agents, contractors, trustees and otherwise so far as it may be done in accordance with the laws of the State of Maine with a provision that said corporation should not operate telegraph lines within the State of Maine contrary to the laws of the State of Maine; nor make, generate, sell, distribute and supply electricity for lighting, heating, manufacturing or mechanical purposes within the State of Maine contrary to the laws of the State of Maine. The principal objects for which said corporation was organized which were announced to the persons purchasing shares of stock of the same were for the purpose of promoting, developing, exploiting, patenting and rendering useful and practical to the public a method or system of wireless telegraphy, for conveying from place to place through the air, and without any medium or conductor other than the atmosphere, messages and information, for the purpose of erecting, equipping and maintaining stations and apparatus for the use and purpose of the said method or system and of serving the public in conveying messages and information by means of the said method or system. On the 4th day of January, 1904, the said DeForest Company was the sole owner of, and exclusively owned, operated and controlled, under and by virtue of the allowance of 58 claims for letters patent of the United States of America, Serial No. 67,136 and patent applications numbered 50,678, 67,136, 43,096; and by virtue of certain letters patent duly issued by the United States, and by Governments of other countries to persons from whom, by sundry mense assignments, the said DeForest Company acquired the title to the same.

The numbers and descriptions of all of said letters patent and the inventions thereby discovered and the names of all the assignors thereof are to your orator unknown, but two of said letters patent, as your orator is informed, and believes, are numbers 71,600 and 71,634; and one of the assignors of the same was Lee DeForest. Said DeForest Company then owned, controlled and used an original system of wireless telegraphy known as the DeForest Anti-Coherer Method or system; and one or more laboratories and manufacturies in the State of New Jersey and elsewhere; and certain wireless telegraph stations in the State of New York and elsewhere on the Atlantic Coast, some of which stations were constructed and in operation at said time; and others which were then in the course of construction. Prior to January 4, 1904, the said

DeForest Company had the exclusive right to use and then used the said system and inventions in the operation of numerous wireless telegraph stations in and about the City of New York and other portions of the United States of America for the transmission of aerograms or wireless messages by which method or system messages could be, and were, transmitted at a high rate of speed, limited only by the ability of the operator.

Prior to and on the 4th day of January, 1904, the said method or system had been, and was widely and extensively advertised, and had been, and was, favorably known throughout the United States of America and enjoyed great prestige in the financial world, and had been and was, of great value and constituted a valuable asset of the defendant, the DeForest Wireless Telegraph Company, and rendered the capital stock of the defendant, the DeForest Company, of great value and of the value of at least $10.00 per share.

III. The defendant, the American DeForest Wireless Telegraph Company, which is hereinafter usually described as the American Company, was organized under color of the laws of the State of Maine on or about the 26th day of November, 1902, for the following declared purposes, amongst others, as set forth in its certificate of incorporation. To construct, establish, equip, install, maintain and operate, or cause to be constructed, established, equipped, installed, maintained and operated, and to maintain and operate a system of wireless telegraphy for communication or other purposes for which the same may be used between the towns of Kittery to Kittery Point in the County of York, State of Maine, by the usual lines of travel and elsewhere, but not contrary to the laws of the State of Maine; and on, over, under and across any and all lands and water and between land and water, objects and persons thereon throughout the whole of the States of the United States of America, except in the State of Maine, the Territories of the United States, its colonial possessions, territorial acquisitions and foreign countries, and between the same or any of them, or any part or parts thereof; and for constructing, establishing, equipping, installing and operating the same; to acquire, grant concession rights, privileges, power and authority therefor from the governing or sovereign powers of the Cities, States or countries and of territorial districts or subdivisions thereof, or of any of them or from persons in authority either in corporate capacity, departments, bureaus or otherwise and from corporations, individuals, firms and associations; and to have power to do and to perform all matters and things necessary for, incidental to, or connected with, the construction, equipment, maintenance, management, operation and conduct of such business or of any business, whether manufacturing or otherwise, which the corporation may think calculated directly or indirectly to effectuate those objects or any of them, or of any parts thereof; and for other purposes, with a proviso that the said corporation should not operate telegraph and telephone lines in the State of Maine, contrary to the laws of the State of Maine.

Your orator is informed and believes and charges that many of the said objects of the said incorporation were in violation of and were not authorized by the laws of the State of Maine; and that the said American Company has no lawful right to maintain and operate a wireless telegraph system and stations anywhere.

The said American Company was organized by one Abraham Schwartz, who at that time had assumed the name of Abraham White for the purpose of concealing himself from his creditors and avoiding criminal prosecution in the State of Texas and elsewhere; and by others, who were stockholders of the said DeForest Company, with the funds of the said DeForest Company. The control of the said American Company and a majority of the shares of the stock of the same that had been issued were until about January 4th, 1904, vested in the said DeForest Company.

Your orator is informed and believes: That no subscriptions were made in good faith to any of the shares of stock of the said American Company; that no cash was paid into the treasury of said corporation for any shares of the same prior to January 4th, 1904; that none of the subscribers to the capital stock of said American Company ever paid any cash for the same; that none of the subscribers to the capital stock of the said American Company ever paid any value for the same; that none of the subscribers to the capital stock of the said American Company ever paid full value for the same; and that all the shares of stock issued by the said American DeForest Company were unlawfully issued and are void. The true object of the incorporation of the said American Company was in order to furnish a means of defrauding the creditors of the said original DeForest Company and of defrauding the stockholders of the said DeForest Company, and especially such of the stockholders thereof as never acquired any of the shares stamped special treasury stock, as hereinafter described.

IV. The said certificate of incorporation of the said DeForest Company and the by-laws of the said DeForest Company contained no provision for the issue of shares of preferred capital stock of the same; nor for the issue of treasury stock of the same; nor for the issue of any class of stock of the same, which should have any preference over shares of any other kind. Notwithstanding this, without any authority from the stockholders of said DeForest Company and without any authority from the directors of said company and without any authority of law the officers in control of said DeForest Company, amongst others, the said Abraham White, stamped and caused to be stamped upon a large number of certificates of shares of stock in said DeForest Company, the words "Special Treasury Stock" and sold the same in the market under representations to the purchasers and holders thereof that the holders of said preferred shares would receive special privileges greater than those owned by the holders of other shares of stock in said DeForest Company. All of this was done subsequently to the acquisition by your orator of the shares of stock in said DeForest Company owned by him as aforesaid. Thereupon the said officers in control of said DeForest Company,

without any authority from the stockholders and without any authority from the directors of the same and without any authority of law, published statements to the effect that they would pay to the holders of "special treasury stock" in said DeForest Company, such dividends, and issued such stock and paid the same every 60 days beginning August 20th, 1903, for a considerable period of time. No such stock dividends were declared or paid to your orator nor to the holders of any shares of stock in said DeForest Company except such stock as was stamped "special treasury stock" as aforesaid. The shares of stock in said American Company issued as aforesaid, were owned by the said DeForest Company and were unlawfully issued in violation of the rights of your orator and of other persons holding shares of stock in the same.

V. Upon information and belief, that on or about the 4th day of January, 1904, without notice to and without the knowledge of your orator and against the will of your orator and in violation of the rights of your orator as a stockholder of the DeForest Company as aforesaid, and in violation of the rights of the other holders of the capital stock of the said DeForest Company the defendant, the American Company, procured the execution by the officers of the defendant, the DeForest Company, of a certain paper or papers which purported to grant to the said American Company the right to use the said patents and certain other property of said DeForest Company for a period of time, the duration of which is unknown to your orator. No consideration and no adequate consideration was paid by the said American Company to said DeForest Company for the execution of said paper nor for such conveyance. Said conveyance was, as your orator is informed and believes, in the form of a lease or of a grant, but the exact terms of the same are to your orator unknown; and your orator has no information concerning the exact terms of said conveyance. In the *New York Herald*, Sunday, January 10th, 1904, the said defendant, the American DeForest Company, published an advertisement with the knowledge and approval of the said DeForest Company, which contained amongst other things the following statement:

"The American DeForest Wireless Telegraph Company now owns more than 100 patents in this and foreign countries * * * The recent consolidation by which the American DeForest Wireless Telegraph Company becomes the leading and strongest in the world embraces the acquisition of the following companies: The DeForest Wireless Tel. Co."; then follow the names of several other wireless telegraph companies. The said advertisement concludes with the statements that subscriptions will be received for stock in the American DeForest Wireless Telegraph Company and that the immediate purchase of that stock is recommended.

On or about December 22, 1903, a circular, addressed to the stockholders of said DeForest Company, bearing said date, was sent by the defendant, the DeForest Company, to a number of persons, not, however, to this plaintiff nor to all the stockholders of the DeForest Company,

which contained among other things the following statements, signed by the Greater New York Security Company:

"We beg to inform you that negotiations have been completed, by which the ownership and control of every wireless telegraph patent owned by the DeForest Wireless Telegraph Company (Parent Company), the International Wireless Telegraph Company and the Greater New York Security Company will be acquired by the American DeForest Wireless Telegraph Company."

A subsequent portion of said circular under the heading of "place of exchange of securities" contained the following statement: "The special treasury shares of the DeForest Wireless Telegraph Company will be exchanged share for share for the new preferred cumulative and participating shares of the American DeForest Telegraph Company; and in addition holders of the special treasury will also receive a bonus of 100% in common stock of the American DeForest Company, *i.e.*, 1 share common for each share preferred, together with 60 days rights for the purchase of additional shares of said preferred stock to the amount of 100% of your holdings." Said circular subsequently stated as follows: "The stock of the DeForest Wireless Telegraph Company other than the special treasury shares referred to herein will be exchanged for the common stock of the American DeForest Wireless Telegraph Company (share for share alike) upon the payment of $1.00 per share."

A copy of the said circular was subsequently delivered to your orator by one, M. Hayden, who received the same from the defendant, the American DeForest Wireless Telegraph Company, some time during the months of January or February, 1904. On or about January 4th, 1904, a circular addressed to the stockholders of the American DeForest Wireless Telegraph Company was printed and issued by the officers of the American DeForest Wireless Telegraph Company and of the DeForest Wireless Telegraph Company signed also by the Greater New York Security Company which was controlled by the said officers. Said circular contained amongst other things, the following:

"To the stockholders of the American DeForest Wireless Telegraph Company: In response to the inquiries regarding the present position of the American DeForest Wireless Telegraph System would beg to submit a statement of the same and of the more recent developments. Of the greatest importance during the last quarter has been the absorption of the following companies by the American DeForest Wireless Telegraph Company: Consolidated Wireless Telegraph Company, the American Wireless Telephone and Telegraph Company, New England Wireless Telegraph and Telephone Company, Federal Wireless Telegraph Company, Northwestern Wireless Telegraph Company, International Wireless Telegraph Company, DeForest Wireless Telegraph Company * * * * and the acquisition of valuable patents in addition to the American DeForest Patents and nine stations strategically located on the Atlantic Coast, but also an increase in the number of Wireless Experts who are con-

stantly working to maintain the scientific superiority of the DeForest System.''

Your orator received the said circular from said M. Hayden who received the same from the American DeForest Wireless Telegraph Company, at the same time that the said Hayden received the other circular hereinbefore mentioned.

Later, during the year 1904, the American DeForest Wireless Telegraph Company printed and issued to the Public a circular with the following title:

''A Few Reasons Why You Should Buy American DeForest Wireless Telegraph Stock Now.'' Said circular contains amongst other things, the following:

''Warning. The Am. D. F. W. T. Co. now controls the assets and patents of the old DeForest Co., making the stock of the old DeForest Co. of no material value, as the stock of the old Company has been offered to investors with advice leading them to suppose that it is the stock of the new company, great care should be taken in purchasing, and the safe way is to purchase direct from the company or to ask the advice of the company before purchasing from outside brokers.''

The said circular concludes as follows: ''Send your order for the amount of stock you want and make all remittances to American DeForest Wireless Telegraph Co., 80 Wall Street, New York. Wealth will follow in the track of this investment just as surely as it followed in the track of an investment in Bell Telephone Stock.''

VII. On or about January 7, 1904, and subsequently thereto, the said DeForest Wireless Telegraph Company gradually turned over to the said American DeForest Wireless Telegraph Company, all of the assets of said former company, including a number of wireless telegraph stations on the Atlantic coast, one or more of which were then in course of construction above mentioned; and its said laboratory and manufactory; and the use of all of the patents of said DeForest Wireless Telegraph Company was then transferred by the officers of the DeForest Wireless Telegraph Company to the said American DeForest Wireless Telegraph Company.

At said times, the presidents of both said corporations were the same, namely, the said Abraham Schwartz or White.

At said times, the vice presidents of both said corporations were the same, namely, one Lee DeForest.

The Secretary and Treasurer of both said corporations at said times was the same, Francis X. Butler.

The said transfer of assets by the said DeForest Wireless Telegraph Company to the said American DeForest Wireless Telegraph Company was gradual; and was terminated, as your orator is informed and believes, sometime during the autumn of the year 1904. The only consideration which the said DeForest Company received from the said American DeForest Company consisted, as your orator is informed and believes, of a block of stock of the said American DeForest Company

of the nominal par value of about $1,500,000 or more, which stock had no value; except such value as it obtained through the said transfer of the assets of said DeForest Company. Said stock of said American DeForest Company had no market value at the time of its issue to said DeForest Company. It has at the present time no actual value, and the only market value that the same has ever had, is caused by the said transfer of the assets of the said DeForest Company. Said American DeForest Company has no assets and never had any assets except property of the said DeForest Company, which it had unlawfully taken into its possession; and the stock of said American DeForest Company was never lawfully issued. The said stock of the said American DeForest Company was, immediately upon the delivery of the certificates thereof to the persons in control of said DeForest Company, appropriated by the said persons, who received the same for their own use under color of an alleged pledge of the same to another company, purporting to be a corporation under the laws of the State of New York, known as the Greater New York Security Company, the president of which was the said Abraham White; and which was controlled by said White, and the legal or equitable title to all the stock in which, was owned by said Abraham White, as security for a fictitious indebtedness alleged to exist by said DeForest Company to said Greater New York Security Company: Upon information and belief: Said fictitious indebtedness arose from the fact that the said Greater New York Security Company had fraudulently obtained a contract from said DeForest Company by which the said Security Company obtained the stock of the DeForest Company at a price not averaging more than ten cents a share, which price was at all times much less than the value of the same. Said stock was, prior to January, 1904, of the market value of more than $7.50 per share. While thus obtaining said stock at said price, the said Greater New York Security Company paid nothing to the said DeForest Company when it received said stock; but out of the proceeds of the sale of said stock by it to persons who paid the same in good faith and for value; the said Greater New York Security Company made alleged advances on behalf of said DeForest Company for office expenses and disbursements, which it claimed to be in excess of said sum of ten cents per share, which it had agreed to pay for said stock; and thus, and by the making of fictitious entries in the books of said Greater New York Security Company, and in the books of said DeForest Company, said Greater New York Security Company established a fictitious claim for indebtedness to it on the part of said DeForest Company. The said Abraham White was in control of the said Greater New York Security Company and president of said DeForest Company at all of the said times; and your orator is informed and believes: That said Abraham White was president of the said Greater New York Security Company at all of said times. Said DeForest Company then had other debts which have never been paid; and said transaction was an unlawful preference of said Security Company.

VIII. All of the officers and the majority of the Directors of the said DeForest Wireless Telegraph Company were, in January, 1904, owners of stock and interested in stock of the said American DeForest Company; and all of the stockholders who voted in support of the resolutions which purported to authorize said conveyance, were holders of stock and were interested in stock in said American DeForest Company. Said conveyance was executed in the name of said DeForest Wireless Telegraph Company without any lawful authority; and the execution of the same and the passing of said resolutions were procured by fraud. No notice that a resolution authorizing any conveyance of the assets nor of the franchises of said DeForest Company would be proposed at a stockholders' meeting, thereof, was ever given your orator.

Since on or about the 1st day of October, 1904, the said DeForest Wireless Telegraph Company has ceased to transact any business. It has had no office, and all the assets of the same have been used and many of the same disposed of by the said American DeForest Wireless Telegraph Company. All the books and papers of the said DeForest Wireless Telegraph Company were delivered during the month of January, 1904, to said American DeForest Wireless Telegraph Company. Said books were, moreover, loosely kept and contained many false and fraudulent entries; and many of the same have been destroyed, and the rest have been secreted by officers of the said American DeForest Company.

Sometime during the year 1904, the president of the said DeForest Company, the said so called Abraham White; the vice president thereof, the said Lee DeForest; and the Secretary and Treasurer thereof, the said Francis X. Butler, signed papers, which purported to resign their positions as officers thereof. One Charles C. Galbraith, as your orator is informed and believes, was elected vice president in the place of the said Lee DeForest; but your orator is informed and believes; that no person has been elected president; and that no person has been elected Secretary; and that no person has been elected Treasurer in the place of the said persons, who claimed to have resigned from said positions. No report has been filed by said DeForest Wireless Telegraph Company in the office of the Secretary of the State of Maine since June 25th, 1904. Your orator has received no notice of any meeting of the stockholders of the said DeForest Wireless Telegraph Company since said date. The said Francis X. Butler signed the report filed by the said DeForest Wireless Telegraph Company in the office of the Secretary of the State of Maine on June 25th, 1904. In an action in the Supreme Court of the State of New York for the County of New York hereinafter described, the said Francis X. Butler swore, in an affidavit therein filed during the month of December, 1905, that he was no longer an officer, nor a director of said DeForest Wireless Telegraph Company. In the said action in the Supreme Court of the State of New York, the vice president of the said DeForest Wireless Telegraph Company, Charles C. Galbraith, swore that he does not know where the books of said corpora-

tion are located. Your orator has requested the said Francis X. Butler, who is the attorney for the said DeForest Wireless Telegraph Company, and your orator has requested the said Galbraith to inform your orator of the location of said books and they refused to give your orator such information.

IX. Your orator did not receive any information concerning the execution of said conveyance by said DeForest Company to said American DeForest Company; and your orator did not receive any information concerning the transfer of the said assets of the said DeForest Company to the said American DeForest Company; until sometime during the month of March, 1904. He then was and he still is, ignorant of the terms of the said conveyance and transfer. He was at that time ignorant of his legal rights in the matter and without money to commence an action to protect his rights and to protect the rights of the said DeForest Company, because of the execution of the said paper as aforesaid and because of said transfer. For the said reasons, and because your orator was in ill health during the whole of the year 1904 and during part of the year 1905; your orator was unable to employ and to consult counsel competent to advise him of his rights in the premises until sometime during the month of March, 1905. On or about the 30th day of March, 1905, the following notice was on behalf of your orator duly and personally served upon the said Francis X. Butler and upon one Henry E. Wise and Henry Doscher, all three of whom are named as directors of the said DeForest Company in the last report filed on behalf of the same in the office of the Secretary of the State of Maine.

"Sirs:

Please take notice that Henry B. Snyder hereby demands that you, and each of you, immediately take proceedings to revoke, cancel and set aside all assignments and transfers of any property of the DeForest Wireless Telegraph Company to the American DeForest Wireless Telegraph Company; and all contracts made by the said DeForest Wireless Telegraph Company with the Greater New York Security Company; and that you restore and reconvey to the said DeForest Wireless Telegraph Company all its property heretofore assigned and transferred to the said American DeForest Wireless Telegraph Company or to the Greater New York Company.

Dated, March 30th, 1905.

ROGER FOSTER.
JAMES A. ALLEN.
Attorneys for Henry B. Snyder,
35 Wall Street, New York.

To

DeForest Wireless Telegraph Company and its officers and directors; and Abraham White, Charles C. Galbraith, Henry E. Wise, Francis X. Butler, John Firth, Samuel S. Bogart, Lee DeForest, James Stewart and Henry Doscher, individually and as officers and directors of the De-

Forest Wireless Telegraph Company; and the stockholders of the DeForest Wireless Telegraph Company.''

No answer to said notice has been made by any of the said defendant; and no action has been taken in the name of the said DeForest Company for the purpose of rescinding the said paper hereinbefore described. The said American DeForest Company controls a majority of the shares of the stock of the said DeForest Company; and your orator is informed and believes that the certificates for a majority of the shares thereof are held by said American DeForest Company; and that on the stock-book of said DeForest Company, said American DeForest Company is registered as the owner of a majority of the shares of the same. Your orator immediately and on or about the 26th day of April, 1905, began an action in the Supreme Court of the State of New York against the said DeForest Company and the said American DeForest Company and others to set aside said conveyance; and said DeForest Company and said American DeForest Company and said Greater New York Security Company all appeared in said action by the same attorneys, namely, Messrs. Knabe & Butler, a law firm, of which said Francis X. Butler is a member; and the said Supreme Court has ordered in said action, that said DeForest Company produce for the inspection of your orator, the books of account, corporate minutes and other books and papers of said DeForest Company, which show its transactions with said American DeForest Company, and its transactions with said Greater New York Security Company; and which show what was done in connection with said transfer of the assets of the said DeForest Company to the said American DeForest Company; but your orator has hitherto been unable to procure an inspection of any of the books and papers of the said DeForest Company. An inspection and discovery of all said books and papers is necessary in order that your orator may prove his case upon the trial of said action. Your orator has grave doubts as to his ability to obtain from the Supreme Court of the State of New York, the appointment of a Receiver of the said DeForest Company, and the appointment of a Receiver of all the assets thereof; and he fears, lest upon an application to said New York Court for the appointment of a Receiver in said action, the Supreme Court might limit the authority of the Receiver appointed to the custody and collection of assets within the State of New York. And your orator is informed and advised by his counsel, learned in the law, and your orator believes: That the due protection of the rights of your orator and of the other stockholders of said DeForest Company requires the appointment of a Receiver of the said corporation and of all of its property by this Court.

X. Since said action was begun and at issue, your orator has seen for the first time, the testimony of the said Lee DeForest before a Master of the Circuit Court of the United States for the Southern District of New York in a suit in equity pending in said Court between the Marconi Wireless Telegraph Company as complainant and said DeForest Company as defendant upon an accounting by the said DeForest Company of the

profits made by it in the infringement of certain patents. Said testimony was given during the latter part of the year 1905. In said suit, your orator has no interest. Your orator is not a stockholder of the said Marconi Wireless Telegraph Company. In said testimony, said Lee DeForest gave the information concerning the alleged issue of said block of stock of the American DeForest Company to the said DeForest Company hereinbefore set forth; and as to the disposition of the books of said DeForest Company; and as to the resignations of said officers; and as to other matters herein alleged, of which your orator had previously no knowledge nor information. In his said testimony, the said Lee DeForest testified: That he had no knowledge or information concerning the present location of the books of account and papers of the said DeForest Company; and he produced a letter from the said so called Abraham White, which stated that said Abraham White had no knowledge or information upon said subject. Said Lee DeForest further testified concerning the said DeForest Company: That no books were ever kept by the said DeForest Company in the sense of ledger or journal; nor itemized statements of debit and credit accounts; that its expense account was kept only in the stubs of check books of the said so called Abraham White and check books of the said DeForest Company, that there was no record made of the receipts of the said DeForest Company, except in certain correspondence; that a large number of receipted bills were kept as vouchers; that the said bills and check books stubs were turned over by the said DeForest Company to the said American DeForest Company, together with all its other books; and that many of the bills, vouchers and check stubs necessary to make up a complete account have been lost. He further testified: That the said DeForest Company had at present no office or place of business; that the said DeForest Company was heavily indebted in January, 1904; that the Atlantic DeForest Wireless Telegraph Company was in the possession of the stations formerly owned by the said DeForest Company at 42 Broadway in the Borough of Manhattan, City, County and State of New York and at Manhattan Beach; and that the said Atlantic DeForest Wireless Telegraph Company directed their operation, and directed the operation of all other stations of said DeForest Company on the Atlantic or Gulf coast. That said DeForest Company had virtually ceased to exist as an active corporation in October, 1903; that some of the capital accounts between the DeForest Company and the American DeForest Company had not yet been fully written up in the books of the said American DeForest Company; but that they were at the present time being written up in the books of the American DeForest Company. Your orator is informed and believes: That the said writing in the said books of the said American DeForest Company, which is now being done, consists of forgeries and falsifications for the purpose of defrauding your orator and the other stockholders and the creditors of the said DeForest Company. Said Lee DeForest further testified in said suit: That the entire business of the said DeForest Company was experimental; and its affairs

during the year 1902 were in a more or less chaotic condition; and that he had made every effort in his power to produce the books and papers of said DeForest Company; but was unable to do so. The said Lee DeForest said that he could not state that there was any written transfer of the patents, property and assets of the said DeForest Company to the said American DeForest Company. He said that he had seen a copy of a resolution agreeing to transfer such rights to the said American DeForest Company; but that he was unable to produce a copy of such resolution. He further stated: That in the Charter of the said DeForest Company, no provision was made for more than one class of stock; that after the transfer by the said DeForest Company to the said American DeForest Company, a number of stockholders in the said DeForest Company exchanged their stock for stock in the American DeForest Company; that a block of stock of the said American DeForest Company of the par value of $1,500,000 or more, was issued to said DeForest Company, in exchange for its American rights; that later, an amount of such stock, the amount of which said witness did not specify, was transferred by said American DeForest Company to said DeForest Company in exchange for its foreign rights; and other property not provided for in the original transfer; that the stock thus issued by said American DeForest Company to said DeForest Company was pledged to secure a heavy indebtedness by said DeForest Company; that said DeForest Company held the control of the American DeForest Company until the American DeForest Company took over the property and assets of the former; and that the American DeForest Company still exercises control over what is left of the DeForest Company. Said Lee DeForest subsequently, in said proceedings, presented affidavits by said White and Butler to the effect that they had made careful search in St. Louis, where the principal office of the said American DeForest Company was said by him to be located, for records of the said DeForest Company, without success; and that he was unable to produce said resolution, which was the only document he had ever been able to find relating to said transfer. Your orator has been informed and believes, his information being derived from a letter to your orator, by J. F. Thompson, who has since died, which letter was dated April 27th, 1905; that one John Firth, who was a director of said DeForest Company in 1904, told said Thompson that the terms of the contract between the said DeForest Company and the American DeForest Company, concerning said transfer, was a lease of the patent rights in return for an agreement by the said American DeForest Company to pay the said DeForest Company $500 a year.

XI. The defendant the Atlantic DeForest Wireless Company was incorporated on or about November 21st, 1904, under color of the laws of the State of Maine, for the purpose of operating a system of wireless telegraphy. The said Atlantic DeForest Wireless Telegraph Company is in the possession of the said wireless telegraph stations at 42 Broadway, in the City of New York, and at Manhattan Beach, in the City of New York; and of all other wireless telegraph stations formerly

owned by the DeForest Wireless Telegraph Company and by the said American DeForest Wireless Telegraph Company on the Atlantic coast, claiming the same under some instrument or agreement, the nature of which is to your orator unknown; and the said Atlantic DeForest Wireless Company has paid no consideration for the said stations. In his said testimony, the said Lee DeForest testified concerning the said Atlantic Company substantially as follows: The wireless telegraph station at 42 Broadway and the wireless telegraph station at Manhattan Beach have passed into the hands of the Atlantic DeForest Wireless Company, which directs their operation as it does of all stations on the Atlantic or Gulf coast. The station at 42 Broadway passed into the ownership of the Atlantic Company during the latter part of the year 1904. The station at Manhattan Beach passed into the possession and ownership of the said Atlantic Company sometime during September or October, 1905. He further testified: That he believed that the Secretary of the Atlantic DeForest Wireless Telegraph Company was the said Francis X. Butler, who is also the Secretary of the said American DeForest Wireless Telegraph Company. The said Abraham Schwartz or White is the president of, and is in control of the said Atlantic DeForest Wireless Company. He organized the same for the purpose of defrauding the creditors and stockholders of the said DeForest Wireless Telegraph Company, and for the purpose of defrauding the creditors and stockholders of the said American DeForest Wireless Telegraph Company. He has been in control of the same ever since its incorporation. Upon information and belief: That none of the stock of said Atlantic DeForest Wireless Company was issued for any valuable consideration; and that the original subscribers to said stock paid no value and no adequate value for the same.

XII. By the use of the said patents and other property of the said DeForest Company, said defendants, the American DeForest Company and the Atlantic DeForest Wireless Company, have unlawfully made large profits. The consequence of said transfer by said DeForest Company to said American DeForest Company, and of the said acts of said defendants, has been to destroy the market value of the capital stock of the said DeForest Company and of the shares thereof, both those held by your orator and of other shares of the same.

XIII. The said American DeForest Wireless Telegraph Company is now printing and issuing a series of negotiable bonds, which it proposes and threatens to sell to different persons throughout the United States, and a few of which it has already sold. Said bonds purport to be secured by a lien upon the said patent rights and other property, which the said American DeForest Company has acquired from the said DeForest Company as aforesaid. The issue and sale of said bonds, if allowed and not restrained, will cause damage to many persons, who purchase the same in good faith, and will create a cloud on the title of the said DeForest Wireless Telegraph Company to the said wireless telegraph patents.

XIV. Amongst other assets of the said DeForest Company which need immediate protection by the appointment of a Receiver, are the

following: The patents of said DeForest Wireless Telegraph Company, some of which are hereinbefore described; a number of wireless telegraph stations on the Atlantic seaboard amongst others, a wireless station at 42 Broadway, in the Borough of Manhattan, City, County and State of New York, and a wireless station at Manhattan Beach in the City and State of New York, the ownership to which is claimed by the defendant, the Atlantic DeForest Wireless Telegraph Company, which claims to be in possession of the same; a laboratory and manufactory in the State of New Jersey; a number of causes of action to recover sums of money amounting to more than a million of dollars, which said DeForest Wireless Telegraph Company has a right to recover against the Greater New York Security Company, the said Abraham Schwartz or White, the said Francis X. Butler, and other persons and corporations, who have despoiled said DeForest Company, and who have appropriated the assets of the same by the means hereinbefore described; and by other means. Inasmuch as your orator can have no adequate relief, except in this Court; and to the end, therefore, that the defendants may, if they can, show why your orator should not have the relief hereby prayed, and may make a full disclosure and discovery of all the matters aforesaid; and according to the best and utmost of their knowledge, remembrance, information and belief, full, true, direct and perfect answer make, to the matters hereinbefore stated and charged; but not under oath, an answer under oath being expressly waived. Your orator prays: That the said DeForest Wireless Telegraph Company and the said American DeForest Wireless Telegraph Company, and each of them, and the officers of each of them, be directed to answer the following questions and to produce and make discovery of the following documents: (1.) State the consideration and date of all transfers made by the DeForest Wireless Telegraph Company to the American DeForest Wireless Telegraph Company of any property. (2.) Produce and make discovery of all documents executed by either of said corporations which relate to such transfer; and produce copies of all resolutions of the Boards of Directors; and of all resolutions of the stockholders of each of said corporations, which refer to said transfer. (3.) Give the numbers of all patents, the use of which, and of all patents, the title to which, was transferred by said DeForest Wireless Telegraph Company to the said American DeForest Wireless Telegraph Company, at any time; and also specify all other property, the title to which, and all, the possession of which, was transferred by said former corporation to said latter corporation at any time. (4.) State the amount of the indebtedness of the DeForest Wireless Telegraph Company on January 4, 1904, with the names of the persons to whom said indebtedness was due, and the consideration of said indebtedness. (5.) Produce all books and documents that mention such indebtedness. And that the said defendants, the American DeForest Wireless Telegraph Company and the said Atlantic DeForest Wireless Company, and each of them, and the officers of each of them, be further directed to answer the following questions and produce and make discovery of the following documents: (6.) Produce all documents, which

relate to any transfer by the American DeForest Wireless Telegraph Company to the Atlantic DeForest Wireless Company, of the title, and all, which relate to, the transfer by the former to the latter of the possession of any property. (7.) State the date and consideration of all transfers by the American DeForest Wireless Telegraph Company to the Atlantic DeForest Wireless Company of any property. (8.) Specify all property, the title to which, and specify all property, the possession of which, and specify all patents, the use of which, was transferred or granted by said American DeForest Wireless Telegraph Company to said Atlantic DeForest Wireless Company at any time. (9.) Produce the books showing the consideration paid for the original issue of all stock of the American DeForest Wireless Telegraph Company and of the Atlantic DeForest Wireless Company at all times. And (10.) That the defendants, the American DeForest Wireless Telegraph Company and the Atlantic DeForest Wireless Company may be decreed to account for and pay over the income or profits unlawfully derived from the violation of your orator's rights and the rights of the said DeForest Wireless Telegraph Company as is hereinbefore set forth. And that your honors may grant a writ of injunction, both preliminary or interlocutory, and final, issuing out of and under the seal of this honorable Court, perpetually (11.) Enjoining and restraining the said defendants, the American DeForest Wireless Telegraph Company and the Atlantic DeForest Wireless Company, their officers, clerks, attorneys, agents, servants and workmen, from any further use of the inventions covered by the said patents, to which the said DeForest Wireless Telegraph Company formerly had a title as alleged in this bill, including amongst others, the 58 claims for letters patent, serial number 67,136 and patent applications numbers 43,096; 67,138; 50,078; and the letters patent numbers 716,000 and 716,334; and all patents connected with wireless telegraphy; and all patents, which were issued to, and which were claimed by Lee DeForest. (12.) Enjoining and restraining the said defendants, the American DeForest Wireless Telegraph Company and the Atlantic DeForest Wireless Company, from transferring, from mortgaging and encumbering, from exercising any authority, from using in any way, and from retaining possession of any of the property, which formerly belonged to the DeForest Wireless Telegraph Company. (13.) Enjoining and restraining the said American DeForest Wireless Telegraph Company from issuing and from selling any bonds of any sort. (14.) Enjoining and restraining the said Atlantic DeForest Wireless Company from issuing any bonds. (15.) Enjoining and restraining both said companies from issuing and from selling, any shares of stock, whether the same be in the treasury or not. (16.) That a Receiver of the said DeForest Wireless Telegraph Company, and of all the property and assets of the same, and of the said American DeForest Wireless Telegraph Company, and of all the property and assets of the same, and of the said Atlantic DeForest Wireless Company, and of all the property and assets of the same, be appointed in the final decree, and also by an interlocutory order herein, with power to sue to recover assets. (17.) That the said Amer-

ican DeForest Wireless Telegraph Company and the said Atlantic De-Forest Wireless Company be directed to account to your orator, and to said Receiver, and to said DeForest Wireless Telegraph Company, for all profits which they have made, and for all money they have received, directly or indirectly, through the use of the assets of the said DeForest Wireless Telegraph Company. (18.) That your orator may have such other and further relief in the premises as may be just, including the costs of this suit. (19.) That provisional and preliminary injunctions issue in accordance with said prayer for final injunction. And (20.) For such other and further relief in the premises as may be just. May it please your honors to grant unto your orator not only the writ of injunction, both preliminary and final, and receiverships interlocutory and perpetual in conformity with the prayer of this bill; but also a writ of subpoena of the United States of America directed to the said DeForest Wireless Telegraph Company, the American DeForest Wireless Telegraph Company and the Atlantic DeForest Wireless Company, commanding them and the officers thereof on a day certain to appear and answer unto this bill of complaint, but not under oath, an answer under oath being waived; and to abide and perform such order and decree in the premises as to this Court shall seem proper, and required by the principles of equity and good conscience.

HENRY B. SNYDER,
JAS. A. ALLEN,
Solicitor for Complainant,
35 Wall Street, New York

ROGER FOSTER,
JAMES A. ALLEN,
Of Counsel.

FORM VIII.—STOCKHOLDERS' BILL TO REGULATE DISTRIBUTION OF STOCK IN OTHER COMPANIES HELD AS ASSETS.

[197 U. S. 244.]

[District] Court of the United States, District of New Jersey.

EDWARD H. HARRIMAN, WINSLOW S. PIERCE, OREGON SHORT LINE RAILROAD COMPANY and THE EQUITABLE TRUST COMPANY OF NEW YORK,
Complainants,
versus
NORTHERN SECURITIES COMPANY,
Defendant.
} In Equity.

To the Honorable the Judges of the [District] Court of the United States for the District of New Jersey:

Edward H. Harriman and Winslow S. Pierce, residents and citizens of the state of New York; Oregon Short Line Railroad Company, a

corporation organized and existing under the laws of the state of Utah and a resident and citizen of said state, and The Equitable Trust Company of New York, a corporation organized and existing under the laws of the state of New York and a resident and citizen of said state, bring this their bill of complaint against the Northern Securities Company, a corporation organized and existing under the laws of the state of New Jersey, and a resident and citizen of said state and an inhabitant of the district of New Jersey.

And thereupon your orators complain and say:

I. Your orators Edward H. Harriman and Winslow S. Pierce are severally residents and citizens of the state of New York; your orator Oregon Short Line Railroad Company is a corporation organized and existing under and by virtue of the laws of the state of Utah as a railroad corporation, and a resident and citizen of said state; and your orator The Equitable Trust Company of New York is a corporation organized and existing under and by virtue of the laws of the state of New York and a resident and citizen of said state.

II. The defendant Northern Securities Company is a corporation organized and existing under and by virtue of the laws of the state of New Jersey and a resident and citizen of said state and an inhabitant of the district of New Jersey.

III. The defendant Northern Securities Company was organized on or about the 13th day of November, 1901, by filing in the office of the Secretary of State of New Jersey, as required by the statutes of said state in such case made and provided, a certificate of incorporation wherein and whereby it was, among other things, recited that said corporation was organized for the object of acquiring and holding shares of the capital stock of other corporations, that its authorized capital stock should be four hundred million dollars ($400,000,000) divided into four million shares of the par value of one hundred dollars ($100) each, and that its duration should be perpetual, as will more fully and at length appear by said certificate of incorporation so filed in the office of the Secretary of State of New Jersey, of which a true copy is annexed as Exhibit A to this bill of complaint and to which reference is prayed.

IV. Your orators further show that said Harriman and Pierce are now and ever since November 18, 1901, have been the registered owners and holders of $82,491,871 par value of the capital stock of said defendant Northern Securities Company, and that such holding of stock by them is and at all times has been as trustees for the use and benefit of your orator, Oregon Short Line Railroad Company, which company was then and still is the beneficial owner thereof.

V. Your orators further show that heretofore and by indenture dated July 17, 1902, said Oregon Short Line Railroad Company duly pledged $82,491,000 par value of said stock of said defendant Northern Securities Company with your orator, The Equitable Trust Company of New York, as trustees for an issue of bonds of said Oregon Short Line Railroad Company, of which bonds $82,491,000 face value have been certified

and issued and are now outstanding, as will more fully and at length appear by said indenture, of which a copy is annexed as Exhibit B to this bill of complaint and to which reference is prayed.

VI. Your orators are informed and verily believe and, therefore, aver that prior to the 9th day of April, 1904, about $176,822,900 par value of the stock of said Northern Securities Company was issued in exchange for about $153,759,400 par value of the stock of the Northern Pacific Railway Company, a railroad corporation organized and existing under the laws of the state of Wisconsin, and about $211,057,600 par value of the stock of said Northern Securities Company was issued in exchange for about $118,124,200 par value of the stock of the Great Northern Railway Company, a railroad corporation organized and existing under the laws of the state of Minnesota, and about $7,522,000 was issued to the public for cash used for the purchase of other property and for corporate purposes.

VII. Your orators are informed and verily believe and, therefore, aver that the total authorized capital of the Northern Pacific Railway Company in November, 1901, amounted to the par value of $155,000,000, consisting of $75,000,000 par value of preferred stock and $80,000,000 par value of common stock, that such proceedings were had in November and December, 1901, that said preferred stock was converted into common stock so as to make the entire issue of stock of said Railway Company consist of one class or common stock, and that such as the authorized amount of its capital stock at the present time, of which all or nearly all has been issued and is now outstanding. They are further informed and verily believe and, therefore, aver that the authorized capital stock of the Great Northern Railway Company in the year 1901 was and still is about $125,000,000 par value, of which about $123,000,000 par value has been issued and was then and is now outstanding.

VIII. Your orators further show that said $82,491,871 par value of the stock of said defendant, Northern Securities Company, standing in the names of your orators Harriman and Pierce, trustees as aforesaid, was part of the original issue of the stock of the said Northern Securities Company, and was issued to them and in their name by said Northern Securities Company on or about November 18, 1901, in exchange for $37,023,000 par value of common stock, and $41,085,000 par value of preferred stock of the Northern Pacific Railway Company, and that at the time of such exchange there was also paid to said Harriman and Pierce by or in behalf of said defendant, Northern Securities Company, the sum of $8,915,629 in cash. The same stock so issued to said Harriman and Pierce on November 18, 1901, is still registered in their names and the certificates therefor are now actually in the custody of your orator, The Equitable Trust Company of New York, as pledgee as aforesaid, and are available for tender, return or restoration as hereinafter tendered.

IX. Your orators further aver that at the time of such exchange, on said 18th of November, 1901, it was understood and agreed by said

Harriman and Pierce and said defendant Northern Securities Company that the said $41,085,000 par value of said preferred stock of the said Northern Pacific Railway Company should be converted into common stock of said Northern Pacific Railway Company, and as your orators are informed and verily believe and, therefore, aver, said preferred stock was subsequently and in or about the month of December, 1901, converted by said defendant Northern Securities Company into common stock of said Northern Pacific Railway Company of the same par value, and certificates for such common stock were substituted in lieu and place of the certificates for said preferred stock, and the Northern Securities Company now holds all and singular the common stock so originally received from your orators Harriman and Pierce and the common stock into which said preferred stock was so converted.

X. Your orators further aver that after the organization of said Northern Securities Company, and on or about the 10th day of March, 1902, the Attorney-General of the United States, under and by virtue of the provisions of the Act of Congress of July 2, 1890, commonly known as the Anti-Trust Act, and entitled "An Act to protect trade and commerce against unlawful restraints and monopolies," filed in the Circuit Court of the United States for the District of Minnesota, Third Division, a petition or bill of complaint in the name and on behalf of The United States of America against the defendant above named, Northern Securities Company, and against the Northern Pacific Railway Company, the Great Northern Railway Company, James J. Hill, William P. Clough, D. Willis James, John S. Kennedy, J. Pierpont Morgan, Robert Bacon, George F. Baker and Daniel Lamont, as defendants in said suit, in and by which bill of complaint it was, among other things, alleged that the defendants in said suit had entered into an unlawful combination or conspiracy in violation of the provisions of said Anti-Trust Act, and praying that such combination or conspiracy be adjudged and decreed unlawful, and that it be adjudged and decreed that the defendant Northern Securities Company had acquired all and singular the shares of stock of the Northern Pacific and the Great Northern Railway Companies held or acquired by it in pursuance of an unlawful combination or conspiracy; that the Northern Securities Company, its stockholders, officers, directors, agents and servants, be perpetually enjoined from purchasing, acquiring, receiving, holding, voting, or in any manner acting as the owner of any of the shares of the capital stock of either the Northern Pacific or the Great Northern Railway Company; that a mandatory injunction issue requiring the Northern Securities Company to recall and cancel any certificates of stock issued by it in purchase of or in exchange for any of the shares of the capital stock of either of said railway companies, rendering in return therefor to the holders thereof the certificates of stock in the respective railway companies in lieu of which they were issued; that the Northern Pacific Railway Company be perpetually enjoined from in any manner recognizing or accepting the Northern Securities Company as the owner or holder of any shares of its capital stock, and from permitting

such company to vote such stock; that the defendant Great Northern Railway Company be likewise perpetually enjoined from in any manner recognizing or accepting the Northern Securities Company as the owner or holder of any shares of its capital stock; that the individual defendants above named be perpetually enjoined from in any manner holding, voting or acting as the owner of any of the stock of the Northern Securities Company issued in exchange for stock of either of the said railway companies, unless authorized by said Circuit Court of the United States, and that a mandatory injunction issue requiring each of the said defendants to surrender any stock of the Northern Securities Company so acquired and held by them and accept therefor the stock of the defendant railway company in exchange for which the same was issued. Thereafter, such proceedings were had in said suit that the various defendants therein duly answered, and issue was joined by the filing of replications on behalf of the United States to the separate and several answers of said defendants; all as will more fully and at large appear by the record in said suit remaining on file in the office of the clerk of said Circuit Court of the United States for the District of Minnesota, Third Division, of which a transcript or copy is annexed as Exhibit C to this bill of complaint, and reference thereto is prayed.

XI.—Your orators further show that such proceedings were had in said suit in the Circuit Court of the United States for the District of Minnesota that thereafter on or about the 9th day of April, 1903, a final decree was entered in favor of the complainant United States of America and against the defendants in said suit, in and by which decree it was, among other things, adjudged and decreed that said defendants in said suit had entered into a combination or conspiracy in restraint of trade such as the said Anti-Trust Act denounced as illegal, that all of the stock of the Great Northern Pacific Railway Company and all of the stock of the Great Northern Railway Company then claimed to be held and owned by the defendant Northern Securities Company was acquired and was then held by it in virtue of such unlawful combination or conspiracy, that the Northern Securities Company, its officers, servants, agents and employees, should be and they were enjoined from acquiring or attempting to acquire further stock of either of the aforesaid railway companies, that the Northern Securities Company should be and it was enjoined from voting the aforesaid stock or from voting at any meeting of the stockholders of either of the aforesaid railroad companies or from exercising or attempting to exercise any control, direction, supervision or influence whatsoever over the acts and doings of said railroad companies, or either of them, by virtue of its holding of such stocks therein, that the said railway companies, their officers, directors, servants and agents be and they were enjoined from permitting the stock aforesaid to be voted by the Northern Securities Company or in its behalf at any corporate election, or from paying any dividends to the Northern Securities Company on account of stock of either of the aforesaid railway companies which it then claimed to own and hold, and that the railway companies be and they were en-

joined from permitting or suffering the Northern Securities Company or any of its officers or agents, as such officers or agents, to exercise any control whatsoever over the corporate acts of either of the aforesaid railway companies. Said decree further contained a provision that nothing therein contained should be construed as prohibiting the Northern Securities Company from returning or transferring to the stockholders of the Northern Pacific and the Great Northern Railway Companies, respectively, all or any of the shares of stock in either of said railway companies which said Northern Securities Company had theretofore received from said stockholders in exchange for its own stock, and that nothing therein contained should be construed as prohibiting the Northern Securities Company from making transfers and assignments of the stock aforesaid to such person or persons as might then be the holders and owners of its own stock originally issued in exchange or in payment for the stock claimed to have been acquired by it in the aforesaid railway companies; all as will more fully and at length appear by reference to the decree of said Circuit Court of the United States for the District of Minnesota, Third Division, dated on said April 9, 1903, of which a copy is annexed as Exhibit D to this bill of complaint and to which reference is prayed.

XII.—Your orators further show that the defendants in said cause thereupon appealed to the Supreme Court of the United States from said decree and that such proceedings were had upon said appeal that thereafter and on or about the 14th day of March, 1904, a decision was entered in said Supreme Court, affirming said decree of said Circuit Court of the United States for the District of Minnesota, and that thereafter and on or about the 15th day of April, 1904, the mandate of the Supreme Court of the United States was duly issued and on or about the 19th day of April, 1904, was duly filed in the office of the Clerk of said Circuit Court of the United States for the District of Minnesota, which said mandate affirmed said decree of the 9th day of April, 1903.

XIII.—Your orators are advised by counsel and, therefore, aver that the effect of said decree of April 9, 1903, as affirmed by the Supreme Court of the United States, was to adjudge that the Northern Securities Company was not a purchaser or owner but simply a custodian of the shares of stock of said railway companies acquired and held by it as aforesaid, that it acquired and held possession thereof in violation of said Anti-Trust Act, that it acquired no title thereto and cannot transfer any rights in respect thereof, and that the legal and equitable owners of said shares of the stock of said railway companies were and are the several parties who originally exchanged the same for stock of the Northern Securities Company or their assigns.

XIV.—Your orators further show that immediately upon the rendition of such decision by the Supreme Court of the United States for the District of Minnesota, the defendant Northern Securities Company, by action of its board of directors, determined to reduce the capital stock of the company by ninety-nine per cent thereof to $3,954,000 par value, and to take corporate action for that purpose and for the purpose of distributing and

dividing the stock of each of said Great Northern and Northern Pacific Railway Companies held by it *pro rata* among the stockholders of said Northern Securities Company, and not to return and retransfer to the stockholders of the Northern Pacific Railway Company and the Great Northern Railway Company, respectively, or their assigns, any of the shares of stock in either of said railway companies which said Northern Securities Company originally received from such stockholders in exchange for its own stock.

Thereupon and in order to consummate said purposes, as your orators are informed and verily believe and, therefore, aver, the board of directors of the Northern Securities Company on or about March 22, 1904, adopted certain preambles and resolutions in the words and figures following:

WHEREAS, In the course of its business, this Company has acquired, and now holds 1,537,594 shares in the capital stock of the Northern Pacific Railway Company; and 1,181,242 shares in the capital stock of the Great Northern Railway Company; and

WHEREAS, In a suit brought by the United States against this Company, the said railway companies and others, this Company has been enjoined from voting upon the shares of either of the said railway companies, and each of the said railway companies has been enjoined from paying to this Company any dividends upon any of the shares of such railway company, held by this Company; and

WHEREAS, This Company has issued, and there are now outstanding 3,954,000 shares of its own capital stock; and

WHEREAS, This Company desires and intends to comply with the decree in the said suit, fully and unreservedly, and without delay;

Resolved, In consideration of the premises, it is declared necessary and desirable for this Company so to reduce its present stock as will enable it, without delay, in connection with such reduction, to distribute among its shareholders, the shares of capital stock of said railroad companies held by it.

Resolved, That the Board of Directors of this Company hereby declares it advisable that Article Fourth (4th) of this Company's Certificate of Incorporation be amended, so as to read as follows:

FOURTH.—The capital stock of this Company is hereby reduced to three million nine hundred fifty-four thousand dollars ($3,954,000), and shall hereafter be three million nine hundred and fifty-four thousand dollars ($3,954,000), divided into thirty-nine thousand five hundred forty (39,540) shares of one hundred dollars ($100) each. Such reduction of capital stock shall be accomplished by each holder of outstanding shares of this Company's stock surrendering to the Company, for retirement, ninety-nine (99) per centum of the shares held by him.

Upon the surrender to this Company, by any shareholder, of the entire number of shares, and parts of shares, of this Company's stock, which he is hereby required to surrender, this Company will assign to him, for each share so surrendered, thirty-nine dollars and twenty-seven cents ($39.27) of the stock of the Northern Pacific Railway.

Company, and thirty dollars and seventeen cents ($30.17) of the preferred stock of the Great Northern Railway Company, and proportional amounts thereof for fractional shares of the stock of this Company.

The Board of Directors or Executive Committee from time to time shall make such rules and regulations as it shall deem necessary or convenient for carrying out the provisions hereof, and all matters pertaining to the surrender and retirement of the stock of this Company, or to the assignment and transfer of the stocks of the said railway companies, hereby contemplated, shall be under the direction of the Board. For the purposes hereof, the stockholders of this Company, and the number of shares held by them, respectively, shall be determined from the stock transfer books of the Company, which, for such determination, shall be closed at a day and hour to be determined by resolution of the Board.

Resolved, That a meeting of the stockholders of this Company, for the purpose of taking action upon the said alteration of the Certificate of Incorporation of this Company, and also upon such other business as may come before the meeting, be, and is hereby called, to be held at the general offices of this Company in the City of Hoboken, County of Hudson, and State of New Jersey, at 11 o'clock A. M., on April 21, A. D. 1904.

Your orators further show that thereupon a circular or notice was directed to be issued and immediately was issued by and on behalf of the defendant, Northern Securities Company, addressed to its stockholders, notifying them of a special meeting of stockholders for the purpose of voting upon the propositions submitted by the directors as in said preambles and resolutions stated, and that such meeting is about to be held on the 21st day of April, 1904.

A copy of the notice or circular so issued by the defendant Northern Securities Company is hereto annexed as Exhibit E of this bill of complaint and made a part hereof.

XV.—As your orators are informed and verily believe and, therefore, aver, the books of account and stock ledgers kept by the defendant Northern Securities Company and the records of its transfer agent and registrar of transfers show for what purpose or consideration each outstanding certificate of stock was originally issued, whether for cash or for stock of said Northern Pacific or said Great Northern Railway Company, and will show that a large part of the stock of the Northern Securities Company, issued originally in exchange for stock of said railway companies, is now held in the name or on behalf of original holders who exchanged the same for stock of said railway companies, and that wherever there have been transfers of certificates to third parties the origin of each and every outstanding certificate of stock of the said Northern Securities Company so transferred to third parties can be traced and shown in and by said records and books so that the assigns of the original holders of stock of the defendant Northern Securities Company can be identified and the stock of either railway company originally exchanged by their assignors

can be delivered to said assigns in exchange for their present holdings of stock of the defendant Northern Securities Company.

XVI.—Your orators further show that the defendant Northern Securities Company threatens and intends, immediately after the holding of said meeting of its stockholders, to distribute the shares of stock of each of said Great Northern and Northern Pacific Railway Companies *pro rata* among its stockholders in disregard of the rights of your orators, and that if said defendant Northern Securities Company be not enjoined from so doing by this court, such distribution will be forthwith made, and the stock of the Northern Pacific Railway Company belonging to your orators, and to which they are entitled, will be lost to your orators, and they will thereby suffer injury which cannot be compensated in damages, in that the shares of the Northern Pacific Railway Company to which your orators are so entitled or any like amount of shares could not be purchased in any market or from any persons whomsoever.

XVII.—Your orators further show that the proposed distribution *pro rata* in place of the return and restitution of the stock of said railway companies would represent a very large loss of annual income to your orators, amounting to over one million dollars, that is to say, the dividends at the rate now being paid upon the stock of the Northern Pacific Railway Company to which your orators are entitled would exceed by the sum of over one million dollars per annum the dividends upon the stock of the Great Northern and Northern Pacific Railway Companies which they would receive upon such *pro rata* division, and that the value of the Northern Pacific Railway stock to which your orators are entitled greatly exceeds the aggregate value of the *pro rata* share of the holdings of each of the said railway companies which your orators would receive on any such proposed *pro rata* distribution.

XVIII.—Your orators further show and aver that they are ready, able and willing, and they hereby offer to return and deliver, or cause to be returned and delivered, and they hereby tender to the said Northern Securities Company all and singular the certificates for the shares of its capital stock so received by them as aforesaid, and said sum of $8,915,629 in cash so paid to them by or on behalf of the said Northern Securities Company, or such further or other sum as the court shall fix, in exchange for and upon the return of the common stock of the Northern Pacific Railway Company, so delivered and exchanged by them as aforesaid, and the common stock of said Railway Company into which the preferred stock so exchanged was converted as aforesaid, and they hereby offer to bring into court said stock of the defendant Northern Securities Company and said moneys whenever the court shall direct and in all respects to do and perform equity and right in the premises.

IN CONSIDERATION WHEREOF and forasmuch as your orators are remediless in the premises at and by the strict rules of the common law and are only relievable in a court of equity where matters of this kind are cognizable, your orators pray the aid of this honorable court to the end that it be decreed that they are entitled to the return and transfer to them by

the defendant Northern Securities Company of the shares of common stock of said Northern Pacific Railway Company which were so delivered by said Harriman and Pierce and the shares of common stock into which the preferred stock of the Northern Pacific Railway Company delivered by them were converted, in exchange for the certificates of stock of the Northern Securities Company so issued to and now held by your orators and said sum in cash; and that the said defendant Northern Securities Company, its directors, officers and agents, may be ordered and directed to endorse the certificates now held by it for said stock of the Northern Pacific Railway Company to your said orator Oregon Short Line Railroad Company or in blank, and deliver the same to your orator The Equitable Trust Company of New York in exchange for the stock now held by it to be held subject to its rights and lien as trustee aforesaid; and that the defendant Northern Securities Company, its directors, officers, agents and employees be perpetually enjoined and restrained from in any manner parting with, disposing of, transferring, assigning or distributing any part of said stock of the Northern Pacific Railway Company so received from your orators Harriman and Pierce as aforesaid, or any common stock into which the preferred stock received from them may have been converted, or the certificates now representing the same or any part thereof, except to return the same to your orators in exchange for its own stock so issued as aforesaid and said cash; and that your orators have such other or further or general relief as shall be proper and just under the circumstances of the case.

Your orators further pray that the defendant Northern Securities Company may be enjoined and restrained from parting with, disposing of, transferring, assigning or distributing said stock of the Northern Pacific Railway Company or any part thereof during the pendency of this suit or any certificates now representing the same.

YOUR ORATORS FURTHER PRAY that it may please your honors to grant unto your orators a writ of subpoena of the United States of America issued out of and under the seal of this honorable court, to be directed to said defendant, Northern Securities Company, therein and thereby commanding it on a day certain to be named, and under a certain penalty, to be and appear before this honorable court, and then and there to answer all and singular the premises, under its corporate seal, but not under oath which is expressly waived, and to stand to, perform and abide by such further order, direction and decree therein as may be made against it in the premises.

And your orators as in duty bound will ever pray, &c.

LINDABURY, DEPUE & FAULKS,
Solicitors for and of counsel with Complainants.

R. V. LINDABURY,
WILLIAM D. GUTHRIE,
R. C. LOVETT,
BAINBRIDGE COLBY,
Of counsel.

UNITED STATES OF AMERICA,
Southern District of New York,
State, County and City of New York, } ss.:

WILLIAM D. CORNISH, of full age, being duly sworn, on his oath says: I am Vice-President of the Oregon Short Line Railroad Company, one of the complainants in the foregoing bill of complaint named. I have read the said bill and am familiar with the contents thereof, and the matters and things therein set forth so far as they relate to the acts and deeds of said Oregon Short Line Railroad Company are true, and so far as they relate to the acts and deeds of others, I believe them to be true.

WILLIAM D. CORNISH.

Subscribed and sworn to before me this 20th day of April, 1904.

[SEAL.]

JAMES L. MOCK,
Notary Public,
Kings County, N. Y.

Certificate filed in New York County.

UNITED STATES OF AMERICA,
Southern District of New York,
State, County and City of New York, } ss.:

ALVIN W. KRECH, of full age, being duly sworn, on his oath says: I am President of The Equitable Trust Company of New York, one of the complainants in the foregoing bill of complaint named. I have read the said bill and am familiar with the contents thereof, and the matters and things therein set forth so far as they relate to the acts and deeds of said Trust Company are true, and so far as they relate to the acts and deeds of others, I believe them to be true.

ALVIN W. KRECH.

Subscribed and sworn to before me this 20th day of April, 1904.

[SEAL.]

JAMES L. MOCK,
Notary Public,
Kings Co., N. Y.

Certificate filed in New York County.

[DISTRICT] COURT OF THE UNITED STATES,

DISTRICT OF NEW JERSEY.

EDWARD H. HARRIMAN, WINSLOW S. PIERCE, OREGON SHORT LINE RAILROAD COMPANY and THE EQUITABLE TRUST COMPANY OF NEW YORK, Complainants, *versus* NORTHERN SECURITIES COMPANY, Defendant.	In Equity.

UNITED STATES OF AMERICA, State, County and City of New York, } ss.:

WINSLOW S. PIERCE, being duly sworn, deposes and says:

I.—I am one of the complainants named in the foregoing bill of complaint and have read the same. The matters and things therein stated, so far as they relate to the acts and deeds of the Oregon Short Line Railroad Company, Edward H. Harriman or myself are true to my own knowledge, and so far as they relate to the acts and deeds of others I believe them to be true.

II.—I am, and since long prior to November, 1901, have been a director of the Oregon Short Line Railroad Company, and as such had personal knowledge of the fact that prior to the 18th day of November, 1901, the Oregon Short Line Railroad Company had duly acquired $37,023,000 par value of common capital stock of the Northern Pacific Railway Company and $41,085,000 par value of the preferred stock of said company. The said stock of the Northern Pacific Railway Company was registered in the names of Mr. Edward H. Harriman and myself, and was held by us as trustees for the Oregon Short Line Railroad Company, which company was the beneficial owner thereof.

III.—Said Harriman and I were present at the office of the Northern Securities Company on the 18th day of November, 1901, when certificates for said preferred and common stock of the Northern Pacific Railway Company were delivered to the Northern Securities Company. Upon such delivery Mr. Harriman and I received from Mr. James J. Hill, president of said Northern Securities Company certificates for $82,491,871 par value of the stock issued in our names, and we also received a check for $8,915,629 in cash.

IV.—I had theretofore been advised by Mr. Harriman that he had agreed that the preferred stock of the Northern Pacific Railway Company should be converted into common stock of the same nominal par value and that such conversion should be by means of the issue of bonds of said Railway Company which should be convertible into common stock.

V.—My information and belief in regard to the allegations of the bill of complaint concerning the legal proceedings instituted by the Attorney-General of the United States in the Circuit Court of the United States for the district of Minnesota, third division, against the Northern Securities Company, the Northern Pacific Railway Company, and other parties, as in the bill of complaint herein alleged, have been derived from a perusal of a copy of the record of the appeal in said case to the Supreme Court of the United States purporting to have been printed by the clerk of the Supreme Court of the United States and from a copy of the opinion of the Circuit Court of the United States for the district of Minnesota and of the Supreme Court of the United States as duly published.

My information and belief in regard to the allegations of the bill of complaint as to the issue of the stock of the Northern Securities Company and its holdings of stock of the Great Northern and Northern Pacific Railway Companies have been derived from a perusal of a copy of an affidavit sworn to by Mr. James J. Hill, President of the Northern Securities Company on the 11th day of April, 1904, in connection with the proceedings of intervention brought by the Oregon Short Line Railroad Company, Mr. Harriman and myself, as hereinafter stated.

I have received by mail from the Northern Securities Company, as a stockholder of record therein, what purports to be a circular issued on behalf of the said Northern Securities Company, and being the same as Exhibit E to the bill of complaint. Such circular so mailed to me as aforesaid was accompanied by a form of proxy prepared by the Northern Securities Company, of which a fac simile is hereto annexed as Schedule A to this affidavit.

My information and belief in regard to the allegations of the bill of complaint concerning the action of the Northern Securities Company and its directors in connection with the adoption of certain preambles and resolutions on the 22d of March, 1904, as alleged in the bill of complaint, have been derived from said circular and proxy and also from the statements made to me by Mr. Edward H. Harriman, who is a director of the Northern Securities Company, to the effect that he attended the meeting of the board of directors of said company on said 22d day of March, 1904, and that the preambles and resolutions referred to in the bill of complaint were then adopted by a majority of the directors, and that the circular annexed to the complaint was then directed to be issued, and that at such meeting a communication was submitted from him stating that he had been advised that there were serious legal objections to the plan which was proposed and requested an adjournment of the meeting, but that such adjournment was not granted. Mr. Harriman further informed me that although present at such meeting as a director of the Northern Securities Company he did not vote.

VI.—Upon being advised that said Northern Securities Company intended to proceed with its plan for the distribution of the stock of said Great Northern and Northern Pacific Railway Companies *pro rata* among its stockholders, the Oregon Short Line Railroad Company and Mr. Harri-

man and myself presented a petition to the Circuit Court of the United States for the district of Minnesota, third division, asking leave to intervene in said suit *pro interesse suo* in order that the rights of the petitioners might be adjudicated in that suit. Such application was presented to the court on Tuesday and Wednesday, the 12th and 13th of April, 1904, and taken under advisement, and subsequently and on the 19th of April, 1904, said court entered an order denying the petitioners leave to file their petition of intervention, giving their reasons therefor in an opinion, a copy of which, as received by telegraph over the wires of the Western Union Telegraph Company, is hereto annexed as Schedule B to this affidavit.

VII.—The reason why an affidavit is not made by Mr. Harriman personally is that he is at present in the West upon a tour of inspection over the railroads with which he is connected, and that it is impracticable to secure his return in time to make an affidavit or to send one to him.

WINSLOW S. PIERCE.

Subscribed and Sworn to before me this 20th day of April, 1904.

[SEAL.]

JAMES L. MOCK,
Notary Public,
Kings County.
Certificate filed in New York County.

FORM IX.—STOCKHOLDERS' BILL FOR INJUNCTION AGAINST CONSOLIDATION OF RAILROAD COMPANIES.

[104 Fed. 934, in which the author was counsel.]

To the Judges of the [District Court] of the United States for the Southern District of New York:

Mary P. Stevens and Frederick C. Stevens, as executors under the last will and testament of Robert S. Stevens, deceased, and Henry D. Mirick, bring this their bill of complaint against the Missouri, Kansas and Texas Railway Company, the Kansas City and Pacific Railroad Company, the Southwestern Coal and Improvement Company, and Henry W. Poor, and thereupon your orators complain and show to the Court:

FIRST.—That your orators, Mary P. Stevens and Frederick C. Stevens, are citizens and residents of the State of New York, and that your orator, Henry D. Mirick, is a citizen of the District of Columbia, and is at the present time a resident of the District of Columbia.

SECOND.—That the defendant in the caption named and called The Missouri, Kansas and Texas Railway Company is a foreign corporation, which at the time of the commencement of this action had its principal office and was engaged in the transaction of business under the name of The Missouri, Kansas and Texas Railway Company, within the Southern District of New York. And your Orators show, on information and belief, that the said defendant The Missouri, Kansas and Texas Railway Company is a

corporation incorporated under the laws of the State of Kansas prior to 1870, and duly organized and existing under and pursuant to the laws of the States of Kansas and Missouri. That the said defendant The Missouri, Kansas and Texas Railway Company, claims to be a corporation formed by consolidation with the Kansas City and Pacific Railroad Company, by virtue of a paper writing purporting to be a deed of consolidation of the defendant herein The Missouri, Kansas and Texas Railway Company and the defendant the Kansas City and Pacific Railroad Company, of which a copy is filed herewith and marked "Exhibit B," and to which your Orators pray leave to refer as though the same were herein fully and at large set forth. And your Orators show, upon information and belief, that if the said defendant The Missouri, Kansas and Texas Railway Company has any corporate existence or capacity as a consolidated corporation as aforesaid, it is only as a corporation *de facto*, and that the conditions precedent to the legal formation and existence of such pretended consolidated corporation under the laws of the State of Kansas have never been in fact fully complied with, as hereinafter more fully shown. That the defendant The Kansas City and Pacific Railroad Company is a foreign corporation incorporated under and by virtue of the laws of the State of Kansas, and having its principal office in the City of New York in the Southern District of New York. That the defendant The Southwestern Coal and Improvement Company is a foreign corporation, incorporated under and by virtue of the laws of the State of West Virginia, having its principal office in the City of New York in the Southern District of New York. That the defendant Henry W. Poor is a citizen and resident of the State of New York, and has no actual or personal interest in the controversy herein set forth, and is made a party defendant hereto only because he is the custodian of certain certificates of stock, to which your Orators make no claim, but which it is necessary to keep within the jurisdiction of this Court in order that this Court may be enabled by its final decree to adjust and protect the equitable rights and interests of the said defendant railway companies as between themselves.

THIRD.—That your Orators bring this action on behalf of themselves and of all the other stockholders of the Kansas City and Pacific Railroad Company, except the defendant The Southwestern Coal and Improvement Company and such other stockholders, if any there be, as are allied with said last named defendant in the fraudulent scheme or conspiracy against the interests of the Kansas City and Pacific Railroad Company, and its stockholders, which is hereinafter more fully shown, and against which relief is sought by this bill. The defendants herein will be hereinafter designated in this bill of complaint in the following manner: The defendant The Missouri, Kansas and Texas Railway Company as the "Kansas Company;" the defendant The Kansas City and Pacific Railroad Company, as the "Pacific Company," and the defendant The Southwestern Coal and Improvement Company as the "Coal Company."

FOURTH.—Your Orators further show that the Kansas Company is the owner and is engaged in the operation of lines of railway running between

St. Louis and Hannibal, in the State of Missouri, through said State and into and through the State of Kansas, and into and through Bourbon County, in said last named State, and into and through the Indian Territory, and into and through the State of Texas. The said Kansas Company, under the name of the Union Pacific Railroad Company, Southern Branch, was organized and its stock subscribed long prior to the first day of March, 1870, and since that date, either under the name of the Union Pacific Railroad Company, Southern Branch, or under its present name, has been and now is engaged in the operation of the lines of railway aforesaid. That the executive office of said defendant is located at number 45 Wall street, in the City of New York, and upon information and belief, the President, Treasurer, Secretary and majority of the Directors, reside in the State of New York.

FIFTH.—That said "Pacific Company" was organized and its stock subscribed long prior to the 9th day of March, 1889, and from the date of its organization, except as hereinafter stated, has been engaged in the operation of its line of railroad, extending from a point in the Indian Territory, about six miles south of the City of Coffeyville, Kansas, by way of Parsons, Kansas, to the City of Paola, Miami County, Kansas, a point about forty-four miles south of Kansas City, Missouri. That from the 27th day of June, 1889, to the first day of August, 1890, the last named railroad was operated by the Receivers of the Kansas Company under the terms of a certain lease or contract not material to this controversy, and since the first day of August, 1890, it has been operated by the Kansas Company under the terms and provisions of a lease dated May 13, 1890, a copy of which is herewith filed and marked "Exhibit A," to which your orators pray leave to refer as though the same were herein fully and at large set forth. That the general office of said Company is located at Number 45 Wall Street, in the City of New York, and upon information and belief that the President, Treasurer and Secretary, and a majority of the Directors reside in the State of New York.

SIXTH.—That said Robert S. Stevens departed this life on the 23d day of February, 1893; that from a date prior to March 9, 1889, he continuously had been, and at the time of his death was, the owner of 1,273 shares of the capital stock of the "Pacific Company;" that said Robert S. Stevens died testate, and in his will named your Orators, Mary P. Stevens and Frederick C. Stevens as joint executors thereof; that your said Orators shortly thereafter qualified as such executors, and letters testamentary under said will were issued to them by the Surrogate's Court of Wyoming County, New York; that a copy of said will and of said letters testamentary have been duly filed and now remain of record in the Probate Court of Labette County, State of Kansas; that all of said stock so owned by said Robert S. Stevens in his lifetime has been held and still is held by said executors, and has not been distributed to the heirs of said Robert S. Stevens, but is still held and controlled by your Orators, Mary P. Stevens and Frederick C. Stevens; that said stock at the time of his death stood on the books of said railroad company in the name of said

Robert S. Stevens, and still so stands; that said stock was and is of the par value of $127,200, and the total issue of stock of said Kansas City and Pacific Railroad Company consists of 25,000 shares of the par value of $2,500,000. That your Orator Henry D. Mirick, from a date prior to March 9, 1889, continuously has been and now is the owner of 538 shares of stock of the said "Pacific Company." That all of said stock so owned by said Mirick has been held, and still is held by him in his own name, and that said stock continuously during the said period has stood and now stands on the books of said "Pacific Company" in the name of said Henry D. Mirick. That said stock was and is of the par value of $53,800. That the defendant the "Kansas Company," in the name of the defendant the "Coal Company," is the owner of and controls about 16,715 shares of the stock of the Kansas City and Pacific Railroad Company, of the par value of about $1,671,500. That sundry municipal corporations in the State of Kansas, which voted bonds to aid in the construction of the railroad of the "Pacific Company," are the owners of about 3,165 shares of said stock of the par value of about 316,500, and individuals, including your Orators, are the owners of about 5,120 shares of said stock of the par value of $512,000. That the total bonded indebtedness of said "Pacific Company" amounts to $2,500,000, bearing four per cent per annum interest. That the total length of the railroad of the said "Pacific Company" is 130.06 miles, and said bonded indebtedness and said stock issue is at the rate of $19,221.10 per mile.

SEVENTH.—Your Orators show that the "Kansas Company" has outstanding of its Common Stock 524,500 shares of the par value of $52,450,000, and also has outstanding of its four per cent non-cumulative Preferred Stock 130,000 shares of the par value of $13,000,000. That said "Kansas Company" also has outstanding bonds which it has issued, and on which it has guaranteed the interest, to the amount of more than $73,000,000, which includes the $2,500,000 bonds of the "Pacific Company" above described. That the mileage of the Missouri, Kansas and Texas system, so-called, amounts to 2,375 miles, of which about 2,004 miles is owned by it, the remainder being either leased or operated jointly with other railroad companies, except about 18 miles in Texas, which is operated but not owned by the "Kansas Company." That the average rate per mile of bonded indebtedness (exclusive of bonds on which it has guaranteed the interest) of the said "Kansas Company" is upwards of $35,000 per mile; that the Common Stock of said Railway Company now outstanding amounts to $28,490 per mile, and the amount of said Preferred Stock of said "Kansas Company" now outstanding amounts to $7,006 per mile.

EIGHTH.—Your Orators further show that the lease above referred to, dated May 13, 1890, under the terms of which said "Kansas Company" has been since August 1, 1890, and now is operating the railroad of the "Pacific Company," demised the property of said "Pacific Company to the "Kansas Company" for a period of 999 years; that by the provisions of said lease the "Pacific Company" leased all its property, except its corporate franchise, to the "Kansas Company" for the term aforesaid;

and the "Kansas Company" as rental therefor, agreed and guaranteed to pay the interest on the bonded indebtedness of the "Pacific Company" as said interest became due; to keep and maintain the track, rolling stock and other property of the lessor in good order and repair, to pay all taxes and other charges levied against the property so demised, and to bear the expenses of maintaining the corporate existence of said "Pacific Company." It was also agreed that if during the first five years of the term of said lease 30 per cent and thereafter 33 per cent of the gross earnings realized by the "Kansas Company" from the operation of said leased property, aggregated more than the sum of $100,000 per year (that being the amount of the interest due yearly on the bonds of the "Pacific Company"), and the amount of the taxes and expenses of maintaining said corporate organization, that such excess should be paid to the stockholders of the last named Company, as its office in the City of Parsons, Kansas, and in case said per centums respectively should not equal said amounts, the deficits should be made up with increase from future earnings.

NINTH.—And your Orators also show that said lease did not provide any plan of dividing the earnings of the properties of the lessor and lessee, or any method of ascertaining the amount of said per centum of earnings but did contain a provision substantially as follows:

That if at any time after said indenture became operative any differences should arise between the two companies as to the manner in which the accounts were kept, with a view to determine whether there was any, and if so, what, earnings of the "Pacific Company" due to its stockholders, such differences should be left to the arbitration of three expert railroad officials, one to be selected by each of the parties to said lease, and in the event of their disagreement they to select a third.

TENTH.—That under the terms and conditions of said lease, the stock of the "Pacific Company," owned by your Orators and other stockholders, on a fair and reasonable apportionment of the earnings of the two railroad properties above described, is of the value of at least $50 per share. That said stock should and would earn a yearly dividend of three and one-half per cent., if the "Kansas Company" as of right it ought to do, apportioned the earnings of the two railroad properties herein mentioned on an equitable basis, or in accordance with the custom prevailing under similar circumstances among other companies in the portion of the United States in which said railroads are situated.

ELEVENTH.—Your Orators show that the common stock of the "Kansas Company" is not worth to exceed ten dollars per share, and is currently reported as worth about that sum in the public markets of the country, and is not entitled to any dividends whatever till the interest is paid on all the bonded indebtedness of said Company, including the guaranteed interest, nor until a dividend has been paid on said preferred stock at the rate of four per cent. per annum.

TWELFTH.—Your Orators show that said "Kansas Company," at or about the date of said lease, acquired the ownership or control of more than two-thirds of the entire capital stock of the "Pacific Company,"

without any cost or consideration, except the execution and delivery of said lease and its agreement to carry out and perform the covenants thereof, and under the following circumstances: All of the capital stock of "Pacific Company," at or about the time of the execution of the said lease, was held and owned by a Construction Company, except the shares of capital stock hereinbefore alleged to have been owned by certain towns and townships who had given aid to the "Pacific Company." That said Robert S. Stevens in his lifetime, and your Orator, Henry D. Mirick, were stockholders in the said Construction Company. The said "Kansas Company" made it a condition of making the said lease that there should be transferred to it, or to some other person or corporation, to be held on its behalf, two-thirds of the capital stock of the "Pacific Company." Said condition was agreed to, and thereupon said Construction Company parted with and transferred under the direction of said "Kansas Company," to be held for its benefit, two-thirds of the entire capital stock of the "Pacific Company" for no other consideration than the making of the lease between the defendant Companies. That the said Construction Company had been formed for the purpose of constructing the railroad of the "Pacific Company," and had built and constructed it. That a large part of the capital stock of the Construction Company was, at the time of the making of the said lease, held and owned by said Robert S. Stevens, and by your Orator, Henry D. Mirick. Your Orators further show that until the spring of 1898 said two-thirds of the capital stock of the "Pacific Company" stood in the names of persons unknown to your Orators, but who held the said stock on behalf of the said "Kansas Company," and voted thereon in the interest of and under the direction of said "Kansas Company." That since the spring of 1898, said two-thirds of the capital stock of the "Pacific Company" has stood upon its books in the name of the defendant the "Coal Company," all of whose capital stock since that time continuously has been and now is held or controlled by the defendant, the "Kansas Company." That since said last named date the said stock of the "Pacific Company" so held by said "Coal Company" has been voted upon in the interest and under the direction of said "Kansas Company;" and your Orators further show that at the annual meetings of said "Pacific Company," held in the months of April, 1898 and 1899, the said shares of capital stock of the "Pacific Company" held by the "Coal Company" have been voted upon by Henry C. Rouse, who at the said times was and still is the President of the defendant, the "Kansas Company."

THIRTEENTH.—Your Orators further show that the said "Kansas Company," by virtue of said ownership or control of the two-thirds of the stock of said "Pacific Company," has annually since May 31, 1890, elected a Board of Directors of said last named Company consisting, with one exception, of persons who were at the same time Directors of the "Kansas Company;" that at the annual meetings held in April, 1898, and April, 1899, your Orators together with substantially all the stockholders of said "Pacific Company," except the "Coal Company," by combined action

succeeded in obtaining the election upon the Board of Directors of said "Pacific Company" chosen at said dates respectively of two directors who were not in the interest of the defendant, the "Kansas Company," but a majority of the members of such Board still consists of persons who are also members of the Board of Directors of said "Kansas Company." That said two directors were your Orator, Frederick C. Stevens, and one R. R. Reynolds. That shortly after their election in 1898, said directors demanded from the officers of the "Pacific Company," and from the directors in control of its affairs, an inspection of the books of the said "Pacific Company" and an accounting between the Companies under the lease. That said inspection was not accorded to said Directors, and that to the best of the knowledge and information of your Orators, no such accounting has ever been had. That said Board of Directors of the "Pacific Company" consists of seven members, a majority of whom are wholly under the domination and control of the "Kansas Company" and were nominated and elected by its power.

FOURTEENTH.—That no demand that this action be brought has ever been made upon the said Pacific Company or upon its Board of Directors or officers, and that any such demand, if made, would be wholly useless and inoperative, for the reason that the said majority of the directors and the officers of said Pacific Company are wholly in the interest and under the control of the said Kansas Company; that the defendant Henry W. Poor, the President of the Pacific Company, is a member of the Board of Directors and of the Executive Committee of the Kansas Company; that Colgate Hoyt, who is Vice-President of the Pacific Company, is a member of the Board of Directors of the Kansas Company and Vice-President of the Coal Company aforesaid; and S. Halline, who is the Secretary of the Pacific Company, is also the Secretary of the Kansas Company, and also the Secretary of the Coal Company. Your Orators further show the same persons are respectively Treasurer and Assistant Secretary of the said Pacific and Kansas Companies.

FIFTEENTH.—Your Orators show that at the stockholders' meeting of the Pacific Company, held on the 7th day of April, 1898, the minority stockholders present offered resolutions requiring the Pacific Company to comply with the laws of Kansas in respect to keeping and maintaining offices in the said State of Kansas and keeping the books of the Company in such a way as will show the method of accounting and apportionment of its earnings under the lease, and also requesting the Kansas Company to make a full report showing the method of accounting and the earnings accruing to the Pacific Company under the lease. The said resolutions were not adopted but a general resolution offered by the said H. C. Rouse, President of the Kansas Company, was adopted, as a substitute, by which the Directors of the Pacific Company were requested in general language to see that the laws of the State of Kansas were complied with and that the Kansas Company conformed to its obligations under the lease. That the substituted resolution was adopted by a vote of 17,246 shares of stock, all of which were cast by said Rouse or other employees or directors of

said Kansas Company, and was opposed by the vote of 6,464 shares of stock, being all stock represented at the meeting owned by municipalities or by individuals not interested in or employed by the Kansas Company. That no action has been taken by the officers of said Pacific Company or by the majority directors above mentioned to comply with the requirements of said statute.

SIXTEENTH.—Your Orators further show that by the Third Article of the said lease of May 13, 1890, the Kansas Company agreed to collect all revenues arising from the use and operation of the railroads of the Pacific Company, and to render accounts thereof to the Pacific Company. That no proper or sufficient compliance with the said agreement to render accounts, has been made by the Kansas Company. That a meagre and wholly insufficient statement of accounts has each year been rendered to a meeting of the stockholders of the Pacific Company which has failed to state the sources of receipts of the Pacific Company and the items of debits and credits creating the results, and the results or conclusions have alone been stated in the so-called accounts. That even such insufficient and meagre accounts show that under the terms of the lease there was at least a surplus on the 31st day of July, 1896, for the year ending on that date, of gross earnings of the Pacific Company over and above the deductions provided to be made by the said lease of $10,811.77, and that on the 31st day of July, 1897, there was a like surplus of $19,923.39, and on the 31st day of July, 1898, there was a like surplus of $7,515.60, and your Orators, upon information and belief, show that upon a proper accounting the amounts of surplus to the credit of the Pacific Company would be greatly in excess of these figures.

SEVENTEENTH.—Your Orators further show that the said directors Reynolds and Stevens, elected at the said stockholders' meeting of the Pacific Company on April 7, 1898, demanded of the President of the said Pacific Company, to wit, of Henry W. Poor, one of the defendants herein, that there should be an arbitration as provided for in Article 3 of the said lease, with respect to the manner in which the said accounts should be kept between the two companies, for the purpose of determining what were the earnings of the Pacific Company. Said directors demanded that the said Poor should not appoint an arbitrator on behalf of the Pacific Company, for the reason that the said Poor was a director of the Kansas Company and said two directors representing the minority stockholders demanded the right to appoint said arbitrator for the Pacific Company. That said Poor refused said request and thereafter, in connection with the Kansas Company, proceeded to a pretended arbitration under the said Article 3 of the lease, both of the arbitrators being substantially appointed by the said Kansas Company.

EIGHTEENTH.—Your Orators show that if the gross earnings of the Pacific Company's property since August 1, 1890, had been computed by said Kansas Company on the same basis, that is and has been in vogue during that period among other railroads in that portion of the United States, in which the railroads of the Pacific Company and of the Kansas

Company are located, to wit, upon a mileage basis with a minimum of not less than twenty-five per centum to the Pacific Company, or if said gross earnings during said period had been ascertained on any other fair and equitable basis, the gross earnings of said Pacific Company would have been sufficient to pay the interest on the bonded debt of said Pacific Company, all lawful taxes on its property, all reasonable and necessary expense of maintaining its corporate existence, and in addition a dividend on its stock during the past three years of at least three and one-half per cent. per annum, and during the three years next succeeding August 1, 1890, at a slightly lower rate. Your Orators show that the Kansas Company has not followed the usage or custom obtaining among and between railroad corporations under similar circumstances and conditions, in crediting the Pacific Company with earnings from its property, but has computed said earnings on an unfair and inequitable basis, the nature of which is unknown to your Orators, and which the said defendant has always refused to divulge to them, or those they represent, although often requested so to do; and your Orators show on information and belief that said basis of accounting does not comply with the terms of said lease.

Your Orators show that an item of $154,550.11 is charged in said accounts for taxes on the property of the Pacific Company; that said charge is grossly unjust, is not authorized by the terms of said lease, and includes taxes on telegraph lines and property, on sleeping cars and other equipments, and on other items of property, none of which are or have been owned by the Pacific Company, but which are the property of the Kansas Company, or other persons or corporations.

Your Orators further show that an item of $10,600 is charged in said account as expense in maintaining the corporate organization of the Pacific Company, which is grossly unjust and exorbitant, and that no such amount has or should have been expended for that purpose, for the reason that nothing but the merest nominal organization of said Pacific Company has been maintained. The said last-named charge did not appear in the aforesaid so-called Statements of Earnings and Disbursements made by the Kansas Company to the stockholders of the Pacific Company until the year 1896, nor until, even according to the system of accounting adopted by the Kansas Company, it was apparent that the rentals of the Pacific property exceeded in amount the sums necessary to pay the interest on its bonded indebtedness, the taxes on its property, and the expense of maintaining its corporate organization.

NINETEENTH.—Your Orators show that the Boards of Directors of the Kansas Company and of the Pacific Company, composed, with one exception, of the same persons, prior to April, 1898, formulated a plan or scheme which they denominated a contract, by which they intend to and will (unless restrained therefrom) consolidate the Pacific Company with the Kansas Company under the name of the latter company, on a basis of exchanging the stock of the Pacific Company, including that of the plaintiffs, for common stock of the Kansas Company, share for share. That said plan or scheme was concocted and has been entered

into without any notice to your Orators and without any notice, as your Orators are informed and believe, to any other stockholder, except the person or corporation in whose name the stock really owned by the Kansas Company has been held. That no notice of said plan or scheme of consolidation was given to any other individual, or to any municipality owning stock of the Pacific Company, prior to the execution of the pretended deed of consolidation hereinafter described, except by a circular letter dated at Parsons, Kansas, February 28, 1898, but really issued from the office of the Kansas Company in New York City, to the effect that a meeting of the stockholders of the said Pacific Company would be held at Parsons, Kansas, on April 7, 1898, at 10:30 o'clock A. M., to act upon said proposed plan of consolidation. That said notice was signed by said S. Halline as secretary, and purported to have been issued by order of the defendant, Henry W. Poor, president of the Pacific Company. That said Henry W. Poor was then a director in both railroad corporations above named, and also a member of the executive committee which has immediate charge of the affairs and business of the Kansas Company. That said Halline was then also secretary of the Kansas Company and under the domination and control of the persons who manage and direct the affairs of that corporation. That at said meeting held at Parsons, Kansas, on April 7, 1898, no action was taken by the stockholders of the Pacific Company in reference to said proposed plan of consolidation.

TWENTIETH.—Your orators further show that it is the purpose of the Kansas Company and of said Henry W. Poor, and of the other persons who control and manage the affairs of the Kansas Company, by virtue of the ownership or control, as above stated, of more than two-thirds of the capital stock of the Pacific Company, and under guise of consolidating the two railroad companies hereinbefore described, under the provisions of the statutes of Kansas, to carry into effect the so-called contract heretofore formulated and entered into between the respective boards of directors of said corporations, and to consolidate said corporations into one company under the name of the Kansas Company, with the effect of destroying by merger the said lease between the said two defendants. That meetings of the stockholders of each of the defendant railway companies were called to meet at Parsons, Kansas, on the 7th day of April, 1898, at which meeting it was the purpose of the persons who owned or controlled more than two-thirds of the outstanding capital stock of said last named corporations, and who managed their business, to have said plan or scheme of consolidation approved and ratified by a vote of the holders of the stock so owned and controlled by them.

That upon the said 7th day of April, 1898, your Orators, Frederick C. Stevens and Henry D. Mirick attended, prepared to protest against the approval of the said so-called Contract of Consolidation, and the order of injunction hereinafter referred to having been served, the officers of the defendant the Pacific Company thereupon refrained from bringing the subject before the meeting of the stockholders.

TWENTY-FIRST.—That on the 19th day of July, 1899, a pretended indenture was signed in the name of the Pacific Company by Henry W. Poor, as President, and S. Halline, as Secretary, and was likewise signed in the name of the Kansas Company by its President and Assistant Secretary separately, such instrument purporting to be an agreement for consolidation of the said two companies on the basis of exchanging the stock of the Pacific Company for common stock of the Kansas Company, share for share. That a written ratification and approval of said pretended indenture was signed in the name of the Coal Company by Colgate Hoyt as vice-president and S. Halline as secretary, as a stockholder of said Pacific Company holding 16,715 shares of its capital stock, and such ratification and approval was also signed by the said H. C. Rouse, Henry W. Poor and Colgate Hoyt, as individual stockholders of said Pacific Company holding each five shares of the capital stock of the Pacific Company, and that said Contract of Consolidation was not ratified, approved or consented to by any other stockholders of the Pacific Company. That said pretended Indenture of Consolidation was filed in the Office of the Secretary of State of the State of Kansas on the 24th day of November, 1899, and is the same pretended deed of consolidation hereinbefore referred to, of which a copy is herewith filed, and marked Exhibit B, and your Orators show, upon information and belief, that prior to the commencement of this action certificates of stock for twenty-five thousand shares of the Common Stock of the Kansas Company were delivered to the said defendant Henry W. Poor, pursuant to said pretended deed of consolidation, and that on or about the 20th day of December, 1899, said defendant by public advertisement issued a call that all the stock of the Pacific Company be presented at the office of said Pacific Company, in the City of New York, during the week commencing on the 13th day of February, 1900, in accordance with the said so-called Contract of Consolidation for exchange for Common Stock of the Kansas Company, share for share. Your Orators show that unless restrained by this Court, the said stock of the Kansas Company, now in the possession of the defendant, Henry W. Poor, within this State, or some portion thereof, will be exchanged for stock of the Pacific Company, pursuant to said published notice and to said pretended Deed of Consolidation, and that said stock of the Kansas Company, unless restrained by the order of this Court, may, and some portion thereof will be, removed from the jurisdiction of this Court, or sold for value, to persons having no knowledge of the matters shown by this Bill of Complaint or otherwise so disposed of that it will not be possible for this Court to provide by its final decree for a return of said certificates of stock to the Kansas Company.

TWENTY-SECOND.—That under and by virtue of said scheme it is intended that your Orators' stock will be called in and canceled, and your Orators will receive in exchange therefor only an equal amount of the common stock of the Kansas Company; that the stock of the Pacific Company formerly owned by Robert S. Stevens, and now in charge and

control of your Orators, Stevens, as executors or trustees, is of the total value of more than $63,000, and, under a fair and equitable system of accounting and division of earnings should and will earn an annual income of more than $4,400. That the stock of the Pacific Company now owned by your Orator, Mirick, is of the total value of more than $26,900, and under a fair and equitable system of accounting and division of earning should and will earn an annual income of more than $1,800. That the common stock of the Kansas Company, which your Orators will receive if the foregoing scheme is consummated, will not be worth more than $20,000 at the utmost. That said common stock of the Kansas Company has never earned any dividends, and is without any value whatever as an interest bearing security. That by reason of the enormous bonded indebtedness of the Kansas Company, and of the obligations of said Railway Company, on guaranteed bonds and preferred stock, there is no prospect that said common stock will ever be of any value, except for the purpose of controlling the organization of said Kansas Company

TWENTY-THIRD.—Your Orators further show that if said plan or scheme of consolidation is permitted to be consummated, the result will be to end and annul the lease hereinbefore described, and to deprive the Pacific Company and all its stockholders, of the benefits and profits properly and fairly derivable therefrom, and of the rent therein stipulated to be paid by the Kansas Company. That to abrogate said lease in such a manner as is proposed by said plan or scheme of consolidation will divest said Pacific Company and each of its stockholders of their vested rights under said lease and will permit the Kansas Company, and the persons who are in control of its business and affairs, to relieve said last named railroad company of the contract duty it owed to the Pacific Company, and to prevent said last named company from paying to its stockholders dividends which the enforcement of said lease will enable it to pay them, in the amounts hereinbefore set forth.

TWENTY-FOURTH.—Your Orators further show that the Kansas Company, under its former name of the Union Pacific Railway Company, Southern Branch, was organized and legally existed prior to the first day of March, 1870, and that prior to that date its Capital Stock was subscribed and issued. That prior to said last named date there was no law by which two or any number of railroad corporations in the State of Kansas could be merged or consolidated without the unanimous consent of all the stockholders of all the corporations concerned, and that said so-called contract of consolidation, concocted as aforesaid, has not received the assent of all or nearly all of the stockholders of the Kansas Company. Your Orators further show that it is claimed by the defendants that a certain statute of the State of Kansas, approved March 1, 1870, authorizing the consolidation of certain railroads, operated as an amendment of the charter of the Kansas Company, so as to permit said Company to be consolidated with other railway companies or with another railway company, upon the consent of less than the whole num-

ber of stockholders of said Kansas Company. And your Orators show that if said statute of the State of Kansas is as claimed by the defendants herein, the same is unconstitutional and void, and contrary to Section 10, Article I, of the Constitution of the United States, because it purports to impair the obligation of the contract originally entered into by the incorporators of the Kansas Company, as between themselves in regard to the nature and scope of the corporate business in which the said Kansas Company was to engage.

Your Orators further show that by the said statute of the State of Kansas, approved March 1, 1870, it was provided that railroad companies might consolidate under certain conditions, but that one of such conditions was that the railroads of such companies should form a continuous line or lines of road. That the lines of railroad owned by the Kansas Company and the lines of railroad owned by the Pacific Company do not form a continuous line or lines of railroad, but, on the contrary, they connect at the town of Parsons, in the State of Kansas, and for a considerable distance they practically run parallel with each other. And your Orators further show that no consolidation of said defendant companies could lawfully be made under the provisions of said statute approved March 1, 1870.

Your Orators further show that the defendant the Pacific Company was organized and legally existed, and all its capital stock was subscribed for and duly issued prior to the 9th day of March, 1889. That on or about the 9th day of March, 1889, a statute was passed amending the aforesaid statute approved March 1, 1870, relative to the consolidation of railroad companies, the intent of such amendment being apparently to permit railroad companies whose lines of road were not continuous but were merely connected with each other to unite and form a consolidated company. And your Orators show, upon information and belief, that said statute was not operative as to corporations organized and existing prior to the enactment thereof, the said act and any proceedings thereunder by the defendant railroad companies herein, being an impairment of your Orators' contract as stockholders as aforesaid of the said Pacific Company under Section 10, Article I of the Constitution of the United States, and that no consolidation of the Pacific Company could be effected with any railroad company whose road merely connected but did not form a continuous line or lines of railroad with the line of the Pacific Company except by the unanimous consent of the stockholders of said Pacific Company. That the stockholders of the Pacific Company have not all agreed or consented to or ratified the said plan or scheme of consolidation, and that none of the said stockholders, except the Coal Company and said Rouse, Poor and said Hoyt have given their approval or assented thereto.

TWENTY-FIFTH.—Your Orators further show that on or about the 6th day of April, 1898, your Orators, Mary P. Stevens and Frederick C. Stevens, as executors aforesaid, began an action against the defendant Railway Companies in the District Court of the State of Kansas, in the

County of Bourbon, the same being a court of record of general jurisdiction, and upon a petition duly filed, obtained an injunction order which was duly and lawfully issued by said District Court through the probate judge of Bourbon County of the State of Kansas, on the 6th day of April, 1898, whereby the said defendants and each of them, and their officers, directors, servants and agents, and the person or corporation holding the 16,715 shares of stock of the Pacific Company, owned or controlled by the Pacific Company, were enjoined and restrained until the further order of the said District Court from consolidating the said defendants under the name of the Kansas Company, or otherwise, and from taking any action looking to such consolidation, or which would tend to cancel, change, or vary the terms or change the said lease of May 13, 1890, and from canceling or exchanging the stock of the Pacific Company, for the common stock of the Kansas Company, or calling in the stock of the Pacific Company held by the said executors of Robert S. Stevens. The said order was provided to take effect and be operative when the plaintiffs gave an undertaking to be approved by the Clerk of the Court. Your Orators show that the said undertaking, duly approved by the Clerk of the said District Court referred to in the said order, was duly given by your said Orators in the form and in the manner prescribed in the said order and duly filed with the clerk of the said District Court, and thereupon, and on the 6th day of April, 1898, the said injunction order became operative and has ever since remained and still is in effect. Your Orators further show that said injunction order was duly served in accordance with the provisions of law applicable thereto in the State of Kansas upon the defendant railroad companies and both of them, within the State of Kansas. That such proceedings were thereafter had that the said cause on the petition of the defendants therein was removed to the Circuit Court of the United States for the District of Kansas, Third Division; that on or about the 5th day of September, 1898, an amendment and supplement to the original bill were filed in said Circuit Court; and that on the 14th day of November, 1898, Mr. Justice Foster of the said Circuit Court of the United States for the District of Kansas, Third Division, in the said cause, on the application of the complainants, made an order continuing in full force and effect until the further order of the said Circuit Court of the United States, the said temporary order of injunction issued on the 6th day of April, 1898, by the District Court through the Probate Judge of Bourbon County, Kansas, and further ordered that the Pacific Company, the Kansas Company, and each of them, and each and all of their officers, directors, servants and agents, and the Coal Company, the holder, of the said 16,715 shares of the stock of the Pacific Company, owned by the Kansas Company, be enjoined and restrained until further order of the said Circuit Court, or a Judge thereof, from consolidating the Pacific Company and the Kansas Company under the name of the latter company and from taking any action looking to such consolidation; and further restraining said companies, and their officers, directors, servants and

agents from taking any action which would tend to cancel, change, vary the terms, or change the existing lease of the Pacific Railroad to the Kansas Company, dated May 13, 1890, and from cancelling, exchanging for common stock of the Kansas Company, or calling in the stock of the Pacific Company held by the said executors under the last will of Robert S. Stevens, deceased.

Your Orators further show that said restraining order of Mr. Justice Foster, at or about the date thereof, was duly served upon the defendant railroad companies.

TWENTY-SIXTH.—Your Orators further show that in disregard and in defiance of said orders of injunction, the said defendant railroad companies, and their directors, officers and agents, and the defendant "Coal Company" have proceeded to take the action hereinabove recited, and to attempt to enter into the said so-called contract of consolidation of July 19, 1899, filed in the office of the Secretary of State on the 24th day of November, 1899, and to give the notice hereinabove alleged to have been given, calling in the stock of the Pacific Company and the providing for its exchange for stock of the Kansas Company, share for share, pursuant to the terms of the said so-called agreement of consolidation, and cancelling and annulling said lease of May, 1890, by the merger thereof as the result of the said consolidation.

TWENTY-SEVENTH.—Your Orators further show that the said plan and scheme of consolidation of the said Pacific Company with the said Kansas Company, was not originated, undertaken, and has not been carried on in good faith and in the interest of the said Pacific Company or of its stockholders, other than the said Coal Company and the individual stockholders who are officers, directors or employees of the defendant the Kansas Company. Your Orators show that said scheme of consolidation is in fraud of the rights of your Orators and of the other stockholders of said Pacific Company similarly situated, and who are not interested in the Kansas Company. That said scheme of consolidation was intended to have, and will have, the effect of largely destroying the value of the stock of your Orators and of the other stockholders similarly situated of the Pacific Company, and of transferring and vesting in the Kansas Company about 90% of the value of the capital stock of your Orators and of the other stockholders similarly situated. That the said scheme of consolidation was entered into by the defendants and their officers, and agents, with the intent to defraud your Orators and the other stockholders of the Pacific Company similarly situated, out of about 90% of the value of their capital stock of the Pacific Company, and for the purpose of annulling and cancelling the said lease of May, 1890, in the interest and for the benefit of the said Kansas Company, and not for the common benefit of the stockholders of the said Pacific Company, or for the benefit of said Pacific Company. That the officers and directors of the said Pacific Company who have voted for or facilitated the making of the said so called consolidation and the pretended cancellation of the said lease, have been actuated with the intent to defraud your

Orators and the other stockholders of the Pacific Company similarly situated, and that the effect of the completion of the said agreement of consolidation will be to consummate and carry into effect the said fraudulent intent.

TWENTY-EIGHTH.—Your Orators further show that they are without adequate remedy at law, and that they will be irreparably injured as hereinbefore averred, unless the Court extends its aid in equity to restrain and enjoin the defendants herein from carrying out and consummating the aforesaid plan or scheme of so-called consolidation.

To the end, therefore, that the defendants may, if they can, show why your Orators should not have the relief hereby prayed, your Orators pray that the defendants may be compelled to make a full disclosure and discovery of all the matters aforesaid, and according to the best and utmost of their knowledge, remembrance, information and belief, full, true, direct and perfect answer make to the matters hereinbefore stated and charged; but not under oath, an answer under oath being hereby expressly waived.

And your Orators further pray:

FIRST.—That the defendants, The Missouri, Kansas & Texas Railway Company and the Kansas City & Pacific Railroad Company, and each of them, be decreed to carry out and perform all the covenants and provisions of the lease between said defendants, date May 13, 1890, in manner and form as therein set forth.

SECOND.—That the defendant The Missouri, Kansas and Texas Railway Company be decreed to account for and with respect to all the dealings and transactions between said defendant and the Pacific Company under the said lease of May 13, 1890, and for all earnings to which the Pacific Company is, or may have been, entitled thereunder, and that said accounting show in detail how the division of earnings between the said corporations has been heretofore made, the particular method by which the gross earnings of the Pacific Company's railroad have been computed and how the gross earnings of the Pacific Company, since August 1st, 1890, have been ascertained, and how the sums charged against the Pacific Company for taxes and maintenance of corporate organization since that date have been arrived at; and that an accounting be had between the said companies under the said lease of May 13, 1890, on the basis of the usage or custom in vogue among railroad companies operating property under similar circumstances to those under which the Kansas Company has operated the property of the Pacific Company, to wit, a mileage basis with a minimum of at least 25% to the Pacific Company on all through or joint business, or on such other basis as may be adjudged to be equitable.

THIRD.—That the decree of this Court be entered requiring the Kansas Company to pay over to the Pacific Company such sum as such accounting may show the Pacific Company to be entitled to, and that the said Pacific Company be decreed to pay over to your Orators and to the other stockholders similarly situated so much of the said sum found due from the

Kansas Company to the Pacific Company as your Orators and the other stockholders similarly situated may be entitled to receive.

FOURTH.—That the defendants, The Missouri, Kansas and Texas Railway Company, the Kansas City and Pacific Railroad Company and the Southwestern Coal and Improvement Company, their officers, directors and agents, be enjoined and restrained, both during the pendency of this action and perpetually, from proceeding to carry out or consummate the scheme of consolidation of the defendants contained in the said indenture of July 19, 1899, or any similar plan or scheme of consolidation, and from taking any steps under or pursuant to the said agreement of July 19, 1899, or any plan or scheme of consolidation of the defendants, and particularly from calling in or exchanging or attempting to exchange any stock of the defendant the Pacific Company for common stock of the Kansas Company, and that said pretended indenture of July 19, 1899, be decreed to be invalid, inoperative and of no force and effect.

FIFTH.—That the defendant Henry W. Poor, in his individual capacity as president of the Pacific Company, or in any other capacity in which he may hold the said twenty-five thousand shares of stock of the Kansas Company hereinbefore referred to, be restrained and enjoined from in any way removing from the jurisdiction of this Circuit Court of the United States, and from handing over, exchanging, disposing of, returning, or in any way parting with the twenty-five thousand shares of stock, or any of them, of the defendant, the Kansas Company, which are referred to in the notice of exchange of stock hereinbefore particularly described, and dated the 20th day of December, 1899, until the further order of this Court.

SIXTH.—That a provisional or preliminary injunction be issued restraining the defendants, and each of them, from doing or performing any of the acts against which preventive relief is herein sought, as hereinbefore stated, and also restraining said defendants, and each of them, from removing from the jurisdiction of this Court, or from transferring, conveying or otherwise disposing of any property of the Kansas City and Pacific Railroad Company, or any money, property, certificates of stock or other thing of value which may have been paid or delivered to or received by any of said defendants, or any of their officers, directors or agents, for or on behalf of said Kansas City and Pacific Railroad Company, as the consideration or as part of the consideration for the pretended deed of consolidation, dated July 19, 1899, and hereinbefore more fully described, and that your Orators may have such other and further relief as the equity of the case may require and to your Honors may seem meet.

DAVIES, STONE & AUERBACH,
Solicitors for the Complainants,
No. 32 Nassau Street,
Borough of Manhattan,
City of New York.

FREDERICK C. STEVENS,
HENRY D. MIRICK.

STATE OF NEW YORK, }
County of New York, } ss.:

FREDERICK C. STEVENS, being duly sworn, deposes and says:

That he is one of the complainants herein named; that he has read the foregoing bill of complaint, and that the same is true of his own knowledge, except as to the matters therein stated to be alleged on information and belief, and as to those matters he believes it to be true.

FREDERICK C. STEVENS.

Sworn to before me this 19th day of March, 1900.

JAS. F. WELLS,
[SEAL.] Notary Public (No. 150),
State & County of New York.

District of Columbia, ss.:

HENRY D. MIRICK, being duly sworn, deposes and says:

That he is one of the complainants herein named; that he has read the foregoing bill of complaint, and that the same is true of his own knowledge, except as to the matters therein stated to be alleged on information and belief, and as to those matters he believes it to be true.

HENRY D. MIRICK.

Sworn to before me this 21st day of March, 1900.

CHARLES R. HARBAN,
[SEAL.] Notary Public.

Notarial certificate of Clerk of Supreme Court of the District of Columbia attached.

FORM X.—BILL FOR ACCOUNTING BY SYNDICATE MANAGERS.

[Gates v. Megargel, C. C. A., 266 Fed. 811.]

[Title.]

In Equity.

The intervenors above named, for their bill of complaint, allege:

I. That Oscar W. Nicholson is a citizen of Wyoming, and resides at Riverton therein; that C. B. Manbeck is a citizen of Wyoming, and resides at Casper therein; and that all the other intervenors are citizens of Illinois, and reside at Chicago therein; and, on information and belief, that defendants are citizens of New York State, and reside at New York City therein, and at all the times hereinafter mentioned were and are doing business under the firm name of R. C. Megargel & Co., with principal offices and place of business at Number 27 Pine Street, New York City. That all of plaintiffs and intervenors are citizens and residents of States other than New York State of which defendants are citizens, inhabitants and residents; and that the amount in controversy (exclusive of interest and costs) exceeds the sum of three thousand dollars.

II. That in August, 1917, defendants R. C. Megargel & Co. formed

and promoted a Syndicate of which they themselves were to become and did become the Syndicate Managers and the agents of and trustees for each and every member of the Syndicate. That said Syndicate was formed for the purpose of acquiring such part of 100,000 shares of the stock of the Glenrock Oil Company as said defendants Megargel & Co., as Managers of said Syndicate, and agents of and trustees for the members of and subscribers to said Syndicate, should determine.

That each and every one of the intervenors above named, in August or September, 1917, became members of said Syndicate and were accepted by Megargel & Co. as members of said Syndicate and participants therein for the number of shares hereinafter set forth, and each and every one of them respectively thereafter made the payments hereinafter set forth, to said Megargel & Co. as Syndicate Managers, of the amounts called for by said Megargel & Co. That said Megargel & Co. now claim that they, as Syndicate Managers, bought 100,000 shares of said stock from themselves, at $7.00 per share. These intervenors state that Megargel & Co. acquired said stock at $3.50 per share, but insist upon charging each and every member of the Syndicate at the rate of $7.00 per share for the same. These intervenors further state that Megargel & Co. never informed any of them that they (Megargel & Co.) were to acquire or intended to acquire or had acquired said stock, or any part thereof, at any sum less than $7.00 per share. That none of these intervenors knew or learned, until after each of them respectively had become a member of said Syndicate and after he had made his payments to said Megargel & Co. as herein set forth, that Megargel & Co. paid only $3.50 per share for said stock, or paid any less sum than $7.00 per share.

III. That defendants, in a printed letter signed by them, dated August 17th, 1917, made a proposition to each of said intervenors above named, for the formation of a Syndicate to acquire, at $7.00 per share, not to exceed 100,000 shares of stock of the Glenrock Oil Co. which the defendants therein stated and represented that they (Megargel & Co.) were negotiating to acquire at $7.00 per share, and of which Syndicate, Megargel & Co. would be Syndicate Managers. A copy of the form of said letter is hereto annexed, marked Exhibit A, and made a part thereof. That said proposition was duly accepted by each of the intervenors above named, respectively. That each of said intervenors respectively subscribed to the Syndicate to be formed as set forth in said letter or proposition of August 17th, 1917, for the number of shares of said stock in the respective amounts set opposite their names, as follows: Oscar W. Nicholson, 1,000 shares; C. B. Manbeck, 1,000 shares; E. J. Kelly, 2,750 shares; James M. Daly, 1,000 shares; James A. Green, 1,000 shares; Hubert E. Howard, 750 shares; Herbert Haase, 750 shares; C. G. Burnham, 850 shares; L. W. Spratlen, 300 shares; H. E. Byram, 500 shares; A. W. Newton, 200 shares; L. W. Parker, 300 shares; Paul Benedict, 100 shares; Lamson Bros. & Co., 5,000 shares; total, 15,500 shares.

IV. That said intervenors have paid to defendants, as Syndicate Managers, on account of their said subscriptions to said Syndicate, the sums set opposite their names, as follows:

Oscar W. Nicholson, 1,000 shares, Amount paid $7 per share, Total paid $7,000; C. B. Manbeck, 500 shares, Amount paid $3 per share, Total $1,500; C. B. Manbeck (withdrawn stock) 500 shares, Amount paid $8 per share, Total $4,000; E. J. Kelly, 2,750 shares, Amount paid $3 per share, Total $8,250; James M. Daly, 1,000 shares, Amount paid $3 per share, Total $3,000; James A. Green, 1,000 shares, Amount paid $3 per share, Total $3,000; Hubert E. Howard, 750 shares, Amount paid $3 per share, Total $2,250; Herbert Haase, 750 shares, Amount paid $3 per share, total $2,250; C. G. Burnham, 850 shares, Amount paid $3 per share, total $2,550; L. W. Spratlen, 300 shares, Amount paid $3, total $900; H. E. Byram, 500 shares, Amount paid $3 per share, Total $1,500; A. W. Newton, 200 shares, Amount paid $3 per share, Total $600; L. W. Parker, 300 shares, Amount paid $3 per share, Total $900; Paul Benedict, 100 shares, Amount paid $3 per share, Total $300; Lamson Bros. & Co., 2,500 shares, Amount paid $2 per share, Total $5,000; Lamson Bros. & Co. (withdrawn stock) 2,500 shares, Amount paid $8 per share, Total $20,000; Total 15,500 shares, $63,000.

V. That, pursuant to said agreement, intervenor Nicholson paid to defendants $7 per share for his 1,000 shares of said stock subscribed for; that intervenor Manbeck paid to defendants $8 per share for 500 shares of his shares; and intervenor Lamson Bros. & Co. paid to defendants $8 per share for 2,500 of their shares; which stock being fully paid for has been delivered to said intervenors, or is now held by defendants as trustees for said intervenors.

VI. That each and every of said intervenors, respectively, paid to defendants, as Syndicate Managers, the respective amounts above set forth, believing that the defendants were paying, or were about to pay, $7.00 per share for the 100,000 shares of stock above referred to; whereas, on information and belief, the defendants, at the time of the formation by them of said Syndicate, had a contract or option for, or had already acquired, all of said 100,000 shares at $3.50 per share; all of which was unknown to said intervenors, and each of them, and was not disclosed to them or any of them by the defendants at any time.

ON INFORMATION AND BELIEF:

VII. That in and by said written proposition dated August 17th, 1917, and also in interviews with Oscar W. Nicholson and Herbert Haase, and by written communications to Lamson Bros. & Co., before said proposition was submitted to them by the defendants, and also by the failure of the said defendants to disclose anything to the contrary to any of the intervenors, and otherwise, defendants wilfully and intentionally represented to said intervenors and each of them, that they were about to acquire said 100,000 shares of stock at $7.00 per share, and each of said intervenors accepted the aforesaid proposition of said defendants, and each of said intervenors became members of said Syndicate, as aforesaid, paying to said defendants, as Syndicate Managers, the amount of the assessments which they made on the Syndicate subscribers as aforesaid, believing that the

defendants were paying $7.00 per share for said stock; and said intervenors would not have made such subscriptions nor obligated themselves in any way to pay $7.00 per share for said stock, except for the representations aforesaid of the defendants, and the belief of each of the intervenors respectively in the truth of such representations, and except for the failure of the defendants to disclose the truth to each and every one of said intervenors; all of which was done by defendants with intent to deceive the intervenors, and did deceive each and every of said intervenors.

That defendants acted as the agents, trustees and fiduciaries of said intervenors in acquiring such stock at $3.50 per share as aforesaid.

IX. That said intervenors did not discover that said stock had been so acquired by defendants at $3.50 per share until long afterward, and after they had made their subscriptions and payments as aforesaid.

X. That said intervenors have tendered, and do now tender to defendants payment for their non-withdrawn stock on the basis of said price of $3.50 per share, in addition to such reasonable commissions and brokerages for sales and purchases effected by defendants acting as the managers of said syndicate, together with necessary expenditures incurred by defendants in the acquisition and marketing of the syndicate stock, and other necessary and lawful expenses incurred by them as such syndicate managers; and intervenors have demanded and do now demand the delivery to them of the shares of non-withdrawn stock for which they have subscribed, but defendants have refused, and still refuse, to accept their tenders of payment as payment in full, and to deliver said non-withdrawn stock to said intervenors therefor.

XI. That intervenors Nicholson, Manbeck and Lamson Bros. & Co., have demanded repayment by defendants of the difference between said $3.50 per share and the amounts they have paid for their non-withdrawn stock, respectively, as above set forth, in order to withdraw same from the syndicate under the terms of said agreement.

XII. That the duration of said syndicate was from on or about August 17, 1917, to on or about December 15, 1917; and all the moneys, property and other assets thereof are now in the possession of defendants.

XIII. That defendants on or about December 31, 1917, submitted to the intervenors a preliminary statement of account, a copy of which is annexed hereto, marked "Exhibit B," which is made a part hereof; which account is incomplete, inaccurate and insufficient, and includes many improper and illegal charges or debits against said syndicate in favor of defendants; that such account does not show full receipts and disbursements, nor the amounts payable nor receivable,—all of which said intervenors wish to know and are lawfully entitled to know.

XIV. That the intervenors have no adequate remedy at law. WHEREFORE, said intervenors pray for an interlocutory decree against defendants, as follows: 1. That defendants render to them a true and full account setting forth the following matters, items and particulars: (a) The amount defendants paid per share for the 100,000 shares of syndicate stock referred to in Exhibit "A," and the date or dates when defendants acquired

the same and from whom; (b) An itemized account of the purchases and sales of the syndicate stock, from whom purchased, to whom sold, the method of payment, whether by check or otherwise, the date and hour of each purchase and sale, with the exact time of transfers, the brokers or agents acting in the transactions, the commissions paid, and to whom; (c) An itemized expense account of the disbursements for publicity, advertising, and miscellaneous expenses; (d) The amount of cash received from each participant on account of the 80,670 shares of non-withdrawn stock, and the amount receivable; (e) An itemized account of all other receipts and expenditures of the syndicate. These Intervenors further pray: 1. That, pending a full and accurate accounting, the defendants be enjoined from disposing of or pledging or hypothecating any of the stock of the Syndicate which the intervenors claim; and that defendants be also enjoined from disposing of any of the property, money, interests or effects of the syndicate or members thereof. 2. That a receiver of the syndicate stock, money, property, interests, affairs and effects, be appointed, with the usual powers and duties. And intervenors demand final judgment against the defendants, as follows: 3. That upon payment to defendants by each or any of the intervenors of the balance of their subscription-price for non-withdrawn stock, at the rate of or upon the basis of $3.50 per share therefor, plus their pro rata share of the commissions and expenses hereinbefore referred to, defendants be required and directed to deliver forthwith to each of the intervenors demanding the same, the entire number of shares of such non-withdrawn stock to which they subscribed. 4. That defendants deliver forthwith the stock of said intervenors who have paid for the same in full and are entitled to receive the same, under said agreement; and that such intervenors have judgment against defendants for the difference between $3.50 per share and the price they paid for such stock so paid for in full whether actually withdrawn or still in the possession of defendants, or in their control; less their pro rata share of said expenses, etc., referred to. 5. That this Court take and state the accounts of defendants with reference to their acts, doings and transaction of every kind, as Managers of said Syndicate, and if this Court shall deem proper, to appoint a Special Master in Chancery to take and state said account and report the same to this Court. 6. That intervenors have such other and further relief as may be proper. 7. That intervenors have judgment against defendants for the costs and disbursements of this action.

WOLLMAN & WOLLMAN,
20 Broad Street, New York City.
HAASE, HANLEY & HOWARD,
Chicago, Ill.
CLARENCE ALEXANDER,
Yonkers, N. Y.
Solicitors for Intervenors.

HENRY WOLLMAN,
Counsel.

(Verified by Clarence Alexander, one of the Solicitors for Intervenors.)

FORM XI.—BILL TO SET ASIDE CONVEYANCES WITH ALLEGATIONS EXCUSING LACHES.

District Court of the United States for the Southern District of New York.

ALFRED R. WILLIAMS, Plaintiff, *against* FRANK B. YORK, individually and as Temporary Administrator of the goods, chattels, credits and estate which were of Mary S. Morris, formerly Mary S. Shepard, deceased, and as testamentary trustee under the last will and testament of said Mary S. Morris, Walter C. Morris and Hazel S. Shepard, an infant over the age of 14 years, Defendants.	Bill of Complaint In Equity No. 22-237.

To the Honorable the Judges of the District Court of the United States for the Southern District of New York:

The above-named plaintiff for his Bill of Complaint herein alleges:

I. That the plaintiff is now a citizen of the State of Massachusetts, residing in the city of Springfield in said state, and that this suit involves an amount in excess of costs and interest of more than $3,000.00.

II. That the defendant, Frank B. York, is a citizen of the State of New York, residing in the city of New York and is an inhabitant of the Southern District of New York, and was duly appointed as administrator of the goods, chattels, credits and estate which were of Mary S. Morris, formerly Mary S. Shepard, deceased, by decree of the Surrogate's Court of New York County, made and entered in proceedings therefor on the 19th day of October, 1920, and thereafter duly qualified as such administrator and is still acting in such capacity and that individually and as such administrator he is in charge and possession of the property and estate of which said Mary S. Morris (formerly Mary S. Shepard) was in possession during her lifetime as executrix of and trustee under the will of A. Warner Shepard, deceased.

III. That the defendant, Walter C. Morris, is a citizen of the State of New York, residing in the city of Syracuse in said state and an inhabitant of the Northern District of said state, and was the husband of the aforesaid Mary S. Morris (formerly Mary S. Shepard, deceased), at the time of her death.

Upon the death of said Mary S. Morris, she left her surviving as her sole heir at law and next of kin, the infant defendant, Hazel A. Shepard, the adopted daughter of said Mary, who had been duly adopted by said Mary previously to the death of said Mary in accordance with the laws of the state of New York, in which state both of them resided and were domiciled. The said Mary left surviving her no other distributee of her

estate except her husband, the defendant, Walter C. Morris. By a paper purporting to be a will dated December 10, 1920, which has not been admitted to probate, it is recited that said Mary S. Morris devised and bequeathed, after the payment and distribution of certain legacies the aggregate value of which was less than the amount which said Mary had used from the income of said estate, all her remaining property, both real and personal, to be held in fee simple by the defendant, Frank B. York, as trustee, and also appointed him her executor. Said Hazel S. Shepard is an infant less than 21 and more than 14 years of age, and is and at the time of the commencement of this suit was a citizen and resident of the Borough of Manhattan in the City, County and State of New York.

IV. That the plaintiff is a person beneficially interested in the estate of his deceased uncle, A. Warner Shepard, who died on the 8th day of September, 1907 in the Borough of Brooklyn, City and State of New York, seized and possessed of real and personal property, which he devised and bequeathed by a last will and testament, dated August 21, 1907, a copy of which reads as follows:

"LAST WILL AND TESTAMENT OF A. WARNER SHEPARD.

"IN THE NAME OF GOD, AMEN, I, A. WARNER SHEPARD, of the Borough of Brooklyn, City of New York in the County of Kings and State of New York, being sound of body and mind and of disposing memory, but mindful of the uncertainty of human life, do make, publish and declare this to be my Last Will and Testament.

"First:—I direct my executors hereinafter named, as soon as possible after my decease to pay and discharge my funeral expenses and all my just debts and liabilities.

"Second:—I give, devise and bequeath all my estate both real and personal and wheresoever situated to my wife MARY S. SHEPARD to have and to hold the same for and during her natural life, hereby giving to her full power and authority to use, in addition to the increase and income thereof, whatever portion of the principal of my said estate she may, in her discretion, deem necessary for her comfort and maintenance. I further direct that she shall have the sole possession, management and control of my entire estate during the whole of her natural life without interference. This devise and bequest to be in lieu of dower.

"Third:—I further direct that my said wife shall have full and complete power and authority to sell, transfer, convey and dispose, at either public or private sale, any part or all of my real estate, if in her judgment she deems it advantageous or necessary for the benefit of my estate, and to give good and sufficient deeds for the conveyance and possession of the same with like force and effect as I might or could do if living.

"Fourth:—I further direct that in the event of the sale of any of my real estate as aforesaid that the proceeds of said sale be by my said wife invested and reinvested as occasion may require in bonds and mort-

gages on real estate, or in such securities as the laws of the State of New York authorize investments by Savings Banks.

"Fifth:—After the death of my said wife, I then give, devise and bequeath all the rest, residue and remainder of my estate both real and personal, wheresoever situated, then remaining, to my brother LUTHER D. SHEPARD, and to the children of my deceased brothers EDWARD O. SHEPARD and THOMAS B. SHEPARD share and share alike per capita and not per stirpes.

"Sixth:—If my brother LUTHER D. SHEPARD should not be living at the time of the death of my said wife and there should be a child or children of his body living, then and in such case it is my will and I do so direct that such child or children shall share equally per capita with the child or children of my two other deceased brothers.

"Seventh:—If at the time of the death of my wife there shall be living a child or children of a deceased child of either of my said three brothers, then and in that case such child or children shall take the share that its or their parents would take if living.

"Eighth:—I hereby nominate, constitute and appoint my said wife MARY S. SHEPARD executrix of this my last Will and Testament, and I do direct that my said executrix be free and exempt from any obligation to furnish bond or security as executrix under this will.

"Ninth:—I hereby revoke and annul all former wills I may have made prior to the date hereof.

"IN WITNESS WHEREOF, I, A. WARNER SHEPARD, have to this my last Will and Testament subscribed my name and set my seal this 21st day of August, 1907.

"Witnesses:

"BERNARD J. YORK,

"FRANK B. YORK.

"A. WARNER SHEPARD (Seal).

"Subscribed by the testator in the presence of each of us, and at the same time declared by him to us to be his last Will and Testament, and thereupon we, at the request of the testator, in his presence, and in the presence of each other, sign our name hereto as witness this twenty-first day of August, 1907.

"BERNARD J. YORK, residing at 56 St. Marks Av., Brooklyn, N. Y.

"FRANK B. YORK, residing at 56 St. Marks Av., Brooklyn, N. Y."

and which said last will was admitted to probate by decree of the Surrogate's Court of Kings County, New York, entered on the 20th day of November, 1907, and which said decree remains in full force and effect.

V. That the said testator left him surviving no issue, but left his wife, Mary S. Shepard aforesaid, who was named in said last will and testament as the executrix thereof, and to whom letters testamentary issued by decree of said court on the 20th day of November, 1907, under which she acted as such executrix and so continued to act until her decease, on or about the 5th day of September, 1920.

VI. That the plaintiff is the son of Edith E. Williams, who was the daughter of the testator's brother Thomas B. Shepard, deceased, referred to in the fifth paragraph of said will and testament, and who died at Springfield, Massachusetts, on the 11th day of November, 1915, leaving no child except this plaintiff her surviving.

VII. That under the provisions of the sixth and seventh paragraphs of the said will and testament this plaintiff is designated as a person belonging to a class who would be beneficially interested in the said estate so devised and bequeathed, as remaindermen or as residuary legatees and devisees, upon the contingency of their survivorship of their respective parents, and also upon their survivorship of the said Mary S. Shepard, the life tenant named in said will and testament.

VIII. That under the second paragraph of said will and Testament, a life estate in all the property of which the testator died seized and possessed was devised and bequeathed to the said Mary S. Shepard, wife of the testator, in lieu of her dower rights therein. This gift so provided she accepted and entered upon the use and enjoyment thereof immediately upon the death of her testator.

IX. That under the fourth paragraph of the said will and testament, said Mary S. Shepard was constructively constituted and appointed testamentary trustee of the real property of the said estate, with specific instructions and directions as to the kind of securities in which to invest the proceeds arising from the sale of any piece or parcel of such property.

X. That after accepting the trusts reposed in her as such executrix and testamentary trustee, and after accepting the bequests and devise so made to her in lieu of dower rights as aforesaid, the said Mary S. Shepard, while acting in a fiduciary capacity as such executrix and while enjoying the use of the estate so devised and bequeathed to her in lieu of dower, and while occupying toward the said estate the relationship of trustee, as shown by the directions of the testator, together with the trusteeship she had accepted and occupied toward the remaindermen or residuary devisees and legatees, which included this plaintiff, in violation of her duties in her representative capacities as aforesaid, and while in full possession of all facts and information touching all and singular the goods, chattels, credits and each and every part and parcel of the said estate so held by her, and without fully and fairly disclosing to this plaintiff the true status and amount of said estate, by means of an inventory or otherwise, or the value of the plaintiff's interest therein, undertook to and did deal with the subjects and objects of her said trust to her own profit and gain, in respect that she, by or through her attorneys, entered into negotiations with the persons constituting the class of remaindermen designated under paragraph fifth of said will and testament, for releases, assignments and conveyances to her of their rights and interests in and to the said estate, by virtue of the said will or otherwise, to the end that she might thereby become vested with the absolute legal title to all the real and personal property, comprising the said estate and did, on or about the fifth day of June, 1908, enter

into an agreement with the remaindermen aforesaid, with whom this plaintiff was influenced to join, purporting to release his rights and interests in and to an estate in expectancy, limited to him upon the contingencies shown by the sixth and seventh paragraphs of the said will and testament,—all to the prejudice of the rights and interests of these plaintiffs,—a copy of which agreement reads as follows:

"AGREEMENT made this Fifth day of June, 1908, between ALLEN R. SHEPARD, EDWARD O. SHEPARD, KATHERINE M. SHEPARD, RALPH L. SHEPARD, of Newburyport, Mass., LUTHER D. SHEPARD, LUTHER D. SHEPARD, Jr., MARIA B. SHEPARD, of Boston, Mass., and EDITH E. WILLIAMS and ALFRED R. WILLIAMS, of Springfield, Mass., parties of the first part, and MARY S. SHEPARD, of the Borough of Brooklyn, City of New York, party of the second part.

"WHEREAS, A. WARNER SHEPARD, late of the Borough of Brooklyn, City and State of New York, by his last will and testament, dated the 21st day of August, 1907, gave, devised and bequeathed all his estate, both real and personal, and wheresoever situated, to Mary S. Shepard above named, for and during the term of her natural life, giving her full power and authority to use in addition to the increase and income thereof, whatever portion of the principal of his estate she should in her discretion deem necessary for her comfort and maintenance, with remainder over to Luther D. Shepard, brother of said testator, and the children of testator's deceased brothers, Edward O. Shepard and Thomas R. Shepard, share and share alike, per capita and not per stirpes, with the further provision, that if Luther D. Shepard should not be living at the time of the death of testator's said wife, said Mary S. Shepard, and there should be child or children of his body living, then such child or children should share equally per capita with the child or children of testator's two other deceased brothers, and further providing that if at the time of the death of testator's said wife, there should be living a child or children of a deceased child of either of said three brothers, then and in such case, such child or children should take the share its parent would take if living, as will more fully appear by said last will and testament, a copy of which is hereto annexed and made a part hereof; and

"WHEREAS, we the said parties of the first part, in and by said Last Will and Testament, have an interest in expectancy, viz., a future estate, in the lands, property and estate, real and personal, of which said A. Warner Shepard died seized, being the remaindermen named in said last will and testament, the said Edward O. Shepard, Ralph L. Shepard, Katherine M. Shepard and Edith E. Williams being the only living children of said testator's deceased brother Thomas B. Shepard; the said Alfred R. Williams being the only living child of said Edith E. Williams; and the said Luther D. Shepard being the said testator's living brother; and the said Luther D. Shepard, Jr., being the only living child of said Luther D. Shepard; and

"WHEREAS the said party of the second part, Mary S. Shepard,

is the widow of said A. Warner Shepard, deceased, being the person named in said last will and testament as life tenant; and

"WHEREAS the said testator A. WARNER SHEPARD died on the 8th day of September, 1907, at the Borough of Brooklyn, City of New York, without having revoked or altered his said last will and testament, which was on the 20th day of November, 1907, duly admitted to probate in the Surrogate's Court, County of Kings, State of New York, as the last will and testament of said A. Warner Shepard valid to pass real and personal property; and

"WHEREAS, in the proceeding brought in the Surrogate's Court, Kings County, to prove said last will and testament, said Maria S. Shepard, one of the parties of the first part above named, appeared by Messrs. Parker, Hatch & Sheehan, her attorneys, and filed an answer objecting to the probate of said last will and testament for the reasons therein stated, and subsequently on the 20th day of November, 1907, withdrew her said answer and objections to said probate, seeking an adjustment, compromise and settlement of all her rights, interest or claim in, to or against the estate of said testator; and

"WHEREAS the other of the said parties of the first part did themselves contemplate an action or actions to determine the validity of the probate of said last will and testament, but being first desirous of effecting an adjustment, compromise and settlement of all their and each of their rights, interest, or claims in, to or against the said estate of said A. Warner Shepard, deceased, they, with Maria B. Shepard, being all the said parties of the first part, did on the 1st day of April 1908, sign a written authorization, as follows:

> "'Whereas we, the undersigned, are or may become entitled to an interest in the estate of A. Warner Shepard, late of Brooklyn, N. Y., either through a successful contest of the will of said Shepard, or under the terms of said will if it will be finally proved and allowed; and
>
> "'Whereas we desire to adjust and compromise our claims against said estate;
>
> "'Now therefore, we hereby authorize Messrs. Parker, Hatch & Sheehan of New York, or Messrs. Saltonstall, Dodge & Carter of Boston, or any representative of either of said firms, to act for us and represent us in negotiating a settlement with the representatives of said estate; and we hereby agree to do all acts and execute all deeds, conveyances and other papers necessary to render effective any such settlement.
>
> "'And we further agree that in case such a settlement is effected, reasonable counsel fees may be deducted from the sums received from said estate and that the balance remaining shall be divided among us, proportionately to our interest under the said will.'

"WHEREAS negotiations have been had between Messrs. Parker, Hatch & Sheehan, representating the parties of the first part, and Messrs. York & York, attorneys for the said party of the second part, and said

estate for the purpose of adjusting, compromising and settling all rights and interest that the said parties of the first part now have or ever may have, and all claims and demands which the said parties of the first part now have or ever may have, by reason of said last will and testament, or otherwise, of, in and to the estate, both real and personal, or any part thereof, of which the said A. Warner Shepard died seized and possessed, wheresoever the same may be situated, and as a result of said negotiations, the parties of the first part proposed for and in consideration of the payment to them of the sum of One Hundred and Ninety Thousand ($190,000.00) Dollars, to jointly and severally grant, sell, convey, assign, transfer, set over and release to the said party of the second part above named, her heirs, executors, administrators and assigns forever, all their estate, right, title, property, interest and rights both at law and in equity, and as well in possession as in expectancy of, in and to the lands, property and estate, real and personal, and wheresoever situated, of which the said A. Warner Shepard died seized and possessed; and

"WHEREAS the said party of the second part has accepted said proposition of settlement and adjustment;

"NOW THEREFORE, THIS INDENTURE WITNESSETH:—

"That in consideration of the premises and the sum of one dollar in hand paid to the said parties of the first part, the receipt whereof is hereby acknowledged, and the sum of One Hundred and Ninety Thousand ($190,000.00) Dollars to be fully paid as hereinafter provided, and for the purposes aforesaid, we, Allan R. Shepard, Edward O. Shepard, Katherine M. Shepard, Ralph L. Shepard, Luther D. Shepard, Luther D. Shepard, Jr., Maria B. Shepard, Edith E. Williams and Alfred R. Williams, and each and every one of us, being the said parties of the first part, have granted, sold, conveyed, assigned, transferred, set over and released and by these present do grant, sell, convey, assign, transfer, act over and release to the said party of the second part, her heirs, executors, administrators and assigns forever, all our estate, right, title, property, interest and rights both at law and in equity, and as well in possession as in expectancy of, in and to the lands, property and estate, both real and personal, of which the said A. Warner Shepard died seized and possessed, and wheresoever situated, together with the appurtenances, and all the estate and rights of the said parties of the first part in and to the said estate of which the said A. Warner Shepard died seized and possessed.

"It being intended and the parties of the first part, and each and every one of them, do by these presents grant and release unto the said party of the second part, her heirs and assigns forever, all the lands and real estate of which the said A. Warner Shepard died seized together with the appurtenances, and all the estate and rights of the parties of the first part in and to said lands and real estate, TO HAVE AND TO HOLD the same unto the said party of the second part, her heirs and assigns forever. And the said parties of the first part, and each and

every of them, do covenant with the said party of the second part, her heirs, successors and assigns, shall and may, at all times hereafter, peaceably and quietly have, hold, use, occupy, possess and enjoy the said real estate and every part and parcel thereof, with the appurtenances, without any let, suit, trouble, molestation, eviction or disturbance of the grantors, the parties of the first part, their heirs, successors or assigns, or any person or persons lawfully claiming or to claim the same; and that the grantors, the said parties of the first part, their heirs or successors, the real estate granted, and every part and parcel thereof, with the appurtenances, unto the grantee, the said party of the second part, her heirs, successors or assigns, against the grantors, the said parties of the first part, and their heirs or successors, and against all and every person whomsoever lawfully claiming or to claim the same, shall and will warrant and forever defend. And it being also intended and the parties of the first part, and each and every of them, do by these presents grant, sell, assign, transfer and set over all the personal property of whatsoever kind and description of which the said A. Warner Shepard died possessed, and all their right, title, property and interest in the same, unto the said party of the second part TO HAVE AND TO HOLD THE SAME to the said party of the second part, her executors, administrators and assigns, to her and their use and behoof forever; and the said parties of the first part, and each and every of them, for themselves and their heirs, executors and administrators, do covenant and agree to and with the said party of the second part, to warrant and defend the said personal property hereby sold, assigned and transferred unto the said party of the second part, her executors, administrators and assigns, against all and every person and persons whomsoever.

"AND WHEREAS the estate of said A. Warner Shepard consists of diverse parcels of real property, as well as personal property, consisting of stocks, bonds, moneys, etc.; and

"WHEREAS separate deeds, conveyances, assignments, bonds, bills of sale and releases for the better and more effectually vesting and confirming the property and interest hereby granted, conveyed, transferred and assigned is demanded by the said party of the second part; and

"WHEREAS the said parties of the first part have agreed and by these presents do agree to make, execute and deliver such deeds, conveyances, bills of sale, assignments, bonds and releases in manner and form as hereinafter provided.

"It is hereby expressly provided, covenanted and agreed in order to enable the party of the second part to prepare such necessary deeds, conveyances, bills of sale, assignments, bonds and releases, and as a guarantee that the said parties of the first part will execute and deliver such deeds, conveyances, assignments, bonds and releases, that the payment of the said sum of One Hundred and Ninety Thousand ($190,000.00) Dollars, the consideration herein expressed, will be withheld by the said party of the second part until the 15th day of July, 1908.

"And it is expressly covenanted and agreed by the said party of the

second part that on the said 15th day of July, 1908, at eleven o'clock in the forenoon, at the office of Messrs. York & York, No. 371 Broadway, Borough of Manhattan, City of New York, the said party of the second part shall pay the said sum of One Hundred and Ninety Thousand ($190,000.00) Dollars, the consideration herein expressed, to said Messrs. Parker, Hatch & Sheehan, the attorneys for the said parties of the first part, whom we, the said parties of the first part, and each and every one of us, hereby authorize, empower and direct shall receive the same for us as our attorneys. And the payment to the said firm of Parker, Hatch & Sheehan shall be a full and complete discharge and payment under this indenture.

"And the said parties of the first part on receiving such payment at the time and in the manner herein provided, shall execute and deliver to the said party of the second part, or to her heirs, executors, administrators or assigns, deeds, bills of sale, assignments, releases and bonds in form as follows, to wit:—The deed or deeds, in number as the said party of the second part may determine, to grant and convey in separate parcels or otherwise the lands and real estate wheresoever situated, of which said A. Warner Shepard died seized, which deed or deeds shall contain covenants of seizing, quiet enjoyment, further assurance, warranty of title, and that the grantors, the parties of the first part, have not done or suffered anything whereby the premises, property, rights, estate herein described have been encumbered; the assignments and bills of sale shall be in the usual form containing covenants of warranty and the necessary powers of attorney; the releases shall be in the usual form releasing, exonerating, and forever discharging the party of the second part, individually and as executrix, her heirs, executors and administrators, and all and every, the lands, property and estate, both real and personal, of and from any and all manner of motions, suits, accountings, and demands whatsoever, which the said parties of the first part ever had, now have, or which they, their heirs, executors or administrators at any time hereafter can or may have touching or concerning the management and disposition of any of the lands, property and estate, both real and personal, of which the said A. Warner Shepard died seized and possessed; and which shall contain a provision ratifying, validating and confirming said last will and testament; and a bond shall be executed and delivered in the following form:

"'KNOW ALL MEN BY THESE PRESENTS, That we, Allan R. Shepard, Edward O. Shepard, Katherine M. Shepard, Ralph L. Shepard, of Newburyport, Mass., Luther D. Shepard, Luther D. Shepard, Jr., Maria B. Shepard, of Boston, Mass., and Edith E. Williams and Alfred R. Williams, of Springfield, Mass., are held and firmly bound unto Mary S. Shepard, of the Borough of Brooklyn, City and State of New York, in the sum of One Hundred and Ninety Thousand ($190,000.00) Dollars, good and lawful money of the United States, to be paid to said Mary S. Shepard, her executors, administrators or assigns; for which payment well and truly to be made,

we do bind ourselves, our heirs, executors and administrators, jointly and severally, firmly by these presents, Sealed with our seals. Dated this day of 1908.

" 'Whereas, in and by the last will and testament of A. Warner Shepard, late of the Borough of Brooklyn, City and State of New York, dated August 21st, 1907, and which on the 20th day of November, 1907, was duly admitted to probate in the Surrogate's Court, County of Kings, State of New York, the said testator gives devised and bequeathed all such estate, both real and personal, to said Mary S. Shepard for and during her natural life, giving her full power and authority to use in addition to the increase and income thereof, whatever portion of the principal of said estate she should in her discretion deem necessary for her comfort and maintenance, and directing that she should have the sole possession, management and control thereof during the whole of her natural life without interference, and after the death of said Mary S. Shepard, gave, devised and bequeathed all the rest, residue and remainder of his estate both real and personal, then remaining to his brother Luther D. Shepard and to the children of his deceased brothers Edward O. Shepard and Thomas B. Shepard, share and share alike, per capita and not per stirpes, with the further provision that if Luther D. Shepard should not be living at the time of the death of said Mary S. Shepard, and there should be child or children of his body living, then such child or children should share equally per capita with the child or children of testator's said two other deceased brothers, and further that if at the time of the death of said Mary S. Shepard there should be living a child or children of a deceased child of either of testator's said three brothers, then such child or children should take the share its parent would take if living; and

" 'Whereas the above bounden Allan R. Shepard, Edward O. Shepard, Katherine M. Shepard, Ralph L. Shepard, Luther D. Shepard, Luther D. Shepard, Jr., Maria B. Shepard, Edith E. Williams and Alfred R. Williams, are the remaindermen named in said last will and testament, and as such have an interest in expectancy, viz., a future estate in the lands, property and estate, real and personal, of which said A. Warner Shepard died seized and possessed, and

" 'Whereas, we, the above bounden have granted, sold, conveyed, assigned, transferred and released all our estate, right, title, property, interest and right, both at law and in equity as well in possession as in expectancy of, in and to the land, property and estate both real and personal, of which said A. Warner Shepard died seized and possessed, for the sum of One Hundred and Ninety Thousand ($190,000.00) Dollars; but

" 'Whereas any after born child or children of any of the above bounden may have an interest in remainder in said estate and property, of which said A. Warner Shepard died seized and possessed,

by reason of said last will and testament, and cannot join in conveying the same to the said Mary S. Shepard; and.

"'Whereas the said Mary S. Shepard, at the request of the above bounden, and on their promise and understanding that any and all after born children of the above bounden will as soon as attaining the age of twenty-one years, grant, convey, assign, transfer and release unto the said Mary S. Shepard, her heirs, executors, administrators and assigns, all their estate, right, title, property and interest, in possession as well as in expectancy of, in and to the lands, property and estate, both real and personal, of which said A. Warner Shepard died seized and possessed, has paid unto the hands of the said Allan R. Shepard, Edward O. Shepard, Katherine M. Shepard, Ralph L. Shepard, Luther D. Shepard, Luther D. Shepard, Jr., and Maria B. Shepard, Edith E. Williams and Alfred R. Williams, the whole of the said purchase money, to wit:—One Hundred and Ninety Thousand ($190,000.00) dollars;

"'NOW THE CONSIDERATION OF THIS OBLIGATION is such that if the said after born child or children of the said above-bounden shall within a reasonable time after attaining the said age of twenty-one years, grant, convey, transfer, assign and release unto said Mary S. Shepard, her heirs, executors, administrators or assigns, by such deeds, conveyances, assignments and releases, as the counsel for said Mary S. Shepard shall advise, all their estate, right, title, property and interest in possession as well as in expectancy of, in and to all the property and estate of which said A. Warner Shepard died seized and possessed, and that without any consideration to be paid by the said Mary S. Shepard or her heirs, executors, administrators or assigns for so doing; and also, if, and in case the said Allan R. Shepard, Edward O. Shepard, Katherine M. Shepard, Ralph L. Shepard, Luther D. Shepard, Luther D. Shepard, Jr., Maria B. Shepard, Edith E. Williams and Alfred R. Williams, their heirs, executors and administrators, shall in the meantime and until the said after born child or children shall have executed such conveyances as aforesaid, save, defend, keep harmless, and indemnify the said Mary S. Shepard, individually and as executrix, her heirs, executors, administrators and assigns, and the said property and estate of said A. Warner Shepard, the rent, issues and profits thereof, of and from all claims and demands to be made thereto by or on the part and behalf of any said after born child or children, then this obligation to be void; otherwise to remain of full force and virtue.'

"And it is understood and agreed that the instruments above referred to are to be duly executed by all the said parties of the first part, and shall be prepared by the attorneys for the said party of the second part.

"It is further covenanted by the said parties of the first part that they have not made, done, committed, executed, or suffered any act or acts, thing or things whatsoever whereby or by means whereof their right, title,

property and interest of, in and to the said lands, property and estate, both real and personal, of said A. Warner Shepard, deceased, or any part or parcel thereof, now are, or at any time hereafter shall or may be impeached, charged or incumbered in any manner or way whatsoever.

"It is further stipulated and agreed that the validity, nature, obligation, interpretation and effect of this indenture shall be governed and determined by the Laws of the State of New York.

"And it is understood that the stipulations and covenants aforesaid are to apply to and bind the heirs, executors, administrators and assigns of the respective parties hereto.

"IN WITNESS WHEREOF, the parties to these presents have hereunto set their hands and seals the day and year first above written.

Sealed and delivered in the presence of:

ALLAN R. SHEPARD (Seal)
EDWARD O. SHEPARD (Seal)
KATHERINE M. SHEPARD (Seal)
RALPH L. SHEPARD (Seal)
LUTHER D. SHEPARD (Seal)
MARIA B. SHEPARD (Seal)
EDITH E. WILLIAMS (Seal)
ALFRED R. WILLIAMS (Seal)
LUTHER D. SHEPARD, Jr. (Seal)
MARY S. SHEPARD (Seal)."

(And acknowledgments).

XI. This plaintiff did not read the will of A. Warner Shepard nor the said paper purporting to be an agreement dated June 5, 1908, nor any of the papers subsequently signed by him as described in this bill nor any copy of said bill or of any of said papers, before any of said purported agreement and other papers were signed by him nor at any time prior to the death of said Mary S. Morris, neither was he informed of the contents of said will or of any of said papers before he signed any of the same. All the information that he had upon the subject before he signed said paper purporting to be an agreement and before he signed other papers was that he thereby released his interest in the estate of said testator A. Warner Shepard, and that his interest therein was of slight value and remote. He signed the same at the request and importunity of his mother, Edith E. Williams, deceased, who was then in straitened circumstances and who has since died. If this plaintiff had been previously informed by the said Mary or by any one of the true value of said estate and of the nature of his interest therein, he would not have signed the paper purporting to be an agreement nor any of the other papers referred to in this bill. At the time of said signatures by him made, plaintiff was ignorant of the terms of each and all of said papers and of the contents thereof, and of his rights under the said will and of the value of said estate and of the value of his interest therein. He did not consult nor did he have the advice of

any lawyer or any counsel before he signed any of said papers. When said papers were signed this plaintiff did not know, nor did he discover until subsequent to the death of said Mary S. Morris that Messrs. Parker Hatch and Sheehan were therein named as his representatives nor that said paper purported to authorize said firm to represent this plaintiff in any capacity nor that said paper purported to authorize Messrs. Saltonstall, Dodge & Carter to represent him nor that said paper mentioned either of said firms. Neither then nor at any time did this plaintiff ever retain Messrs. Parker Hatch & Sheehan as his attorneys. Neither then nor at any time did this plaintiff ever retain Messrs. Saltonstall, Dodge & Carter as his attorneys.

That thereafter and on or about the 15th day of July, 1908, this plaintiff executed certain papers, purporting to be releases, assignments, bills of sale and deeds, jointly and severally, with the aforesaid remaindermen and persons beneficially interested, and also certain deeds individually, in conformity with the provisions of the said agreement therefor, and for the execution of which and of said agreement and the rights and interests conveyed thereunder this plaintiff received no good, valuable or adequate consideration, either directly or indirectly, from any person or persons whomsoever, even though the said agreement recited a consideration of $190,000.00. Moreover, the plaintiff charges that no good, valuable or adequate consideration moved from the said Mary S. Shepard or from any other person or source to this plaintiff, or, in fact, to the said remaindermen with whom he joined in executing the aforesaid instruments, because of the fact that the said $190,000.00 recited as such consideration, was at all times a part of the corpus of the trust estate held by said Mary S. Shepard, as aforesaid, the plaintiff later learned from the appraisal thereafter filed, amounted to $781,210.77, or thereabouts. Over this trust estate said Mary S. Shepard was acting as trustee as aforesaid. The corpus of the trust estate was at that time vested in the beneficiaries or remaindermen aforesaid, subject to being divested upon the happening of certain contingencies, as shown by the context of said Will, and subject to the use of said Mary S. Shepard during her lifetime.

That the said sum of $190,000, named in said first agreement above described as the consideration therefor and for the execution of the papers subsequently executed under color thereof was inadequate and much less than the value at that time of the interest in the estate of A. Warner Shepard, owned by the persons who signed said agreement. Any and all sums of money paid by said Mary S. Shepard under color of said agreement, if any were paid by her, was paid by her out of the body and funds of the estate, bequeathed by A. Warner Shepard, as aforesaid, and no part was paid by her out of her own property. The said Mary has always lived within the income and rents of the said estate. She has never used nor applied to her own use for her comfort and maintenance any part of the principal of said estate. The net income of said estate on June 5, 1908, was at least $50,000 per year. There was no necessity on June 5, 1908, neither was there any probability of necessity of the expen-

diture by said Mary for her comfort and maintenance of using more than one-fourth part of such income. Said Mary, however, then had it in her power by secret investments of the principal and body of said estate in her own name or in the name of others for her benefit to make it appear that she had spent for her comfort and maintenance more than the income thereof and thus to impede and to make it costly and difficult for the remaindermen to enforce their rights to share in said estate.

XII. That in procuring the execution of the aforesaid instruments the said Mary S. Shepard attempted to secure the absolute legal title to all the real and personal property over which, by the terms of her testator's Will, she was impliedly and constructively appointed his trustee for the purpose of carrying out his wishes and executing his last will and testament, and attempted thereby to enable herself to dispose of the said property by her last will and testament, or otherwise, to strangers to the blood of her testator, acting in violation of the trusts reposed in her and in contravention of the provisions of his Will, which said attempt was in effect a wrongful conversion of the estate so entrusted to her and a fraud upon this plaintiff and such other persons designated by the seventh paragraph of testator's Will as might not then be in being and all of which done without application to or sanction of the said Surrogate's Court of Kings County or of any other court or judicial tribunal whatsoever, and all to the prejudice of the rights and interests of this plaintiff.

XIII. The plaintiff further alleges that the said Mary S. Shepard and her attorneys well knew that said plaintiff was to receive no portion of the said $190,000.00, because of the fact that her said attorneys made the offer of said amount based on the alleged equities of $25,000 net to each of the seven persons in whom the remainder was then vested, with the allowance of the balance of $15,000 for fees and disbursements, thereby making no provision for the plaintiff in payment for the release of his rights in and to the said estate, and at the same time persuading and fraudulently inducing him to believe that his interest was very remote.

XIV. The value of said estate was then at least the sum of $1,500,000, as your orator is informed and believes and therefore alleges. The value of one-seventh part thereof subject to the interest of said Mary was then at least the sum of $200,000, as your orator is informed and believes and therefore alleges. The value of one-seventh part thereof after deducting therefrom the interest of said Mary in said estate was then at least the sum of $107,000, as your orator is informed and believes and therefore alleges. These facts and the value of said estate said Mary fraudulently concealed from your orator and from the other remaindermen. Said estate consisted of land and also of a large number of negotiable securities for all of which said Mary has not accounted. She represented to the mother of your orator and to the persons who represented said mother that the value of said estate was not more than $781,210.77. Your orator did not discover nor receive any information concerning the actual value of said estate until after the death of said Mary. Said papers were signed by

your orator's said mother in reliance upon and under the belief that such representations were true. Plaintiff is ready and willing and he hereby offers to do whatever equity requires in the premises. [Next came an immaterial allegation.] Inasmuch as plaintiff has no adequate remedy at law, he prays:

(a) That this Court grant him an injunction *pendente lite* enjoining and restraining the defendant Frank B. York, individually and in his present or any other representative capacity he may occupy toward the estate of Mary S. Morris (formerly Mary S. Shepard), deceased, and the defendant Walter C. Morris and their agents and representatives, from disposing of any of the property affected by this suit.

(b) That the defendant, Frank B. York, be required to deliver up, to be impounded in this Court during the pendency of this suit, all instruments executed, either jointly and severally or individually, by this plaintiff or others touching the property affected by this suit.

(c) That each and every instrument executed, either jointly and severally or individually, by this plaintiff which purports to convey, release or assign the rights, title and interests of this plaintiff in and to the estate of the said A. Warner Shepard, deceased, to said Mary S. Shepard, be adjudged and decreed by this Honorable Court to be void and of no force and effect.

(d) That it be adjudged by this Court, and decreed, that upon the death of Mary S. Morris (formerly Mary S. Shepard), this plaintiff became seized in fee of an estate of inheritance in and to a one-seventh undivided interest in all of the real estate of which the said A. Warner Shepard died seized and possessed, save and except so much thereof as was disposed of by said Mary S. Shepard during her trusteeship over said property pursuant to the provisions and directions made therefor by said testator under the terms of his last will and testament.

(e) That it be adjudged and decreed by this Court that upon the death of said Mary S. Morris (formerly Mary S. Shepard), deceased, this plaintiff became vested with the absolute ownership in a one-seventh undivided interest in and to all of the personal property of which the said A. Warner Shepard died possessed or that into which such property has been equitably converted, together with that into which any part of the said real property has been equitably converted by said Mary S. Shepard pursuant to the provisions and directions therefor, save and except so much thereof as shall be herein allowed as costs of her administration.

(f) That the said Frank B. York individually and as the representative of the estate of said Mary S. Morris (formerly Mary S. Shepard), and as the custodian of the property hereby affected, be directed to pay over and distribute to this plaintiff an equal one-seventh part of the personal property of the estate of A. Warner Shepard, deceased, as shall appear to be attributable to him.

(g) That the said Walter C. Morris, surviving husband of said Mary S. Morris (formerly Mary S. Shepard), be directed to execute such deeds,

releases or other instruments as may be reasonably necessary or proper for the purpose of vesting in this plaintiff legal title to his equal one-seventh part of the real estate and personal property of the estate of A. Warner Shepard, deceased.

(h) That the defendant, Frank B. York, as the representative of Mary S. Morris (formerly Mary S. Shepard), deceased, be required to render proper accounts for her executorship and trusteeship or custodianship under the Will and estate of her said testator A. Warner Shepard.

(i) That the defendant, Frank B. York, individually and in his representative capacity, be required to account to this plaintiff for all profits, income and interest which shall have accrued upon the interests of this plaintiff in the estate affected by this suit.

(j) That the defendant, Walter C. Morris, be required to account to the plaintiff for and on account of any and all property, real, personal or mixed, of whatsoever nature, which he acquired by, through or from the said Mary S. Morris (formerly Mary S. Shepard) and to turn over to this plaintiff the part thereof which shall be decreed herein to belong to him.

(k) That a master or masters be appointed to take such accounting or accountings as may be found due to the plaintiff hereunder and to hear the parties and their evidence and report their findings to this Court.

(l) That the plaintiff may have such other and further relief as equity may require and as to this Honorable Court may seem just.

The other persons who signed paper purporting to be an agreement and said other papers purporting to be deeds to which reference is made in this bill with the exception of said Mary then were and still are and at the time of the commencement of this suit were citizens and residents of the state of Massachusetts, with the exception of Edward O. Shepard, who at all said times was and still is a citizen, resident and inhabitant of the state of Montana. Each and all of them consent to the relief herein prayed.

To the end, therefore, that said defendants may show cause why the plaintiff should not have the relief herein prayed for, and may make full, true and perfect answer, but not under oath (answer under oath being expressly waived) according to the best of their knowledge and remembrance, information and belief, to the several matters hereinbefore averred and set forth, as fully and particularly as if the same were repeated paragraph by paragraph and said defendants thereto severally and specially interrogated.

May it please Your Honors to grant to the plaintiff a writ of *subpoena ad respondendum*, issued out of and under the seal of this Honorable Court and directed to the defendants, Frank B. York, individually and as administrator of the goods, chattels, credits and estate which were of Mary S. Morris, formerly Mary S. Shepard, deceased, and as testamentary trustee under the paper purporting to be a will of Mary S. Morris, deceased; and to Walter C. Morris, and to Hazel A. Shepard, an infant, commanding them and each of them to appear to make answer to this bill of complaint, and to perform and abide by such order and decree herein as to this Court may seem required by principles of equity, and that a

guardian ad litem to represent said infant be appointed. And the plaintiff will ever pray.

ALFRED R. WILLIAMS,
Plaintiff.

RAY M. SHOEMAKER,
Solicitor for Plaintiff,
Office and Post-Office Address,
15 Park Row, Borough of Manhattan,
City and State of New York.

ROGER FOSTER,
BARKER, WHITE, WOOD & WILLIAMS,
Of Counsel.

DISTRICT OF MASSACHUSETTS,
STATE OF MASSACHUSETTS, } ss.:
COUNTY OF HAMPDEN.

ALFRED R. WILLIAMS, being duly sworn, deposes and says, that he is the plaintiff named in the foregoing bill of complaint; that he has read the foregoing complaint and knows the contents thereof, and that the same is true, of his own knowledge, except as to the matters therein stated to be alleged on information and belief, and as to those matters he believes it to be true.

Sworn to before me this 18th day of October, 1921.

ALFRED R. WILLIAMS.

[SEAL.] JOSEPH GOLDIN,
Notary Public.
My commission expires February 4, 1927.

FORM XII.—BILL IN EQUITY IN PATENT CASE.

[Approved by D. C. E. D. Michigan, So. Div. in 205 Fed. 158. Whether such a form would be approved by another court cannot be foretold. *Cf.* Maxwell S. V. Co. v. Nat. Casket Co., 205 Fed. 515.]

In the District Court of the United States for the Eastern District of Michigan Southern Division.

THE ZENITH CARBURETER COMPANY,
AND
SOCIETE DU CARBURATEUR ZENITH,
Complainants,
vs.
STROMBERG MOTOR DEVICES CO.,
Defendant.
} No. 1. IN EQUITY.

To the Honorable the Judges of the District Court of the United States for the Eastern District of Michigan Southern Division in Equity:

The Zenith Carbureter Company, a corporation organized and existing under and by virtue of the laws of the State of Michigan, and having its

principal office for the transaction of business in the City of Detroit, Wayne County, Michigan, and Societe Du Carburateur Zenith, a corporation of the Republic of France, having its principal office in the City of Lyon, France, bring this their bill of complaint against Stromberg Motor Devices Company, a corporation of the State of Illinois, having its principal office in the City of Chicago, Cook County, Illinois, and a branch office within the Southern Division of the Eastern District of Michigan, to-wit at number 463-465 Woodward Avenue, in the City of Detroit, Wayne County, Michigan, and thereupon your orators complain and say:

1. That Letters Patent of the United States number 907,953 were issued, on the 29th day of December, 1908, to Francois Baverey of Oullins, Rhone Department, Republic of France, his heirs and assigns for certain new and useful improvements in Carbureter for Explosive Engines, whereby there was granted to him, the said Francois Baverey, his heirs and assigns, the exclusive right to make, use, and vend the invention set forth, described and claimed therein, for the term of seventeen (17) years from said 29th day of December, 1908, throughout the United States and the territories thereof; that on or about the 20th day of August, 1910, said Francois Baverey did, by instrument in writing, thereafter duly recorded, and for a valuable consideration to him in hand paid, sell, assign and transfer his entire right, title and interest in and to said Letters Patent number 907,953, for the entire remaining term thereof to your orator, Societe Du Carburateur Zenith, a corporation of the French Republic, having its principal office at Lyon, France; and that thereafter, to-wit, on or about the 10th day of July, 1912, said Societe Du Carburateur Zenith did by instrument in writing, and for a valuable consideration to it in hand paid, granted unto your orator, The Zenith Carbureter Company, an exclusive license to make, use, and vend carbureters of the type set forth, described and claimed in said Letters Patent number 907,953, for their full remaining term, throughout the United States and the territories thereof, together with all privileges and rights of action as may have accrued thereunder subsequent to the first day of July, 1911, and previously to the date thereof. A printed copy of the specification and drawings of said Letters Patent number 907,953 is hereunto annexed and made a part of this bill; and profert is hereby made of said instrument of assignment and of said exclusive license hereinabove referred to, or of duly certified copies thereof, to be produced in Court when necessary.

2. That your orator, The Zenith Carbureter Company, was organized under the laws of the State of Michigan on July 3, 1911, and that it at once proceeded to manufacture and place upon the market carbureters of the type set forth, described and claimed in said Letters Patent number 907,953, that it has invested large sums of money in the equipment of a plant for such manufacture, and in advertising and otherwise bringing its products to the favorable attention of prospective buyers and users and has built up a large, lucrative, and expanding business based wholly and entirely on the one type of carbureter characterized by the disclosures of said Letters Patent number 907,953.

3. That said Stromberg Motor Devices Company, well knowing the premises and the rights of your orators, Zenith Carbureter Company, and Societe Du Carburateur Zenith, therein and thereto, with the intent of injuring your orator and to deprive them of the benefits and advantages which might and otherwise could accrue unto them from its rights in and to said Letters Patent number 907,953 as aforesaid, has, since said 1st day of July, 1911, and before the commencement of this suit, unlawfully, and without license or allowance by, and against the will of, your orators, and in infringement of their rights as set forth in and by said Letters Patent number 907,953, committed acts of infringement, to-wit, making, using and selling, and offering and importing into the said Eastern District of Michigan, for use and sale, and preparing, aiding, and encouraging others so to do, within the Southern Division of the Eastern District of Michigan, and elsewhere in the United States, carbureters for explosive engines constructed in accordance with the disclosures of said Letters Patent 907,953 and embodying the invention and improvements set forth, described and claimed therein, and that said Stromberg Motor Devices Company, is now continuing so to do, and is preparing and threatening so to do in the future, and that said Stromberg Motor Devices Company, though repeatedly advised and warned of your orator's rights in the premises, and requested to abstain from and cease its infringing acts and operations has disregarded such notice and warnings, and has refused to cease its infringing and unauthorized acts, all of which is contrary to equity and good conscience, and in violation of your orator's rights, as stated; and that said Stromberg Motor Devices Company, has failed and refused to pay over unto your orators all or any of the profits that have accrued to it in consequence of its unauthorized and infringing acts; and further that but for said Stromberg Motor Devices Company, said unlawful and unauthorized acts, your orators would still be in the undisturbed possession, use, and enjoyment of the exclusive privileges secured to them as owner of, and exclusive licensee under, said Letters Patent number 907,953, and in receipt of the profits accruing therefrom, all of which works great and irreparable injury to your orators and to their rights in the premises.

4. To the end, therefore, that said Stromberg Motor Devices Company may, if it can, show reason why your orators should not have relief, may it please your honors to bring said defendant, Stromberg Motor Devices Company before this Court by process of subpœna, there to make full, true, direct and perfect answer to the several matters and things herein set forth and charged (though not under oath, same being hereby expressly waived), and that it be decreed to account for and pay over to your orators the income and profits thus unlawfully derived, or which might and otherwise would have been accrued by your orators but for the unlawful and unauthorized acts of said Stromberg Motor Devices Company and that said herein above named Stromberg Motor Devices Company be required to produce its full records and accounts of all kinds touching upon and concerning its unlawful and unauthorized acts, for the guidance

of the Court in determining the amount justly due to your orators in consequence thereof, and further that said defendant, Stromberg Motor Devices Company may be restrained from any further violation of your orator's rights in the premises, may it please your honors to grant a writ of injunction issuing from and under the seal of this Honorable Court, perpetually enjoining and restraining said Stromberg Motor Devices Company, its officers, employees, attorneys, agents and representatives of every kind and grade, from further manufacture, use or sale, in any manner, or attempts thereat, or offers, negotiations or encouragement theretowards, in violation of your orators' right as aforesaid; and for the further protection of their rights, your orators pray that a provisional or temporary injunction or restraining order be issued, restraining the said Stromberg Motor Devices Company, its officers, employees, attorneys, agents and representatives of every kind and grade from any further infringement of said Letters Patent, pending this cause; and it further prays for such other and further relief as the equities of the case may require and to your honors may seem meet.

And your orators will ever pray, etc.

(Signed) SOCIETE DU CARBURATEUR ZENITH,
By Victor R. Heftler,
President & Treasurer.

(Signed) SOCIETE DU CARBURATEUR ZENITH,
By Victor R. Heftler,
American representative.

(Signed)
WILLIAM M. SWAN,
Solicitor for Complainant,
1010 Ford Building,
Detroit, Michigan.

STATE OF MICHIGAN, }
COUNTY OF WAYNE. } ss.

Victor R. Heftler, being first duly sworn, deposes and says that he is President and Treasurer of the Zenith Carbureter Company, one of the complainants in the above entitled cause, and that, though he holds no office in said Societe Du Carburateur Zenith, the French corporation named as the other complainant herein, he is generally and specially authorized to act for it and on its behalf in the commencement of suit by and through the foregoing bill of complaint; that he has read the same, subscribed by him on behalf of each complainant therein named, and knows the contents thereof and that the same is true of his own knowledge except such as are stated on information and belief, and as to those he believes it to be true.

VICTOR R. HEFTLER.

Subscribed and sworn to before me at
Detroit, Wayne County, Michigan,
this 1st day of February, 1913.

(Signed) ENOCH SMITH,
[NOTARIAL SEAL.] Notary Public, Wayne County, Michigan.1

[1] The following forms in patent cases in use in the Chancery Division of the High Court of Justice of England. They have been furnished to the author by the well known patent expert, Dr. George H. Benjamin. Whether they would be approved by the Federal Courts is a question not yet decided.

STATEMENT OF CLAIM.

In the High Court of Justice,
Chancery Division.
Between Albert Jones, Plaintiff,
and
William Dickson, Defendant.

1. The defendant has infringed and threatens to infringe the plaintiff's letters patent No. 36728 of 1907, granted for an invention entitled "IMPROVEMENT IN DRILLING MACHINERY." Particulars of breaches are delivered herewith.

2. The plaintiff claims:—

(1) An injunction to restrain the defendant, his servants and agents, from infringing the said letters patent.
(2) An inquiry as to the damages sustained by the plaintiff by reason of such infringement, or, at the option of the plaintiff, an account of the profits made by the defendant.
(3) That the defendant may be ordered to deliver up forthwith to the plaintiff all articles in his possession or power made in infringement of the said letters patent, or that the said articles may be ordered to be destroyed.
(4) Costs.

PARTICULARS OF BREACHES.

In the High Court of Justice,
Chancery Division.
Between Albert Jones, Plaintiff,
and
William Dickson, Defendant.

The following are the particulars of the breaches complained of in the statement of claim herein:—

1. The defendant on or about the 16th day of February, 1911, at his factory at Lewes, in the County of Sussex, manufactured the drilling machinery which forms the subject-matter of all of the claiming clauses in the specification of the plaintiff's patent.

2. On the 30th day of January, 1912, the defendant sold to John Doe of 60 Chancery Lane, London, a drilling machine manufactured by the defendants which forms the subject-matter of the plaintiff's patent. The plaintiff will rely upon this machine as an instance of the type of the infringement committed by the defendants.

STATEMENT OF DEFENSE.

In the High Court of Justice,
Chancery Division.
Between Albert Jones, Plaintiff,
and
William Dickson, Defendant.

(1) The defendant did not infringe the patent.
(2) The invention was not new.
(3) The plaintiff was not the first or true inventor.
(4) The invention was not useful.

(5) (Denial of any other matter of fact affecting the validity of the patent).

(6) The patent was not assigned to the plaintiff.

PARTICULARS OF OBJECTIONS.

In the High Court of Justice,
Chancery Division.
Between Albert Jones, Plaintiff,
and
William Dickson, Defendant.

Take notice, that the defendant will, on the trial of this cause, rely on the following objections to the validity of the letters patent sued upon:—

(1) The said Albert Jones was not the true and first inventor of the alleged invention. The true and first inventor thereof was Richard Roe of 36 Oxford St., London.

(2) The said alleged invention was not new at the date of the said letters patent. It had been published:—

(a) By the public manufacture, sale and use of drilling machines constructed in accordance with the said invention from the year 1899 to the present day at Huddersfield by the defendant, and also by James E. Smith, of Bolton, Lanes. Machines so manufactured are now in existence and may be inspected by the plaintiff at 17 Oxford Street, London.

(b) By the public manufacture, sale and use of machines constructed in accordance with the said invention from the year 1902 to the year 1905 at Lincoln by William Thompson, of Lincoln. The said articles are no longer in existence. A description and drawings of the said articles are delivered with these particulars.

(c) By the public manufacture, sale and use of machines by means of the patented process at Bolton by John Thomas of Bolton, from the year 1896 until the year 1898. A description of the said process of William Harris, of Bolton. The defendant will endeavor to obtain inspection of the apparatus by the plaintiff.

(d) By the deposit in the Patent Office Library of the following specification of letters patent granted in foreign countries:—

Name	Date & No.	Country	Claims of Plaintiffs, specification against which relied on
Wilson	176,543	U. S. A.	Claims 1, 3 and 7
Johnson	3,478	Germany	Claims 2 and 4

(e) By the publication of the following specifications of British letters patent:

Name	Date & No.	Parts Relied on	Claims of Plaintiffs, specification against which relied on
Thomas	17,324/95	p. ps. 5 to 7	Claims 1, 3 and 7
Hancock	21,342/92	p. ps. 3 and 4	Claims 1, 3 and 7

(f) By the deposit in the Library of the British Museums in the year 1897 of a work bearing the title "DRILLS AND DRILLING MACHINERY" by William E. Vassas, and in particular by the passage commencing at p. 76, line 7 and ending at p. 80, l.14.

(3) The said alleged invention was not proper subject-matter for letters patent having regard to the common general knowledge at the date thereof. The defendant will rely upon the specifications set forth under paragraph 2 hereof as part of the common general knowledge of the art.

(4) The said alleged invention was not useful.

(5) The specification is insufficient to enable the invention properly to be carried into effect. The plaintiffs will rely upon the passage of p. 2, l.14 to p. 3, l.3, wherein no sufficient directions are given for causing the cam J to effect the required movement.

(6) The specification gives directions which are misleading and dangerous. If the directions on p. 3, l.12 to p. 3, l.24, are carried out, the machines will not work.

(7) The subject-matter of the said letters patent was the subject-matter of a prior grant of letters patent to William Davis dated January 2d, 1907, and numbered 368 of 1907, which letters patent were and are good and valid.

DECREE.

In the High Court of Justice,
Chancery Division.
1911 C. No. 326.

COLMAN and others v. COOK & CO.

NOTICE is hereby given that on the 6th day of November, 1912, it was ordered

1. That the above-named defendants, Cook & Co., and their servants and agents should be

PERPETUALLY RESTRAINED FROM INFRINGING

the Plaintiff's Letters Patent No. 18778 of the year 1900 and No. 2311 of the year 1903.

2. That an inquiry should be made as to what damages the Plaintiffs had sustained by reason of the Defendants' infringement and that the Defendants should PAY SUCH DAMAGES when ascertained.

3. That the Defendants should forthwith upon oath DELIVER UP to the Plaintiffs or BREAK UP or otherwise RENDER UNFIT FOR USE all knotting machines or parts of knotting machines manufactured or let for hire by or by the use of the Defendants in infringement of the aforesaid Letters Patent which are in the possession, custody or power of the Defendants or their servants or agents..

4. That the Defendants should PAY THE TAXED COSTS of the action.

Plaintiffs' Solicitors.

FORM XIII.—BILL IN EQUITY IN PATENT CASE WITH ALLEGATIONS TO SUPPORT INTERLOCUTORY INJUNCTION.

In the District Court of the United States, Northern District of Illinois, Eastern Division.

A. SCHRADER'S SON, INCORPORATED *vs.* PROTEX MFG. COMPANY.	In Equity 1064 on U. S. Patent No. 927,298, dated July 6, 1909.

The Plaintiff, for its bill of complaint, alleges:

FIRST: That it is a corporation duly organized and existing under and by virtue of the laws of the State of New York, and a citizen and resident of said State, and that on information and belief the above-named Defendant, PROTEX MFG. COMPANY, is a corporation organ-

ized and existing under the laws of the State of Illinois and a citizen of said last-named State and a resident and inhabitant of the Northern District of Illinois, Eastern Division, having a regular and established place of business at Chicago, in the County of Cook, in said Eastern Division, where it has committed the acts of infringement hereinafter complained of.

SECOND: That this suit is brought under the patent laws of the United States for the infringement of Letters Patent, wherein the jurisdiction of the Court depends upon the subject-matter.

THIRD: That on or about the 9th day of October, A. D. 1908, CHARLES R. TWITCHELL, being within the meaning of the statutes of the United States then in force, the original, sole and first inventor or discoverer of certain improvements in Pressure Gauges for Pneumatic Tires, and being entitled to a patent therefor under the provisions of said statutes, duly filed in the United States Patent Office an application for Letters Patent for said invention, and that on the 6th day of July, 1909, all the requirements of the statutes then in force having been complied with, Letters Patent of the United States No. 927,298 were duly issued on said application to said Charles R. Twitchell, a copy of which Letters Patent is hereto attached, and marked "Exhibit A," and prayed to be taken as part hereof.

FOURTH: That the validity of said Letters Patent numbered 927,298, has been sustained by a decree of the United States Circuit Court, Southern District of California, Southern Division, in a suit between Charles R. Twitchell and the Northam Auto Pressure Gage Company, wherein the defendant was charged with infringing claims 1, 2, 3 and 4 of said patent; that defendant's article was made according to Letters Patent No. 948,526 of February 8, 1910; that at final hearing on pleading and proofs which occupied two full days the Court in an oral opinion sustained the validity of said Letters Patent and held that the defendant had infringed claims 1, 2, 3 and 4 thereof, as will more fully and at large appear from a certified copy of the decree of said Court here in Court to be produced and prayed to be taken as part hereof.

FIFTH: That the validity of said Letters Patent 927,298 has been sustained by the Supreme Court of the District of Columbia in a suit between the said Charles R. Twitchell and the Rudolph & West Company, a corporation organized and existing under the laws of the District of Columbia, wherein defendant was charged with infringing claims 1, 2, and 3 of said patent; that on final hearing on pleadings and proofs the said Court decided in favor of said Twitchell on October 26, 1911, as will appear from the opinion of His Honor Judge Clabaugh (Commissioner's Decisions 1912, page 417) (Official Gazette, Vol. 177, page 527), and on October 30, 1911, authorized a decree holding said Letters Patent valid and infringed, which decree was duly entered, as will more fully and at large appear from a certified copy of the decree of said Court here in Court to be produced, and prayed to be taken as part hereof.

SIXTH: That on May 18, 1911, the said Charles R. Twitchell instituted suit in the United States Circuit Court for the Southern District of

New York against the Prest-O-Lite Company, a corporation organized and existing under and by virtue of the laws of the State of New York, charging infringement of said Letters Patent by the sale of pressure gauges in violation of the rights of the said Charles R. Twitchell and that a decree *pro confesso* was entered by said Court on September 22, 1911, and still remains in full force and effect.

SEVENTH: That on September 19, 1911, in the United States Circuit Court for the Southern District of New York the said Charles R. Twitchell entered suit against the New York Sporting Goods Company, a corporation of the State of New York, charging the said defendant with the sale of pressure gauges in violation of rights of the said Charles R. Twitchell under said Letters Patent; that said New York Sporting Goods Company duly entered its appearance by counsel, but filed no answer, plea, or demurrer to the bill of complaint, wherefore, a final decree, authorizing a perpetual injunction was entered in said cause on February 20, 1912, as will more fully and at large appear from a certified copy of the decree of said Court here in Court to be produced, and prayed to be taken as part hereof.

EIGHTH: That on or about the 26th day of October, 1911, in the United States Circuit Court for the Southern District of New York, said Charles R. Twitchell entered suit against the Allen Auto Specialty Company, a corporation of the State of New York, charging said defendant with the sale of pressure gauges in violation of rights of the said Charles R. Twitchell under said Letters Patent; that said Allen Auto Specialty Company duly entered its appearance by counsel and filed an answer to said complaint but thereafter recognized the validity of said Letters Patent and its infringement by said Allen Auto Specialty Company, and was granted a license under said Letters Patent empowering it upon the payment of stipulated royalties to manufacture and sell its said pressure gauge, which license the said Allen Auto Specialty Company has continued to operate under down to the present time.

NINTH: That on or about the 26th day of October, 1911, in the United States Circuit Court, for the Southern District of New York, the said Charles R. Twitchell entered suit against A. Schrader's Son, Inc., a corporation of the State of New York (the present plaintiff herein) charging said A. Schrader's Son, Inc., with the sale of pressure gauges known as "Schrader Universal Tire Pressure Gauges" in violation of the rights of said Charles R. Twitchell under said Letters Patent; that said A. Schrader's Son, Inc., duly entered its appearance by counsel and duly filed its answer to said bill of complaint; that before such cause came on for trial said A. Schrader's Son, Inc. (the present plaintiff) acquired the entire right, title and interest in and to said Letters Patent in the manner set forth in Paragraphs Ten and Eleven hereof.

TENTH: That on or about the 12th day of February, 1912, the said Charles R. Twitchell by an instrument in writing, dated on or about said day, and duly executed and delivered to the City Real Estate Company, a corporation of the State of New York (acting as trustee for the plain-

tiff herein), sold, assigned, transferred and set over unto the said City Real Estate Company, the entire right, title and interest in and to said Letters Patent No. 927,298, as will more fully appear from a certified copy of said assignment here in Court to be produced, and prayed to be taken as part hereof.

ELEVENTH: That thereafter, to-wit: on or about the 20th day of August, 1912, plaintiff's trustee, the said City Real Estate Company, by an instrument in writing, dated on or about said day, and duly executed and delivered to Plaintiff, sold, assigned, transferred and set over to plaintiff the entire right, title and interest in and to said Letters Patent No. 927,298, and that plaintiff is now the owner of said Letters Patent and of all rights of action, claims, or demands thereunder, and for infringement of said patent as will more fully appear from a certified copy of said assignment here in Court to be produced, and prayed to be taken as part hereof.

TWELFTH: That on or about the 21st day of October, 1912, plaintiff instituted suit in the United States Circuit Court for the Northern District of Illinois, Eastern Division, against E. Edelmann & Company, a corporation of Illinois, charging infringement of said Letters Patent by the sale of Pressure Gauges in violation of plaintiff's rights; that in said suit plaintiff duly moved for a preliminary injunction against said E. Edelmann & Company, which motion was heard before His Honor, Judge Landis, on or about the 16th day of December, 1912; that said E. Edelmann & Company duly appeared by counsel and fully presented its defense to said motion; thereupon the Court granted said motion and authorized a decree, dated the 16th day of December, 1912, holding said Letters Patent valid and infringed; as will more fully and at large appear from a certified copy of said decree here in Court to be produced, and prayed to be taken as part hereof. That thereupon and on the 6th day of January, 1913, said E. Edelmann & Company entered an appeal to the United States Circuit Court of Appeals for the Seventh Circuit, which appeal was allowed by His Honor, Judge Carpenter, on the 6th day of January, 1913; that after briefs on appeal for the plaintiff and defendant had been duly presented and filed, said appeal was withdrawn by said defendant on or about the 7th day of April, 1913, and that on or about the 14th day of April, 1913, a final decree was entered in said cause, as will more fully and at large appear from a certified copy of said decree here in Court to be produced, and prayed to be taken as part hereof.

THIRTEENTH: That on or about the 2nd day of April, 1914, the plaintiff instituted a suit in the United States District Court for the Southern District of New York against the 35% Automobile Supply Company, a corporation organized and existing under and by virtue of the laws of New York, charging infringement of said Letters Patent by the sale of pressure gauges in violation of plaintiff's rights. Answer in said suit was filed on or about April 24, 1914, preliminary injunction was issued by said Court July 22, 1914, an interlocutory decree by default

was entered on March 1, 1915, and accounting proceedings commenced on April 1, 1915.

FOURTEENTH: That on or about the 1st day of May, 1917, plaintiff instituted a suit in the United States District Court for the Northern District of Illinois, Eastern Division, against the Martin Gauge Company, a corporation of Illinois, charging infringement of said Letters Patent by the sale of pressure gauges in violation of plaintiff's rights under said Letters Patent; that answer was duly filed by said Martin Gauge Company on or about the 20th day of June, 1917; that said defendant thereupon ceased the manufacture and sale of such infringement gauges; and that said suit is still pending.

FIFTEENTH: That notice has been given to the public that the Pressure Gauges for Pneumatic Tires embodying the improvements or inventions claimed in and by said Letters Patent numbered 927,298 are patented by affixing on all gauges sold thereunder the word "Patented," together with the day and year the patent was granted.

SIXTEENTH: That the invention covered by said Letters Patent is of great commercial value and has been successfully exploited by said plaintiff and the said Twitchell; that pneumatic tire air gauges embodying said invention are the only practical, successful and efficient air gauges for this purpose on the market; that there was a demand for such gauges, and that the previous efforts of others to produce an efficient air gauge for this purpose were unsuccessful and that a large and valuable industry of great value to plaintiff has arisen as the result of the invention of the said Twitchell, and that plaintiff is fully capable of supplying the demand for air gauges embodying the said invention.

SEVENTEENTH: That the defendant has, subsequent to August 20, 1912, infringed upon said Letters Patent No. 927,298 by making, using and selling within the Northern District of Illinois, Eastern Division, and elsewhere in the United States, Pressure Gauges for Pneumatic Tires, embodying the invention described in said Letters Patent and has continued so to infringe, whereby defendant has profited and plaintiff has been damaged. That plaintiff is informed and believes that the defendant is now infringing upon said Letters Patent and has on hand large quantities of said Pressure Gauges for Pneumatic Tires made in infringement of said patent, which it is offering for sale.

EIGHTEENTH: That the acts of infringement hereinbefore complained of have been without the authority or license of the plaintiff, or its predecessors in ownership of said Letters Patent, and against the will and in violation of the rights of plaintiff, or its said predecessors.

The plaintiff, therefore, prays:

1. For an injunction and a preliminary injunction pending this suit, restraining the defendant, its officers, servants and agents from infringement of said Letters Patent No. 927,298;

2. For costs and an accounting for profits and damages, and that any damages assessed may be tripled;

3. For such other and further relief as the circumstances of the case may require.

A. SCHRADER'S SON, INCORPORATED,
[CORPORATE SEAL.] By M. C. SCHWEINERT,
Treasurer and General Manager.

BARNETT AND TRUMAN,
Solicitors for Plaintiff.
GRAFTON L. MCGILL (MCGILL AND MAGUIRE)
EUGENE V. MYERS,
Of Counsel.

STATE OF NEW YORK, }
County of Kings. } *ss.*

M. CHARLES SCHWEINERT, being duly sworn, deposes and says that he is Treasurer and General Manager of A. SCHRADER'S SON, INCORPORATED, the plaintiff herein; that he has read the foregoing bill of complaint; that the statements therein contained are true of his own knowledge except so far as they are stated to be on information and belief; and that as to those matters he believes them to be true; and deponent further states that he believes CHARLES R. TWITCHELL to be the original, true and first inventor of the new and useful improvements described in the Letters Patent set forth in said bill of complaint and that plaintiff's title to said Letters Patent is as set forth in said bill of complaint.

M. C. SCHWEINERT.

SWORN TO and subscribed before me this 1st day of May, 1918.

GEORGE A. HUNTER,
[NOTARY'S SEAL.] *Notary Public.*

FORM XIV.—BILL IN EQUITY IN COPYRIGHT CASE.

[Demurrer overruled except as to the omissions cured by the amendments herein inserted, 119 Fed. 271.]

[*District*] *Court of the United States, Southern District of New York, in the Second Circuit.*

EDWARD THOMPSON COMPANY
against } *In Equity.*
AMERICAN LAW BOOK COMPANY.

To the Judges of the [*District*] *Court of the United States for the Southern District of New York, in the Second Circuit:*

The Edward Thompson Company, a corporation duly organized under the laws of the state of New York, having its principal office and place of business at the village of Northport, Long Island, and a resident and citizen of the state of New York, brings this bill against the American Law

Book Company, a corporation duly organized under the laws of the state of New Jersey, having its publication office and place of business and a resident agent in the city of New York, in the southern district of New York.

And thereupon your orator complains and says that your orator is and for thirteen years last past has been a corporation, duly organized, created and established by and under the laws of the state of New York, for the purpose of carrying on the business of making, editing, preparing, publishing, and selling law books, and that during such time it has carried on and still carries on said business at the village of Northport, Long Island, in the state of New York, where it has its principal office and place of business; that the defendant, The American Law Book Company, is and for a year last past has been, a corporation duly organized, created and established by and under the laws of the state of New Jersey, for the same purpose, and that during such time it has carried on and still carries on said business at the city of New York, in the state of New York, where it has its publication office and place of business; and that the defendant, as well as your orator, is, and both of them are, residents and citizens of the United States.

And your orator further alleges and shows that it is, and at the time of the commission of the acts hereinafter complained of was, the author and proprietor of certain publications known as the American and English Encyclopædia of Law, Second Edition, and the Encyclopædia of Pleading and Practice; that said books were designed to give a complete statement of the law on the subjects touched upon therein, and together with their continuations now in the course of preparation, are designed to cover all American and English substantive law, and the practice and procedure in the courts of the United States, both state and federal, and to form a complete and practical working library for the members of the bench and bar in this country; that said volumes were edited, prepared and published by and under the direction of your orator at great expense, from original sources, your orator being at great expense in collecting the cases and authorities therein cited and searching for judicial precedents, and in discussing and formulating the propositions of law therein contained, and in presenting, selecting and arranging the matter contained in said books; that the contents of such books are alphabetically arranged under topics of the law, and consist of text classified in order giving epitomized statements of the law with notes of decisions, statutes and authorities sustaining, illustrating or explaining the same, and of words which have received judicial construction, with a statement of the decisions and citations of the cases, all of which is original compilation by your orator from original sources of information.

And your orator further alleges and shows that it and its predecessor in business, one Edward Thompson, whose rights it secured by purchase and assignment, have been engaged in the editing and publishing of Encyclopædias of Law since 1887, being owner and publisher of the American and English Encyclopædia of Law, whose publication was first commenced in the year 1887; that the American and English Encyclopædia

of Law, Second Edition, is a new and original work entirely rewritten and not based upon the first edition of such work, but given the name of "Second Edition" to distinguish it from such first Encyclopædia of Law published by your orator and its predecessor in business.

And your orator further alleges and shows that within the seven years last past, it, from time to time, made, edited, and prepared and published, and thereupon became and was the author and proprietor of, the following publications, being the books, so far as published to date, comprising the series known as the American and English Encyclopædia of Law, Second Edition, and the Encyclopædia of Pleading and Practice:

[Next follow description with dates of deposit of title page in mail and of two copies in mail.]

And your orator further alleges and shows that, as such author and proprietor, your orator, desiring to secure a copyright upon the aforesaid publications, in accordance with the statutes of the United States in such case made and provided, before the publication of each of said volumes respectively and on the dates above set forth respectively, duly deposited in the mail within the United States, to wit, at the village of Northport, Long Island, New York, addressed to the Librarian of Congress at Washington, District of Columbia, a printed copy of the title of each of said volumes, together with the statutory fee for recording the same, and in accordance with the law, on the dates above set forth respectively and not later than the date of publication of each book respectively, deposited in the mail within the United States, to wit, at the village of Northport, Long Island, New York, addressed to the Librarian of Congress at Washington, District of Columbia, two copies of each of said copyrighted books, and that such copyrighted books in each and every case were printed from plates made in the United States, from type set within the limits of the United States; and your orator avers that it has done all acts and complied with all legal requirements necessary to establish its right to the aforesaid copyrights under the statutes of the United States in such case made and provided.

Your orator further shows that it has caused to be printed and inserted in the several copies of each volume of every edition of the said book called "American and English Encyclopædia of Law, Second Edition," and in the several copies of each volume of every edition of the said book called "Encyclopædia of Pleading and Practice," on the page immediately following the title pages thereof the word "copyright," together with the year the copyright was entered, and the words "Edward Thompson Company," as required by law.

Your orator further shows that before the committing by respondent of the wrongful acts complained of in the bill of complaint, the titles of all the volumes the copyright of which is alleged in said bill to belong to complainant, to wit, volumes 1 to 19 inclusive of the American and English Encyclopædia of Law, Second Edition, and volumes 1 to 21 inclusive of the Encyclopædia of Pleading and Practice, were duly recorded by the Librarian of Congress on the following dates, respectively, viz.:

[Next followed dates of record of titles.]

And your orator further alleges and shows that each and all of said books were composed, edited, prepared, arranged, and compiled from original sources of information by and under the direction of your orator, and each of said books contained and contains a large amount of matter wholly original with your orator, all of which is the private property of your orator, and that your orator applied for and, as such author and proprietor, obtained, the copyright thereof as aforesaid.

And your orator further alleges and shows that it has from time to time printed a large number of said books and sold the same to its customers and subscribers, and has caused to be printed and inserted in each and all of said copies or volumes, on the back of the title page, the word "Copyright," together with the year the copyright was entered and the words "Edward Thompson Company," as required by law, and has complied with all legal requirements necessary to maintain its right to the aforesaid copyrights, and that your orator has never sold or transferred any of said copyrights of said books or any interest or share in the same, nor has it authorized defendant to publish any of said volumes or any portion thereof, or any extracts, excerpts or abridgments thereof, but your orator was and is the sole and exclusive owner of the stock and the proprietor of all of said copyrights, and has the sole and exclusive right to publish each and all of said books and the collections of cases and authorities under the topics in such books, and the exclusive right to all the contents contained in each and all of said books; and that the copyrights of said books are of great value, to wit, of the value of five hundred thousand dollars, and the loss and damage to your orator by reason of the violation is not less than the same amount.

Nevertheless, as your orator further alleges and shows, the defendant was organized for the purpose of publishing and selling an encyclopædia designed to cover the same field of work as your orator's publications and in competition therewith, and in pursuance of such design defendant has caused to be prepared a book known as the "Cyclopædia of Law and Procedure," which it is now selling in competition with your orator's publications, containing a large amount of your orator's original copyrighted matter taken, copied and pirated from your orator's publications aforesaid.

And your orator further alleges and shows that defendant, in preparing its Cyclopædia of Law and Procedure, volumes one and two, has as a substitute for and in lieu of a resort to original sources unfairly used the results of your orator's labor as set forth in your orator's publications aforesaid, and has incorporated such results in defendant's publications, and defendant's said publications are to a very large extent the product of your orator's original work rewritten as to form and with changes, omissions and additions made by defendant, so as to conceal the fact that it was the product of your orator's original work as aforesaid; that defendant, instead of resorting to original sources for citations of cases, definitions of terms, statements of legal principles, and similar legal information, has to a very large extent obtained the same from your orator's said publications, thereby unfairly availing itself of your orator's original work, the results of which it published as its own original work

in unfair competition with your orator's publications and in violation of its copyrights as aforesaid, and to the great injury and irreparable damage of your orator in its business, and for which it cannot be compensated in damages in an action at law.

And your orator further alleges and shows that the promoter and chief officer and manager of defendant's company is one Charles W. Dumont, who, prior to the organization of The American Law Book Company, was the treasurer of and a stockholder in the Edward Thompson Company, and was fully conversant with its plans and methods, having personal acquaintance with your orator's editors, salesmen and other employees and their methods of work, and that by reason of such fact defendant is fully informed as to your orator's business and its plans and methods, and that in order the better to carry out its scheme of unfair competition and to avail itself of your orator's good name and standing, and its original work as aforesaid, its methods of business and its copyrighted work, defendant has employed many of your orator's editors, salesmen and other employees, and has skilfully stimulated the title of its said publications and its advertising matter, using in its advertising matter quotations and apt phrases long associated with the advertising matter used by your orator; that the better to conceal the use of any piracy upon your orator's publications in the preparation of defendant's books defendant has advertised that certain well known persons not connected with your orator's publications were editing its volumes and has caused the names of such persons to be inserted in its books as editors of articles, notwithstanding the fact that such articles were wholly written and prepared by former editors of your orator. And because defendant has availed itself of the original copyrighted work and the methods and ideas of your orator in making, preparing and selling its said publications, it is thereby enabled to prepare and publish its books with greater ease and accuracy and at far less expense and to sell the same in greater numbers and at less price than would be otherwise possible, in direct competition with your orator's books; all of which infringements, copying and piracy will more fully appear upon an examination and comparison of said Cyclopædia of Law and Procedure volumes one and two, with the aforesaid copyrighted books of your orator; that the said Cyclopædias of Law and Procedure are infringements of and piracies upon the copyrights of your orator, and the said books were made and intended to take the place of, and as far as possible to supersede, the said books of your orator; and that by means of the various arts and devices aforesaid defendant has been and is selling large numbers of its books to persons who would otherwise have bought or would now buy the books of your orator, to its great loss and damage; and the defendant, by means of the acts and devices aforesaid, unless restrained by this honorable court, will sell large numbers of its said books to persons who would otherwise buy the said Encyclopædias of your orator, to its great loss and damage. All of which acts and doings of the defendant are contrary to equity and good conscience and tend to the manifest injury and wrong of your orator in the premises.

And your orator further alleges and shows that the corporation defend-

ant has and maintains an office in the city of New York, in the southern district of New York, where its books are edited and published and where the same are kept on sale, which office is under the personal charge and supervision of its president, one Charles W. Dumont, and defendant's books have imprinted on their title pages, as the place of publication from which they are issued and sold, the said city of New York.

consideration whereof, and forasmuch as your orator is without adequate remedy, save in a court of equity, your orator prays this honorable court to issue its writ of subpœna in due form of law directed to the said American Law Book Company, the defendant aforesaid, commanding it, at a certain day and under a certain penalty to be therein specified, to appear before this honorable court to answer all and singular the matters and things hereinbefore set forth and complained of.

But the answers to the bill of complaint need not be under oath, an answer under oath being hereby expressly waived.

And your orator prays that defendant may be restrained by injunction, preliminary until final hearing and perpetual thereafter, from publishing, selling or exposing for sale, or causing or being in any way concerned in the publishing, selling or exposing for sale, said Cyclopædia of Law and Procedure, volumes one and two, hereinbefore complained of, and that the defendant be required to surrender and deliver the same to your orator, and be decreed to render an account of all of said books or numbers published and of all that have been sold, and to pay the same, besides the damages suffered from such unlawful publications, and the costs of this suit, to your orator; and that your orator may have such other and further relief as the nature and circumstances of the case may require, and as to this court shall seem just and equitable.

EDWARD THOMPSON COMPANY,
By JAMES COCKCROFT, Prest.

WALTER LARGE,
Solicitor for Complainant,
Office and post-office address, Temple Court, New York City.
FRANK P. PRICHARD,
Of Counsel.

UNITED STATES OF AMERICA,
Southern District of New York. } ss.

James Cockcroft, being duly sworn, deposes and says that he is president of the corporation complainant above named, and is familiar with its business; that he has read the foregoing bill of complaint and knows the contents thereof; that the same is true to the knowledge of deponent except as to matters therein stated to be alleged on information and belief, and that as to those matters he believes it to be true.

JAMES COCKCROFT.

Subscribed and sworn to before me this
ninth day of December, 1901.
GEO. BABCOCK,
[SEAL.] Notary Public.

FORM XV.—BILL TO PROTECT TRADEMARK.

[Baglin v. Cusenier Co., 221 U. S. 580, in which the author was counsel.]

[TITLE.]

BILL OF COMPLAINT.

To the Honorable the Judges of the Circuit Court of the United States for the Southern District of New York:

Your orator, Pere Alfredo Luis Baglin, of Tarragona, Spain, Procureur of the Order of Carthusian Monks, Convent La Grande Chartreuse, for himself and all of the other members of the said order, brings this his bill of complaint against Cusenier Company, a New York corporation, located at and having its principal office and place of business at No. 110 Broad Street, in the Borough of Manhattan, City and State of New York, within the Southern District of New York. And thereupon your orator complains and says:

I. That said Order of Carthusian Monks, of the Convent La Grande Chartreuse, generally known as "Peres Chartreux" (Chartreuse Fathers), has for about nine hundred years prior to 1901, continuously occupied a convent at La Grande, near Voiron, in the Department of Isere, Republic of France, and for upwards of four hundred years last past has continuously carried on the manufacture of a certain liqueur or cordial known throughout the world as "Chartreuse," which said liqueur or cordial has been, and now is manufactured by them exclusively, in accordance with a certain secret recipe or formula whereof the said order of Carthusian Monks has been and now is the sole proprietor, and which, by reason of its virtues and excellent qualities has become widely and favorably known, and is, and always has been, known and recognized by the distinctive name "Chartreuse," indicative of its manufacture by the said "Peres Chartreux." That in consequence of the skill and care exercised by the said "Peres Chartreux" in the manufacture of said cordial or liqueur, and of the merit of said formula, a great demand therefor has been created and still exists throughout the world, which demand your orator and his associates are able and willing to supply.

II. And your orator further shows that the said Order of Carthusian Monks, known as "Peres Chartreux," is a religious order of voluntary association, that your orator under the title of "Procureur" is the present business head of the said Order or Association, and has charge of and is responsible for the manufacture and sale of the liqueur aforesaid; and that on account of the great number of Monks, who are the associates of your orator in the Association of said order, it is impossible to join every one of them by name in this suit, wherefore your orator is constrained to bring this suit in his own name on behalf of himself and all of his associates.

III. Further your orator shows that in the year 1904, the said order of Peres Chartreux, in consequence of the enforcement by the French Govern-

ment of an enactment known as the Associations Act, removed the branch of said convent having charge of the manufacture of said cordial or liqueur to Tarragona, in the Kingdom of Spain, where the manufacture of said cordial or liqueur known as "Chartreuse" is still carried on in accordance with said original secret recipe or formula (which is still the exclusive property of said order) under the immediate supervision of your orator, who, in his capacity of Procureur has custody thereof.

IV. And your orator further shows upon information and belief that he and his said associates, and their predecessors in said order have, for upwards of three hundred years, made use of the word "Chartreuse" as a trademark to designate the said cordial or liqueur manufactured by them; and such trademark has been used, throughout the world, exclusively for that purpose; that said cordial or liqueur has been commonly packed in bottles of peculiar design, and packed in cases, both bottles and cases bearing conspicuously the trademark "Chartreuse," together with other distinctive marks and symbols, such as facsimile of the signature of L. Garnier, who was, about sixty years ago the predecessor of your orator in the office of Procureur of said order.

V. That in the year A. D. 1876, the said order by its then procureur, Frere (that is to say "Brother"), Marcel M. Grezier, caused the said name "Chartreuse" to be registered in the United States Patent Office on behalf of said order, as evidenced by certificate of registration No. 3,377, dated January 25, 1876, as by reference thereto, or to a duly authenticated copy thereof, here in Court to be produced, will more fully appear; and that in the year 1884, said order caused a re-registration of said mark by its procureur (Frere Grezier), as evidenced by certificate No. 10,897, dated January 29, 1884, as by reference to said certificate, or a duly authenticated copy thereof, here in Court to be produced, will more fully appear; that said Frere Grezier, on behalf of said order, fully complied with all the laws of the United States in respect to the registration of trademarks; that said trademark had been, prior to the earliest registration aforesaid, and continuously to the present time has been used in commerce between the United States and a foreign country; and that said order has at this time the right to the exclusive possession and enjoyment of said trademarks.

VI. And your orator avers, upon information and belief, that since the removal of said order from France, certain persons in said country have, without the consent of said order, commenced the manufacture of a cordial or liqueur in imitation of that which has for many centuries been manufactured by your orator and his associates as aforesaid, and are marketing the same under the name "Chartreuse," falsely representing that it is made in accordance with the famous recipe long owned (and still owned exclusively) by your orator, and, for the purpose of injuring your orator and his association and of deceiving the public, have offered the said imitation liqueur to the public in bottles and cases similar in appearance to those long used by your orator and associates as aforesaid, and

bearing labels similar to those long used by your orator and associates, and placing thereon the trademark "Chartreuse."

VII. And your orator has been informed and believes that the said defendants and each of them, acting jointly, without the consent of your orator and his associates, but in violation of their rights, have imported from France into the United States, at the port of New York, for sale and use, and have sold and used within the Southern District of New York and elsewhere in said United States and the territories thereof large quantities of said spurious liqueur or cordial, in cases and bottles closely resembling in appearance, and bearing labels closely resembling those long used by said Order of Peres Chartreux, as aforesaid, the resemblance being so close as readily to deceive the public and bearing the trademark "Chartreuse"; and that the said defendants have thereby gained and received large profits but to what amount your orator is ignorant, and therefore prays a discovery; and that your orator and his associates have been damaged by the said acts of defendants and their confederates to the amount of one hundred thousand dollars. And your orator is informed and believes, and therefore avers, that these defendants are in like manner about to import and receive in the port of New York for sale and use within the Southern District of New York and elsewhere within the United States and the territories thereof, further quantities of the said spurious "Chartreuse," under the trademarks, labels and other distinguishing marks of your orator and his associates, and will thereby cause irreparable injury to your orator and his associates unless this Court grants the relief hereinafter prayed.

VIII. And your orator avers that the subject-matter here in dispute is of great value, exceeding the sum or amount of two thousand dollars ($2,000), exclusive of interest and costs.

IX. And forasmuch as your orator and his associates can have no relief save in this Honorable Court, your orator prays on behalf of himself and all of his said associates:

(1) That your Honors will permit him to maintain this suit in his own name on behalf of himself and all of his associates composing the said order of Carthusian Monks (Peres Chartreux).

(2) That a perpetual injunction, issuing out of and under the seal of this Honorable Court, may issue against this defendant forbidding it, and its associates, attorneys, successors, assigns, agents, clerks, servants, and workmen from

(a) infringing the said trademarks or either of them;

(b) imitating the said labels or other distinctive markings and features of the genuine "Chartreuse" of your orator and his associates;

(c) making use of the name "CHARTREUSE" or any imitation thereof in connection with liqueurs or cordials;

(d) or in anywise representing that any liqueur or cordial or similar liqueur not manufactured by your orator and his associates or their successors in the said order of Carthusian Monks is the genuine Chartreuse, or is made in accordance with the secret process of the Carthusian Monks,

or in any manner trading upon the reputation and good-will of your orator and his associates and their predecessors and successors in said Association.

(3) That your Honors will grant a preliminary injunction, to the same purport, tenor and effect, as herein prayed for in regard to the perpetual injunction.

(4) That this defendant may be compelled to account for all the profits, gains, savings and advantages derived or received by it, by reason of the unlawful acts herein complained of; and that this Court may assess or cause to be assessed the amount of damages sustained in the premises by your orator and his associates; and that this defendant may be compelled to pay to your orator as the representative of himself and all his associates in the said order of Carthusian Monks, the profits and damages so ascertained;

(5) That your Honors will grant unto your orator the costs of this proceeding and such other and further relief as the equity of the case may require.

To this end, therefore, that the said defendant may, if it can, show why your orator should not have the relief hereby prayed, and may full, true and direct answer make—but not under oath, answer under oath being expressly waived—according to the best and utmost of the knowledge, information, remembrance and belief of the defendant and of its officers and agents to all the allegations of this bill of complaint, as fully and particularly as if the same were repeated, paragraph by paragraph, and the said defendant and its officers and agents thereto severally and specifically interrogated, may it please your Honors to grant to your orator a writ of subpoena ad respondendum issuing out of and under the seal of this Honorable Court directed to said defendant, Cusenier Company, and commanding it to appear and make answer to this bill of complaint and to perform and abide by such orders and decrees as to this Court may seem just.

And your orator will ever pray.

(Signed) ALFREDO LUIS BAGLIN,
Procureur of the Association of Carthusian Monks, on his own behalf and as representing all his associates in said order.
(Signed) By HENRY BATJER,
His Attorney in Fact.

(Signed) PHILIP MAURO,
C. A. L. MASSIE,
Of Counsel.
(Signed) ELISHA K. CAMP,
Solicitor for Complainant,
Office and P. O. Address,
277 Broadway,
Borough of Manhattan,
City of New York.

[Affidavit.]

FORM XVI.—BILL TO PREVENT UNFAIR COMPETITION.

[TITLE.]

To the Honorable Judges of the District Court of the United States in and for the Southern District of New York:

1. HENRY DOE, a corporation duly organized and existing under the laws of the State of New York, and having its principal place of business in the City, County and State of New York, and a citizen of said State, and a resident and inhabitant in the Southern District of New York, within the meaning of the constitution and laws of the United States, brings this its bill of complaint against John Doe, a citizen of the United States, and of the State of New Jersey, and a resident and inhabitant of the City of Hoboken, County of Hudson, State of New Jersey, and within the District of New Jersey, and Richard Roe, a citizen of the United States and of the State of New Jersey, and a resident and inhabitant of Jersey City, County of Hudson, State of New Jersey, and within the District of New Jersey, and thereupon your orator complains and says:

2. Your orator is a corporation duly organized and existing under the laws of the State of New York, and engaged in the business of selling ——— in the United States and in foreign countries.

3. Your orator is informed and believes and therefore alleges that the defendant John Doe is a citizen of the United States, and of the State of New Jersey, and a resident and inhabitant of the City of Hoboken, County of Hudson, State of New Jersey, and within the District of New Jersey.

4. Your orator is informed and believes and therefore alleges that the defendant Richard Roe is a citizen of the United States and of the State of New Jersey, and a resident and inhabitant of Jersey City, County of Hudson, State of New Jersey, and within the District of New Jersey.

5. Your orator's business was founded by one Henry Doe, who was the father of the present president of your orator. Henry Doe was the first person to utilize in a commercial way the idea of selling. The business was first started by him in Paris, prior to the ——, and was established by him in London in ——, and in New York City about ——.

6. Since the foundation of the said business by the said Henry Doe, as aforesaid, it has continued uninterruptedly in the City of New York up to the present time, and is now in successful operation.

7. By reason of the excellence of the service, and the careful attention which was given to this business by your orator's predecessor Henry Doe, and has since been given to it by your orator, your orator has acquired a very valuable good-will and reputation, which has crystalized round the names "Doe," "Doe's ——— Bureau," "Doe's ———," and similar names, in all of which the name "Doe" is the essential part.

8. In or about the year 1902, for valuable consideration, the said Henry Doe duly conveyed, granted, assigned, transferred and set over to your orator, its successors and assigns, the ——— business established and conducted by him in New York City, as aforesaid. In this transfer were included all trade-marks, trade names and good-will of the said business

of Henry Doe, and your orator is now the true and lawful owner of all trade-marks, trade names and good-will connected with the business founded by said Henry Doe, and is entitled to all the right, title and interest of the said Henry Doe in and to the names "Doe" and "Henry Doe," and all similar names containing the word "Doe" as applied to the business.

9. By reason of the very wide attention which this original business of the said Henry Doe attracted soon after it was founded by him, and the efforts of said Henry Doe to advertise the same, the word "Doe" has acquired a distinct and widely recognized secondary meaning, which is in addition to its meaning as the name of a family which bears it as a patronymic; such trade meaning being this, that when it is used by the public in connection with the ——— business, it refers to and designates, not merely a business conducted by some person by the name of Doe, but a particular and distinct business founded by the said Henry Doe, and nothing else, and the public have in general acquiesced and recognized and respected the sole and exclusive right of your orator and its predecessors to the use of the name "Doe" and all similar names in connection with the ——— business.

10. Your orator is informed and believes, and therefore alleges that no person or corporation, except the said Henry Doe, and your orator, ever used the name "Doe" in connection with the ——— business until these defendants entered into competition with your orator.

11. By reason of the care, skill, accuracy and good faith used by your orator, and its predecessor, in conducting the said business, and the confidence which has grown up in said business in the minds of the public, and especially in the minds of thousands of persons who have used its services, and by reason of the expenditure of large sums of money in advertising, a very high reputation was established by the said Henry Doe, which reputation crystalized around the name "Doe," "Doe's ——— Bureau," "Doe's ———," and "Doe's," and similar names, and which reputation has since been maintained, and which is now the property of your orator, your orator has been and is now popular with the public, and many persons repose great confidence in your orator, as a reliable ——— bureau, and the word "Doe," used in connection with the ——— business has become and is in the minds of a large number of persons synonymous with the business of your orator, and nothing else, and this good-will and reputation is a source of great pride, benefit and advantage to your orators, and is of great value.

12. The defendant John Doe was in the employ of your orator in a minor capacity for some years prior to in or about May, 1916. The defendant Richard Roe was for many years in the employ of your orator, and after the death of Henry Doe became president thereof, and remained as such up to in or about May, 1916. He was a director of your orator for a number of years, and was in active executive charge of your orator's business.

13. Your orator is informed and believes and therefore alleges that the defendants John Doe and Richard Roe have formed a partnership, and are engaged in the business of selling ——— under the name Doe & Roe

in competition with your orator; that the defendant Roe, not the defendant Doe, is the head of the defendant's business and in charge of the same; that the said Doe is connected therewith only in a minor capacity.

14. Your orator is informed and believes and therefore alleges that the name "Doe & Roe," instead of "Roe & Doe" or some other name, is used by the defendants not because the defendant Doe is at the head of the defendant's business or in charge and direction of the same, but for the purpose of causing the defendant's business to be known as "Doe's" or identified by the name "Doe" instead of by the name "Roe," and in order that the defendant's business may be listed in various directories under the name "Doe," thus enabling the defendants to pass off themselves to persons seeking the ——— business long known by the name "Doe" as and for the plaintiff.

15. Your orator has given to the defendants due and timely notice and warning that the use by them of the name "Doe & Roe" will cause confusion and deceit, and has requested them to stop using this name, and has requested them to, at least, use the name "Roe & Doe," but the defendants have refused so to do, and have threatened to continue to use and are now using the name "Doe & Roe."

16. By reason of the fact that the defendants are doing business under the name of Doe & Roe, there is a constant confusion in the minds of the public, and in the minds of customers of your orator as to the identity of the defendants, due to the adoption and use of their name as aforesaid, and the business and goods of the defendants have been confused with your orator and its goods.

17. The above mentioned facts are calculated to deceive the public, and the subscribers of your orator, and have actually caused, and still do cause, and will inevitably continue to cause them to confuse the defendants' business with your orator's, and to pass off the defendant partnership as and for your orator, and unless relief is granted in this cause, will continue to cause passing off and deceit, all to the serious damage of your orator.

18. All of the aforesaid acts of the defendants have been done with full knowledge of the rights of your orator in and to the name "Doe," and with full knowledge of the intimate association in the minds of the persons interested in ———, between the name "Doe" and similar names, and your orator and its predecessors, and all such acts have been done without any commercial necessity therefor, and with the fraudulent, unfair and unlawful intent and purpose of creating in the minds of persons interested in the ——— business, the idea that the defendants are in some way connected with, or are a part of your orator's corporation, or are conducting and carrying on the business originally founded by Henry Doe, and of passing off themselves, for their profit, as and for your orator.

19. Your orator is informed and believes and therefore alleges that the defendants threaten and intend to continue their unfair acts, and thus cause your orator irreparable damage, for which your orator has no adequate remedy at law.

20. By reason of the premises, and the fraudulent, wilful and unlawful acts of the defendants as aforesaid, your orator has been and is prejudiced

and injured in its business, and will be seriously and irreparably injured unless each of the defendants are restrained and enjoined from the aforesaid unlawful acts. That the reputation of your orator's business has been and is endangered, and its sales of ——— ——— by reason of the defendants' acts have been and will be seriously reduced; that it has already sustained great loss and damage, the amount thereof can not be stated with accuracy, by reason, among other things of ignorance as to the quantity of ——— ——— which have been sold by the defendants under their partnership name as aforesaid.

21. The matter in dispute herein, exclusive of interest and costs, exceeds the sum or value of three thousand dollars ($3,000.00).

22. Your orator has no adequate remedy at law.

23. In consideration of the premises, and for as much as your orator remediless, except in a court of equity, your orator prays: (a) That a writ of subpoena ad respondendum be issued in due form of law, requiring the defendants John Doe and Richard Roe, and each of them, to appear and answer all and singular the matters and things hereinbefore complained of, but not under oath, an answer under oath being hereby expressly waived. (b) That the defendants, and each of them, be decreed to account for and pay over to your orator all profits diverted from your orator, or received by any of the said defendants arising out of the use by the said defendants of the name "Doe & Roe." (c) That the damages sustained by your orator by reason of each of the defendants aforesaid unlawful acts be ascertained, and that your orator have judgment therefore against the defendants, and that each of the said defendants be decreed to pay to your orator the amount of said profits. (d) That the defendants John Doe and Richard Roe, and all of their associates, salesmen, servants, clerks, agents, workmen, employees, attorneys, and every person claiming or holding under or through the said defendants, or in any way connected with their business as aforesaid, be perpetually enjoined and restrained from in any way or manner conducting a ——— ——— business under the name "Doe & Roe." (e) That each of the said defendants, John Doe and Richard Roe, and all of their associates, salesmen, servants, clerks, agents, workmen, employees, attorneys, and every person claiming and holding under or through the said defendants, or in any way connected with their business as aforesaid, be enjoined and restrained as aforesaid during the pendency of this action.

That your orator have such other and further relief in the premises as may be just, together with the costs of this suit.

And your orator ever will pray,

HENRY DOE,
By
President.

HARRY D. NIMS,
Solicitor for the complainant,
Office & P. O. Address,
17 East 42nd Street,
Borough of Manhattan,
New York City.

FORM XVII.—PETITION UNDER ANTI-MONOPOLY LAW.

[Sustained 238 U. S. 516.]

IN DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF NEW JERSEY.

THE UNITED STATES OF AMERICA, PETITIONER,

v.

THE DELAWARE, LACKAWANNA & WESTERN RAILROAD COMPANY AND THE DELAWARE, LACKAWANNA & WESTERN COAL COMPANY, DEFENDANTS.

ORIGINAL PETITION.

To the honorable the judges of the District Court of the United States for the District of New Jersey sitting in equity.

I. Your petitioner, the United States of America, by John B. Vreeland, its attorney for the district of New Jersey, acting under the direction of the Attorney General, brings this proceeding in equity against The Delaware, Lackawanna & Western Railroad Company, a Pennsylvania corporation, and The Delaware, Lackawanna & Western Coal Company, a New Jersey corporation, for the purpose of preventing and restraining them from further violating the provisions of the act of Congress approved July 2, 1890, entitled "An act to protect trade and commerce against unlawful restraints and monopolies" (the antitrust act) and also the provisions of the commodities clause of section 1 of the act to regulate commerce as amended June 29, 1906 (34 Stat. 584), which prohibit a railroad company from transporting in interstate or foreign commerce articles or commodities, other than timber and the manufactured products thereof, manufactured, mined, or produced by it, or under its authority, or which it may own in whole, or in part, or in which it may have an interest, direct or indirect, except those intended for use in its business as a common carrier.

And upon information and belief, your petitioner alleges and shows—

II. Defendant, The Delaware, Lackawanna & Western Coal Company, is a corporation organized and existing under the laws of New Jersey, with its principal office at Hoboken therein and outstanding capital stock of $6,590,700. Among the objects for which it was established and the perpetual powers granted to it are the following shortly stated: To purchase, mine, produce, prepare, manufacture, and sell or deal in coal, coke, and other commodities and to act as sales and purchasing agent or factor of other corporations. To purchase, buy, or lease coal or ore mines and all manner of interest in lands, and to develop, improve, lease, and dispose of the same. To buy, build, construct, or otherwise, acquire and maintain and operate piers, docks, and all necessary conveniences and means of transportation incidental to carrying on the business of buying, selling, and trafficking in coal and other commodities and for the development and operation of lands and mines. To acquire by purchase or otherwise

and to hold as investments and to guarantee the principal, interest, and dividends of the bonds or shares of other corporations. To aid any corporation or association whose securities it may hold and to conduct its business in the State of New Jersey and in all other states and foreign countries. It is now and, since the second day of August, 1909, has been engaged in the business of dealing in anthracite coal within the states of New Jersey, Pennsylvania and New York at the various places, towns, and cities reached by the lines of The Delaware, Lackawanna & Western Railroad, especially at Hoboken, New Jersey, where are situated the New York harbor terminals to which that railroad constantly transports from the mines in Pennsylvania large quantities (to wit, 3,000,000 tons per annum) of the coals accepted there by the defendant coal company under the terms of the agreement hereinafter described. It also has agents and officers in other states and carries on business therein.

The Delaware, Lackawanna & Western Railroad Company is a corporation duly organized and existing under and by virtue of the laws of Pennsylvania, with offices therein at Scranton, also in New York City, and within this judicial district. It is authorized by its franchises to carry on the business of a common carrier, to own and operate coal mines in the State of Pennsylvania, and to buy and sell coal. For a long time it has owned, leased, and operated as one system of lines of railroad in the states of New Jersey, Pennsylvania, and New York, connecting among other places therein Hoboken, Scranton and Northumberland, and Utica, Binghamton, Oswego, and Buffalo; also many lateral and branch lines, some of which reach the anthracite coal mines owned by it and also some owned by others lying within the counties of Lackawanna and Luzerne, Pennsylvania, and in the Wyoming region of the anthracite and coal fields. Over such lines this defendant is now and for thirty years and more last past has been engaged in interstate and foreign commerce as a common carrier of passengers and freight, especially of anthracite coal not intended for its own use. Over some of them it has been so engaged for more than fifty years. It likewise owns and operates a fleet of marine barges which carry anthracite coal from Hoboken, N. J., to points in New England. At various times (commencing prior to 1860) the defendant railroad company has acquired by purchase or lease and now holds some 15,000 acres of lands containing anthracite coal lying in said Lackawanna and Luzerne Counties. Approximately one-half of these were acquired after January 1st, 1874, when the present constitution of Pennsylvania became effective That instrument, Art. XVII, sec. 5, provides:

"No incorporated company doing the business of a common carrier shall, directly or indirectly, prosecute or engage in mining or manufacturing articles for transportation over its works; nor shall such company, directly or indirectly, engage in any other business than that of common carriers, or hold or acquire lands, freehold or leasehold, directly or indirectly, except such as shall be necessary for carrying on its business; but any mining or manufacturing company may carry the products of its mines and manufactories on its railroad or canal not exceeding fifty miles in length."

Upon the lands so acquired and held there are many collieries which have long been and now are being constantly operated by the defendant railroad company in its own name; and at all times the coals therefrom, when ready for transportation, have been mined and produced by and the full legal title thereto vested in it. Their annual output has been at the approximate rate of 7,000,000 to 10,000,000 tons; and this probably will continue indefinitely. Great quantities of the same, intended for sale and distribution in different states, to wit, from 7,000,000 to 8,000,000 tons annually, not necessary or intended for defendant's use in its business as a common carrier, have long been and now are loaded upon its cars at the mines or adjacent breakers and then carried by it in interstate and foreign commerce to various points outside of Pennsylvania. Part moves to the North and West, while approximately 3,000,000 tons—mostly small sizes—has been and is carried each year to Hoboken, New Jersey, on the New York Harbor and sold there; and defendant intends to continue to transport the same substantially as heretofore. For a long time this defendant has been accustomed to buy almost the entire output—75 per cent or more—shipped from the mines and breakers located along its lines which are owned and operated by others—in 1911, 1,500,000 tons; has transported most of the same in interstate and foreign commerce, and intends hereafter to continue the same course of action.

III. Anthracite coal is an article of prime necessity in general use for domestic purposes throughout New England and the Middle Atlantic states, and is also largely burned in other sections of the Union and in Canada. The smaller sizes are much in demand for steam purposes in and about New York City, Boston, and other large cities in the East. The course of the entire supply, except a small amount of inferior quality, is in northeastern Pennsylvania, where the deposits underlie an area of about 484 square miles, divided for trade purposes into the Wyoming, the Lehigh, and the Schuylkill regions. The total annual output of all the mines is approximately 75,000,000 tons. About 12 per cent is consumed at or near the collieries, while the remainder (with insignificant exceptions) is carried away over the lines of the nine railroad companies named below which extend thereto—four-fifths being transported and sold in interstate and foreign commerce, viz: Philadelphia & Reading Railway Company; the Central Railroad Company of New Jersey; Lehigh Valley Railroad Company; the Delaware, Lackawanna & Western Railroad Company; Erie Railroad Company; the New York, Susquehanna & Western Railroad Company; the Delaware & Hudson Company; Pennsylvania Railroad Company; New York, Ontario & Western Railway Company. Except the lines of the Delaware & Hudson Company, all these railroads reach New York harbor and carry there, where the same is ultimately sold, 25 per cent of the total shipments of anthracite moving by rail, their rates therefore being approximately the same, irrespective of the length of the haul. This is by far the most important market for such coal. In it from 18,000,000 to 20,000,000 tons are annually sold, and distribution is made therefrom by water or otherwise, to points in various states. Being the chief distributing point, prices prevailing there largely fix and regulate those in other

markets. The terminals of the railroads carrying such traffic on New York harbor are at separate points on the New Jersey side, from Edgewater on the north to South Amboy on the south; and at these points, after passing the larger sizes over screens, the coal is weighed, dumped into barges, and is quoted and sold free on board thereof. The abovementioned anthracite carrying railroads and the great coal companies united or affiliated with them severally in ownership or management have long engrossed the output of the collieries. Each road directly or through one or more coal companies has contrived to gain control over the output of most of the mines served by it and the sale of the same. This is especially true of coal moving to New York harbor, and as a consequence f. o. b. prices of anthracite at the various terminals there are made and controlled by the defendant railroad and other railroad companies and their affiliated coal companies. These prices or their averages are reported monthly by the sellers to a bureau of statistics sustained by them jointly, and the result is then sent out to all of them. The substantially uniform prices for anthracite f. o. b. New York harbor now quoted and demanded are from $5.25 per ton for certain prepared sizes down to $1.80 for the size known as barley. These necessarily depend upon the freight charges demanded by the railroads, and under normal and natural conditions would vary with the same; and these charges have long been and now are exceedingly high, in fact, excessive. The present tariff schedules fix them at approximately $1.50 per ton for prepared sizes down to $1.10 for the small sizes, or from about 25 per cent to 60 per cent of the f. o. b. prices New York harbor, of coal transported.

IV. Prior to August 2, 1909, the defendant railroad company, acting openly in its own name, mined coals from its own collieries and whilst holding full legal title thereto transported the same to the markets in different states for sale therein and not for use in its business as a common carrier. Almost the entire production of all the anthracite mines along its lines was also sold by it in the markets of different states, the output of those not owned having been purchased at the breakers as above shown. In order economically and expeditiously to transport and sell this coal, the defendant railroad company constructed at points in different states, adjacent to or connected with its tracks, extensive terminal facilities, storage yards, depots, docks, wharves, transfer trestles, coal trestles, sale yards and other accessories essential or convenient for carrying on such business. Its great financial ability, its power and position as a common carrier, and the exclusive use of these facilities, put other producers and operators at a serious disadvantage when seeking to market their coal in competition with it. In consequence the railroad was enabled to and did purchase so much of the output of colliers owned and worked by others as, added to its own, gave it the disposition of more than 90 per cent of the entire production along its lines, complete dominance of the market therefor and a monopoly thereof; and gave it the power arbitrarily to fix prices at all points not reached by another railroad. But for such purchases most of this coal from mines not owned by it would have been sold in interstate and foreign commerce in competition

with the railroad; and if not so purchased in the future will be so sold in competition. The business of the defendant railroad has been immensely profitable and its financial strength is very great. A majority of its stock has long been and is now held in large blocks by less than twenty-five individuals and interests who act in concert and unity. A still smaller number have and do dominate and control its affairs, being enabled thereto by their stock holdings and their unity of purpose and effort.

V. Section 1 of the act of Congress approved February 4, 1887, entitled "An act to regulate commerce," as amended by the act approved June 29, 1906 (34 Stat. 584), provides: "From and after May first, nineteen hundred and eight, it shall be unlawful for any railroad company to transport from any State, Territory or the District of Columbia to any other State, Territory, or District of Columbia, or to any foreign country, any article or commodity, other than timber and the manufactured products thereof, manufactured, mined, or produced by it, or under its authority, or which it may own in whole, or in part, or in which it may have any interest direct or indirect except such articles or commodities as may be necessary and intended for its use in the conduct of its business as a common carrier." The inhibitions of this provision rendered it unlawful after the first of May, 1908, for defendant railroad to transport in interstate and foreign commerce coal purchased by it or produced by the mines which it owned and operated while having an interest in such commodity unless intended for use in its business as a common carrier. The combined business of buying, mining, transporting and selling anthracite had been immensely profitable to the railroad and to its stockholders; and those who dominated and controlled its affairs desired to preserve for themselves such profits and to continue the business substantially as theretofore conducted, notwithstanding the manifest purpose of the provisions of the act above quoted. To that end, accordingly, they determined to cause the organization of a new corporation to be under their own control—whose stockholders would be substantially the same as those of the railroad company—and through it to conduct the business theretofore carried on by the railroad sales department, thus securing, in effect, the continued unity of mining, transporting, and selling, in substance as theretofore, and depriving the public of the benefits which the aforesaid act was intended to produce. Thereupon, they caused their representatives and nominees to organize under the laws of New Jersey, on or about June 30, 1909, defendant, The Delaware, Lackawanna & Western Coal Company, with an authorized share capital of $6,800,000—one-fourth of the then outstanding capital of the defendant railroad—such shares being intended for pro rata distribution among the railroad's stockholders. Their further purpose was to cause the two defendants to enter into the contract and arrangement hereinafter described. Accordingly, about the first of July, 1909, they caused the railroad company to declare a cash dividend of 50 per cent and took the further action described in the communication then sent out, a copy of which follows:

"To the stockholders of the Delaware, Lackawanna and Western Railroad Company:

"An extra dividend of fifty per cent has been declared by the board of managers on the capital stock of the company, payable on July 20th, 1909, to stockholders of record at the close of business on July 1st, 1909. In conformance with the decision recently rendered by the United States Supreme Court, declaring that this company cannot lawfully transport in interstate commerce coal owned by it, a coal-selling company has been organized under the laws of the State of New Jersey, under the name of the Delaware, Lackawanna & Western Coal Company, the capital stock of which will be $6,800,000.00, divided into 136,000 shares of $50.00 each par value. It is proposed that the Delaware, Lackawanna & Western Railroad Company, as the seller, shall contract with said coal company, as the buyer, to sell and deliver the coal mined and purchased by the railroad company to the coal company at the mines. The stockholders of the railroad company at the rate of one share of the latter for each four shares of the capital stock of the railroad company held by the several stockholders as shown by the books of the company at the close of business July 1st, 1909. As it is deemed undesirable to issue part shares as scrip, or otherwise, any stockholder whose pro rata coal company subscription may entitle him to a part share, may, on payment in cash of the additional amount necessary, acquire a full share instead of the part share allotted to him. Herewith subscription blank which each stockholder should sign and have duly witnessed in the event he desires to subscribe for the stock of the coal company on the basis set forth herein. Such blank contains an order on the treasurer of the company authorizing and directing that one-half of the dividend of fifty percent due and payable on July 20th, 1909, will be paid to the coal company in satisfaction of the subscription of such stockholder whose pro rata coal company subscription may entitle him to a dividend will of course be paid in cash. Certificates for the number of shares of stock so paid will be issued in the name of and delivered to the stockholders as the latter may direct. It is urged by the company's legal advisors that the proposed selling contract be made operative as early as possible. It is therefore respectfully requested that the stockholders of the company take prompt action on the several matters submitted to them hereby." With insignificant exceptions (about twenty in all, owning together less than $30,000 of stock), the railroad stockholders subscribed for the coal company's shares apportioned to them, and immediately the two corporations with all their business and assets came into and they have ever since remained under the substantial ownership and immediate control of the same individuals. William T. Truesdale, president, and Edward E. Loomis, vice-president of the railroad, have always been two of the seven directors of the coal company and the latter always its president. The other directors of the coal company have likewise been but the nominees and instruments of those in control of the railroad company. Thereupon, according to the plan and on or about August 2, 1909, the two defendants entered into the written contract, a copy of which marked "Exhibit A" is annexed and made a part hereof and which, among other things, in substance provided: That the railroad company would sell to the coal company all mined, marketable coal then owned, except such as it

should elect to retain for use in its business as a common carrier, to be paid for within thirty days at prices designated. That the railroad company would lease to the coal company certain described storage and stocking plants, trestles, and docks, and accept in payment 5 per cent per annum on a valuation to be agreed upon. That the coal company would take over certain leases of trestles and sales agency contracts theretofore made by the railroad company. That the railroad company would sell and deliver to the coal company, f. o. b. cars at the breakers, all coal thereafter mined by the former from all lands owned or leased by it, together with all coal purchased by it, the amount to be so sold and delivered to be at the absolute option of the seller and without liability upon its part for failure to supply any. The coal company agreed to purchase all coal offered by the railroad company, and no other, unless necessary to comply with contracts then outstanding. That the railroad might retain sufficient coal for its use as a common carrier.

That the coal company would accept from the railroad company all coal delivered on cars at the breakers, and pay for all sizes above pea 65 per cent of the general average f. o. b. prices at tide points at or near New York between Perth Amboy and Edgewater, and for the smaller sizes specified portions of such general average prices. That the coal company would conduct the business of selling so as best to conserve the interest of and preserve the good will and markets of the coal mined by the railroad company; that any disputes which might arise between the parties should be settled through a board of arbitration, made up as specified; and that the terms of the agreement itself might also be modified by arbitration if conditions justified. That the contract should continue to be operative until six months after either party shall notify the other in writing of its intention to cancel the same, and that upon its expiration the coal company would sell to the railroad company and the latter would buy all coal then stored or in transit theretofore purchased by the former at prices to be agreed upon or fixed by arbitration. The copy of the contract, Exhibit A, is specifically referred to for a more complete and definite understanding of its terms and provisions. In the annual report of the defendant railroad company for the year 1909, its president said: "In conformance with the decision rendered by the United States Supreme Court that railroad companies cannot lawfully transport in interstate commerce coal owned by themselves, the sales division of the coal department of the D., L. & W. Railroad was discontinued August 1st, 1909, and a coal-selling company was organized under the laws of the State of New Jersey. Therefore, the annual report of the coal department covers but seven months—from January to July, inclusive—of the sales end of the business. A contract was entered into with the new coal company, whereby the railroad agreed to sell its coal on board cars at the mines on the same basis as generally prevails in the anthracite region, or what is known as the 65% basis of tidewater prices; and also to sell and turn over all stocks of coal along its lines and on western docks, and to lease its trestles, to the coal company.

[Matter omitted.]

In rearranging its affairs in conformance with the decision of the United States Supreme Court in what is known as the commodities case, the company declared an extra dividend of 50%, which was payable in cash, the stockholders, however, being given the option to use one-half of this extra dividend in purchasing stock of the Delaware, Lackawanna & Western Coal Company, which was organized and took over the merchandising of this company's coal on August 1st, 1909. At the same time a stock dividend of 15% was declared and paid to the stockholders of the company. As a result its capital stock was increased to $30,277,000.00.'' The defendant coal company at once took possession of the coal held by the railroad and entered upon the use of the sundry facilities belonging to it as agreed. The other terms of the arrangement likewise have been and are now being carried into effect. The railroad company continues to buy the output of mines belonging to others located along its lines, amounting in 1911 to about 1,500,000 tons, and goes through the form of delivering the same to the defendant coal company along with the product from its own mines, amounting annually to about 7,000,000 tons. So much coal as the railroad needs for use in its own business as a common carrier (about 1,000,000 tons annually) is reserved and not delivered to its co-defendant. The coal company takes ostensible possession of the coal so offered when delivered on board cars, causes most of it to be transported in interstate and foreign commerce by the defendant railroad, and is carrying on the business of selling the same in its own name at the sundry points in different states reached by the railroad, substantially according to the methods originally adopted by the latter, all as agreed, and both parties intend to continue this course. The annual sales of the coal company—four-fifths being outside Pennsylvania—amount to from 8,000,000 to 9,000,000 tons, all secured from the defendant railroad and transported by it as above shown. And such coal is not transported for use by the railroad in its business as a common carrier.

By reason of the arrangements described, the support of the railroad company, and the peculiar advantages and facilities acquired, the coal company at once secured and has ever since maintained an unlawful monopoly of the sale of coal produced along defendant's railroad, and has completely dominated the markets at all points thereon not reached by any other railroad. Its position, power, and support render effective competition with it practically impossible, and the monopoly which it now holds will continue indefinitely unless restrained.

VI. Since the organization of defendant coal company there have been some changes in the ownership of its stock, but its stockholders and those of the defendant railroad who own and control not less than 85 per cent of the shares of both have been and now are the same individuals or their representatives. Not exceeding twenty-five of these have continuously owned a majority of the stock of both companies, and the affairs of both have been dominated and controlled by a still smaller number acting in concert. Thus substantially the same group of individuals acting together

own, control, and direct both the business of the railroad and that of the coal company. The operations of the coal company have been immensely profitable, as was intended by those who procured its organization and gave it the above-described sales contract. Dividends have been paid at the rate of 10 per cent per annum, and a surplus exceeding $3,500,000—more than 50 per cent of a very large capitalization—has been accumulated in less than three and one-half years. The vice-president of the railroad company has always been the chief officer of the coal company and an active member of its board of directors. The affairs of both have been carried on in complete accord and unison and with the purpose and effect of enriching their common shareholders. The purpose of the railroad company and those who controlled it in organizing the defendant coal company was to use the latter as a mere instrumentality for retaining under their direction and for their profit the business of selling coal theretofore carried on by the railroad; and under the agreement of August 2, 1909—Exhibit A hereto—this purpose has been carried into fruition. The coal company is and must always be subservient to the will and direction of the railroad and those who control the latter. They have always constituted its dominant stockholders and probably always will. They elect its officers, determine its policies, and, moreover, they may take away its sole business upon six months' notice. If its conduct should fail to meet their approval, it may be deprived of all benefits under the sales contract—Exhibit A—and its business quickly destroyed. In such event a similar subterfuge could be organized and the profits of the entire business still be secured to the stockholders of the railroad.

The arrangement under which the defendant companies are operating in no proper or legal sense destroys or terminates the interest which the railroad company has in the output of the mines which it owns and operates or in the coal which it purchases from others before the same starts in the course of interstate or foreign transportation; but during the entire time and course of such transportation the carrier has an interest therein within the true meaning and intent of the statute. The two companies are but instrumentalities of the same group of stockholders: the arrangements and contracts between them are but devices to avoid the prohibitions of the Interstate Commerce Act, and operations under them are more damaging to the public than those under the old plan prior to August, 1909. They have enabled the coal company to acquire a monopoly of the sales of coal produced along the defendant railroad, and through the exclusive use of the instrumentalities leased by the latter and otherwise this monopoly will be continued. Having in the ways described secured for itself a monopoly, the defendant railroad successfully undertook to transfer this to the coal company, and, unless prevented, such monopoly will continue to the great detriment of the public.

Furthermore, the contract between defendant's Exhibit A hereto—necessarily hinders and prevents the railroad from freely fixing its rates for transporting coal according to recognized and legitimate standards, and introduces a factor into the determination of questions relating thereto

which may not be considered consistently with the rights of the public and which necessarily tends to keep such rates unduly high. For since under the contract the railroad company receives for its coal at the mines a percentage of the price at New York Harbor, which price is largely determined by the freight rate, it follows that the higher the freight rate from the mines to New York Harbor the higher the price received by the railroad company at the mines; and, on the other hand, as the freight rate decreases, such price decreases. The contract is thus not only a barrier against any reduction in the railroad company's freight rates to New York, however justified by the conditions, but is an inducement to higher rates regardless of any change in the cost or character of the service. It is undue, unreasonable, and unlawful restraint of interstate and foreign trade and commerce. The purchase of coal by defendant railroad company as above shown, for resale or for transportation over its lines, is incompatible with its duties as a public carrier, and the necessary tendency of such action is to produce a monopoly of and unlawfully to hinder and restrain interstate and foreign commerce in that commodity. The imperative duty of a common carrier by railroad is to transport freight and passengers for all alike, without discrimination, at fair, reasonable, and just rates; and it may not enter into contracts or arrangements the necessary tendency of which is materially to hinder, impair, or destroy its ability to perform such duty or its freedom in determining what action should be taken in respect thereto. Especially it may not use its enormous and unusual powers and opportunities to acquire a monopoly nor make contracts or enter into arrangements which necessarily tend towards monopolization.

VII. Wherefore petitioner prays:

1. That writs of subpœna issue directed to defendants the Delaware, Lackawanna & Western Railroad Company, and the Delaware, Lackawanna & Western Coal Company, commanding each of them to appear herein and answer, but not under oath (oath being expressly waived), the allegations contained in the foregoing petition, and abide by and perform such orders and decree as the court may make in the premises. 2. That the court adjudge that the Delaware, Lackawanna & Western Railroad Company has not since August 2, 1909, when the above-described contract between it and the other defendant went into effect, in a bona fide way, before accepting the same for carriage, divested itself of all interest in the anthracite coal purchased from others or produced at its mines or under its direction and control; and that it is and has been unlawfully transporting the same in interstate and foreign commerce. 3. That the defendants be enjoined from shipping, transporting, or causing to be transported any anthracite coal, the product of mines owned by defendant railroad company or purchased by it from others, and sold, transferred, or delivered to defendant coal company in pursuance of the above-described agreement or arrangement existing between them or any similar one. 4. That the court adjudge the existing arrangements and agreements between the defendants constitute a contract and combination in restraint of trade and commerce among the States and an attempt to

monopolize a part of such trade and commerce contrary to the provisions of the act of July 2, 1890, and that further violations of said act in the ways specified or any similar ones be enjoined. 5. That the court adjudge the purchase of coal by the defendant railroad company from others and the sale or transfer of the same to the defendant coal company, or any other party, to be unlawful, and enjoin any such future action. 6. That complainant have such further other and general relief as it may be entitled to.

JOHN B. VREELAND,
United States Attorney,
District of New Jersey.

GEORGE W. WICKERSHAM,
Attorney General.
JAMES A. FOWLER,
Assistant to the Attorney General.
JAMES C. MCREYNOLDS,
G. CARROLL TODD,
Special Assistants to the Attorney General.
February, 1913.

FORM XVIII.—BILL IN EQUITY FOR APPOINTMENT OF RECEIVER.

To the Honorable the Judges of the [District] Court of the United States for the District of Delaware:

William Buchanan, a resident and a citizen of the City, County and State of New York, on behalf of himself and all other holders of the income bonds of the defendant corporation who may join herein, brings this his bill of complaint against Bay State Gas Company, a corporation created by and organized and existing under the laws of the State of Delaware, and a resident and citizen of said State and District. And, thereupon, your orator complains and says:

I. The defendant above named was incorporated and created by a special Act of Legislature of the State of Delaware in 1889, under the name of the Peninsular Investment Company; a copy of which Act of Incorporation is hereto annexed, and marked "Exhibit A." Immediately upon the organization of the defendant, its name was changed to Bay State Gas Company. The principal office of the defendant is in the City of Wilmington, in the State of Delaware, and it is a citizen and resident of said city and State. Your orator is a citizen and resident of the City, County and State of New York, and is the owner and holder of $100,000 par value of the income bonds of the defendant company, duly issued on the first day of May, 1899, the total issue thereof being, at their par value, the sum of two million dollars. Said entire issue of two million dollars of income bonds, together with three million dollars, par value, of the capital stock of the defendant company, was issued to one Heman G. Mulock, in consideration of the assignment by said Mulock to the defendant of a certain bond or obliga-

tion of the Bay State Gas Company of Massachusetts, for the sum of $4,500,000. A copy of the contract between the defendant and said Mulock is hereto annexed, and marked "Exhibit B."

Said Mulock acted in said transaction as the representative of the Beacon Construction Company. A corporation or a limited partnership organized under the laws of the State of Pennsylvania, of which company one J. Edward Addicks was chairman, and held 14,980 shares out of 15,000 shares, the total number of its capital stock, and your orator subsequently purchased said hundred thousand dollars of bonds from said Beacon Construction Company, which then owned the same; and your orator paid therefor to said company, the sum of $100,000 in cash. A copy of one of said bonds is hereto annexed and marked "Exhibit C."

Said obligation of $4,500,000 was, as the complainant is informed and believes, until its alleged cancellation, as hereinafter mentioned, the only asset of the defendant company of any value, and its only source of income. During the years of 1890, 1891, 1892 and 1893, the defendant received from the Bay State Gas Company of Massachusetts, as interest upon the said bond or obligation, about $1,300,000, and thereupon paid to your orator and others interest upon its said income bonds at the rate of seven per cent. per annum in May, 1890, November, 1891, November, 1892, and April, 1893. Since April, 1893, defendant has paid no interest upon its said income bonds to your orator or other holders thereof. A copy of said bond or obligation for $4,500,000 is hereto annexed and marked "Exhibit D."

II. It is provided in said income bonds, among other things, that the defendant will pay to the bearer or assigns so much interest on said bonds not exceeding seven per cent. in any one year, and not to be cumulative, as the net earnings of the defendant for each fiscal year, ending on the 31st day of December, will pay; and, further, that "such net earnings are to be only part of the income of said company as would be applicable to the payment of dividends on its capital stock, and they shall in all events be reserved and applied exclusively to the payment of said interest before and in preference to any payment on account of any other obligation of the said company disposing of the said net income, the intention of these presents being to make the payment of said interest a first charge or lien upon the said net earnings to the extent aforesaid."

By virtue of said provision the complainant and other holders of said income bonds had and have a specific interest in the net earnings of the defendant, and a right to insist that they shall be applied to the payment, to the extent specified, of interest on said income bonds, and shall not be, directly or indirectly, pledged or incumbered for other purposes. It was and is also the duty of defendant not to contract liabilities nor use nor to dispose of its assets in any such manner as to impair its net earnings, except in the legitimate and honest management of its affairs; but notwithstanding its duty in the premises, the

defendant corporation has assumed obligations for the payment of many hundreds of thousands of dollars annually; without any valuable consideration to itself, and solely for the fraudulent purpose of benefitting certain of its officers in control of its affairs, in connection with certain independent enterprises in which they were and are interested. It has disposed or attempted to dispose of the said $4,500,000 obligation of the Bay State Gas Company of Massachusetts, its principal asset, without any adequate consideration, and for the fraudulent purpose above stated. It has likewise pledged the specific income of property to which it is entitled for the payment of obligations other than its said income bonds, and has fraudulently transferred to one or more of its officers in control of its affairs, assets since acquired of great value, without any adequate consideration, whereby it, the defendant, has been nearly or wholly depleted of its assets, has ceased to receive any considerable income, and has been rendered insolvent. In support of said allegations, the complainant alleges the following facts:

III. Ever since the incorporation of the defendant one J. Edward Addicks has been, and now is, the president of the defendant corporation and one of its directors. During all or most of said period one F. P. Addicks, a brother of said J. Edward Addicks, has been vice-president, treasurer and one of the directors. During the same period, or the greater part thereof, one William H. Miller, the private secretary of said J. Edward Addicks, has been the secretary of said corporation and one of its directors. The capital stock of the defendant was by its Act of incorporation fixed at the sum of $100,000, but was, immediately after its incorporation, increased to $5,000,000, of which $3,000,000 was issued to said Beacon Construction Company, of which said Addicks was then chairman and holder of substantially all its capital stock, in part payment of said obligation for $4,500,000. The balance of the $2,000,000 of its stock was issued to said J. Edward Addicks, or his representatives, although, as complainant is informed and believes, no real consideration was ever paid therefor. Subsequently, in 1894, said Addicks, fearing lest he might lose control of the defendant corporation by reason of a large part of said stock having previously been sold to independent parties, caused the capital of the defendant to be increased to $15,000,000. Said J. Edward Addicks caused said increase to be made solely for the purpose of retaining control of the defendant corporation. A sufficient amount of said new stock to enable him to remain in control was issued to him or his representatives or associates without any real consideration therefor; and said issue was fraudulent and in violation of the charter of said company, which provided that all new stock should be offered to existing stockholders in the first instance, which was not in fact done. By virtue of his control of the capital stock said J. Edward Addicks has always named the directors and officers of the defendant company and directed its affairs, and none of the officers or directors of said company have ever acted as such independently, but they and each of them have always acted as officers and directors of defendant solely as the creatures of said J. Edward Addicks.

Prior to or early in 1889, as appears by the agreement next herein referred to, said J. Edward Addicks, together with one W. E. L. Dillaway, who was the attorney of said Addicks, acquired the ownership of the entire capital stock of the Boston Gas Light Company, of the Roxbury Gas Light Company, of the South Boston Gas Light Company, and of the Bay State Gas Company, of Massachusetts, all of which were and are corporations organized under the laws of the State of Massachusetts, and engaged in the manufacture and sale of gas in the city of Boston. On the 16th day of February, 1889, said Addicks caused to be organized under the general laws of the State of New Jersey, a corporation called the Bay State Gas Company, with a capital of one million dollars. Thereupon said Bay State Gas Company of New Jersey issued its negotiable bonds to the amount of sixteen millions of dollars, of which twelve millions of dollars were and are designated as United Gas bonds, second series; and said Addicks and the said Dillaway thereupon assigned to said Bay State Gas Company of New Jersey, subject to the agreements hereinafter mentioned all their interest and the interest of each of them in the capital stock of the above-mentioned Boston gas companies in exchange for seven millions of dollars in the amount of the first series of said bonds of the Bay State Gas Company of New Jersey, and three millions of dollars of bonds of said company, second series, and its entire capital stock of one million dollars. By two agreements similar in terms, dated January 1, 1889, between said J. Edward Addicks, said W. E. L. Dillaway, said Bay State Gas Company of New Jersey, and the Mercantile Trust Company of the city of New York, a New York corporation, of one of which agreements a copy is hereto annexed marked "Exhibit E," it was provided, among other things, that as security for the payment of said bonds of the Bay State Gas Company of New Jersey, the entire capital stock of the said four Boston corporations so transferred to the Bay State Gas Company of New Jersey should be issued in the name of the said Mercantile Trust Company, as trustee, and deposited with it as security for the payment of said bonds, as aforesaid. In and by said agreements it was provided, among other things, that said Mercantile Trust Company should, at all stockholders' meetings of the said Boston gas companies, vote upon the stock for such persons or directors of said Boston gas companies as the Bay State Gas Company of New Jersey should direct. It was also therein provided that the said Mercantile Trust Company, as trustee, should collect the dividends upon the stock of said Boston gas companies, as the same should be paid, and should apply the same to the payment of its compensation for services in the execution of the trusts declared by said agreements, and for its necessary expenses in and about the same; to the payment of all taxes which might be lawfully levied or assessed upon it by reason of its ownership of said stocks; to the payment of interest upon the bonds of said first and second series as the same should accrue, and to the creation, by installments, of a sinking fund, as provided in said trust agreements; and that the surplus, if any, should be paid over to the Bay State Gas Company

of New Jersey. The par value of the stock of said Boston gas companies so transferred to said Bay State Gas Company of New Jersey in exchange for said ten millions of dollars of its negotiable bonds, and one million dollars of its capital stock, and so pledged with the Mercantile Trust Company, as security for the payment of ten millions of dollars of bonds, as appears from the returns of such gas companies to the Board of Gas Commissioners of Massachusetts, was the sum of $4,400,000; and, as appears from the records of the Boston Stock Exchange, the market value of said stocks was, in January, 1889, after the value had been enhanced by the endeavor of said Addicks and said Dillaway to purchase the same, only slightly over seven millions of dollars. As appears from the terms of said ten millions of dollars of bonds, the annual interest thereon was five hundred thousand dollars. The annual charges of the trustee for its services, expenses and taxes paid amounted to from two to three hundred thousand dollars annually in addition. The total annual charges of said trustees under said agreement, exclusive of the sinking fund, amounted consequently from seven to eight hundred thousand dollars. The dividends on the stock of the four Boston gas companies, out of which said annual charges were to be paid, as appears by the sworn returns of the companies to the Board of Gas Commissioners of Massachusetts, amounted in the year ending June 30, 1889, to only $363,000, and in the year ending June 30, 1890, to only $370,200, leaving an annual deficit of approximately, three to four hundred thousand dollars. This annual deficit the Bay State Gas Company of New Jersey as appears by the terms of said agreement, agreed to pay to the Mercantile Trust Company; but the Bay State Gas Company of New Jersey had no assets of any kind whatsoever except the equity in the capital stock of the four Boston gas companies, which was of no value.

As appears by the contract hereinafter mentioned, some time prior to April 9, 1890, said Addicks and said Dillaway fraudulently, by exercising the control by said Addicks of defendant hereinafter described, sold and transferred to the defendant company shares of the capital stock of the Bay State Gas Company of New Jersey of the par value of $995,000. The complainant is ignorant as to what consideration was paid said Addicks and Dillaway therefor. Said stock of the Bay State Gas Company of New Jersey was of no value, as the company had no assets other than the equity in the capital stock of the four Boston gas companies, as hereinbefore stated.

On the 9th day of April, 1890, said J. Edward Addicks fraudulently caused an agreement to be made between the defendant and the Bay State Gas Company of New Jersey, which agreement was signed by said J. Edward Addicks, as president, and W. H. Miller, as secretary, of the defendant, and by said F. P. Addicks, as treasurer, and W. H. Miller, as secretary, of the Bay State Gas Company of New Jersey, of which agreement a copy is hereto annexed and marked "Exhibit F." In and by said agreement it was provided, in substance, that the defendant should pay to the Bay State Gas Company of New Jersey, from time to time, such sums of money as should become due from the Bay

State Gas Company of New Jersey, to the Mercantile Trust Company under said time agreement in case the annual dividends upon the capital stock of the four Boston Companies should be insufficient to pay the fixed charges in respect of the aforesaid bonds issued by the Bay State Gas Company of New Jersey.

At the time said agreement was made, said J. Edward Addicks was the president and a director in both the defendant corporation and the Bay State Gas Company of New Jersey, and was in control of both corporations and of their respective boards of directors, both of which boards were his agents and acted under his orders. The defendant received no consideration for said agreements. The alleged consideration, namely, the assignment by the New Jersey company to the defendant of any excess of dividends, was, in fact, no consideration; first, because the defendant, as owner of the capital stock of the New Jersey company, was, prior to said agreement entitled to such surplus, if any, as a dividend; and secondly, because, in fact, there was no reasonable probability of there ever being any such surplus; since the aggregate dividends of the four Boston companies for the year ending June 30, 1890, as appears in the sworn return of said companies to the Board of Gas Commissioners of Massachusetts, were only $370,200, thus leaving a deficiency of between three and four hundred thousand dollars, which the defendant, by reason of said agreement, became bound to pay to the Mercantile Trust Company of New York during that year.

The said J. Edward Addicks, the said F. P. Addicks and the said W. E. L. Dillaway were, at the time of the signing of said agreement, officers and directors of the four Boston companies, and were familiar with said facts. Said J. Edward Addicks caused said agreement to be made by the defendant solely for the fraudulent purpose of further securing the ten millions of dollars of bonds of the Bay State Gas Company of New Jersey, which were owned by said Addicks and said Dillaway, and to enable said Dillaway to sell and dispose of the same; and there was no intention or expectation of benefiting the defendant thereby.

As appears by the sworn returns of the Boston gas companies to the Board of Gas Commissioners of Massachusetts for the year ending June 30, 1891, the aggregate dividends upon the capital stock of the four companies amounted to only $319,500; for the year ending June 30, 1892, to only $372,600; for the year ending June 30, 1893, to only $371,350; for the year ending June 30, 1894, to only $509,400, and for the year ending June 30, 1895, to only $469,900. The defendant has, in pursuance of said fraudulent agreement, from time to time, paid to the Bay State Gas Company of New Jersey large sums of money, aggregating several hundreds of thousands of dollars a year. Since the 1st day of May, 1894, the defendant has paid to the Bay State Gas Company of New Jersey large sums of money, aggregating several hundreds of thousands of dollars a year. Since the 1st day of May, 1894, the defendant has paid to the Bay State Gas Company of New

Jersey, in addition to the sums necessary to pay the balance of the interest, taxes and other charges upon said bonds, a sum amounting to between eighty and ninety thousand dollars a year, for the purpose of providing a sinking fund for the retirement of said bonds. Said agreement between the defendant and the Bay State Gas Company of New Jersey was and is fraudulent and void as against the complainant and the other holders of the income bonds of the defendant. The payments made thereunder were illegal and fraudulent dispositions of the assets of the defendant company, whereby its net earnings were impaired to such an extent that the defendant has not been able to pay any interest upon its income bonds since the 1st of May, 1893, and has paid no such interest to your orator or other holder of said income bonds since said date.

So long as the defendant remains under the control and management of said J. Edward Addicks, and as long as it has any assets left, it will continue to make payments to said Bay State Gas Company of New Jersey, in pursuance of said fraudulent contract, and it threatens and intends to make said payments. The Bay State Gas Company of New Jersey has no assets of any value, and if such payments are allowed to continue the defendant and its creditors will be unable to recover the amounts so paid.

IV. In the year 1893 a committee of the Legislature of the Commonwealth of Massachusetts investigated the affairs of the Bay State Gas Company of Massachusetts, and its affiliated companies, and as the result of such investigation an Act was passed, being Chapter 474 of the Acts of the year 1893, by which it was provided, among other things, in substance, that the charter of the Bay State Gas Company of Massachusetts should be revoked and annulled, unless said company should, prior to December 1, 1893, "procure or cause a certain obligation of $4,500,000, dated the 11th day of March, 1885, and issued by said company as part consideration for a contract for the construction of its works, to be legally canceled and discharged, and shall surrender and deliver the said obligation thus legally canceled and discharged to the Commissioner of Corporations." And in Section 4 of said Act it was further provided that said Massachusetts corporation "The Bay State Gas Company may, for the purpose of procuring such cancellation and delivery of said obligation, issue to the holder or holders of said obligation, upon the said delivery, stock to an amount equal to the excess of the actual market value of the property of said company over five hundred thousand dollars, not including therein any value of its franchises." Said obligation for $4,500,000 was the same one which had been assigned, as aforesaid, to the defendant, and in part payment for which the income bonds of the defendant had been issued, and at the time of the passage of said Act it was held by the defendant and was its only asset of any substantial value. In case of the dissolution of the Bay State Gas Company, of Massachusetts, as provided in said Act, the defendant, as holder of said obligation, had and has a claim on the property of the Bay State Gas Company of Massachusetts, which property then was, and

still is, of great value, being valued in the sworn returns of the officers of the company at over five millions of dollars, and which was valued by Commissioners subsequently appointed under the terms of said Act at two millions of dollars, exclusive of its franchises. Had said property of said Massachusetts company been then sold and distributed among its creditors, said outstanding $4,500,000 would have been paid in full. At the time of the passage of said Act said J. Edward Addicks, by virtue of his control of the defendant company, controlled the affairs of the Bay State Gas Company of New Jersey, the stock of which was owned by the defendant company, and by virtue of the control of the Bay State Gas Company of New Jersey he was enabled to name the directors of the four Boston gas companies, who were elected by the Mercantile Trust Company as holder of the capital stock of said companies. By virtue of said control said Addicks has caused himself, his brother, F. P. Addicks, and his attorney, said W. E. L. Dillaway, to be elected officers and directors of said four Boston companies, and the said J. Edward Addicks to be elected president of the Boston Gas Light Company; and, at the time of the passage of said Act, as appears by the testimony of said Addicks at said investigation, he was in receipt of a salary of $25,000 per annum as president of the Boston Gas Light Company, paid by said gas light company to him, which salary was fraudulently paid and grossly in excess of the value of his services as such president. If the charter of the Bay State Company of Massachusetts had been revoked, as provided in said Act, it would have resulted in a default, under the terms of the trust agreement securing the $10,000,000 of bonds acquired by said J. Edward Addicks, and said Dillaway, as aforesaid, and in the sale by the Mercantile Trust Company of the capital stock of said four Boston companies, and the same with the control of said Boston companies would have passed out of the control of said Addicks. Thereupon, for the fraudulent purpose of promoting his own interests and in utter disregard of the interest of the defendant corporation, of which he was then president and a director, and which he controlled, said Addicks caused said obligation for $4,500,000 to be delivered to the said Mercantile Trust Company, which company, as appears from the original obligation now in the hands of the Commissioner of Corporations of Massachusetts, endorsed upon it what purported to be a cancellation thereof, and delivered the same to said Commissioner of Corporations. Thereafter, under the provisions of said Act, the Mercantile Trust Company, as owner of all the stock of the Bay State Gas Company, of Massachusetts, caused the capital stock of said company to be increased to two millions of dollars, being $1,500,000 in addition to its original capitalization, and, at the request and with the connivance of said J. Edward Addicks, wrongfully, and in utter disregard of the rights of the complainant and the income bondholders of the defendant, caused such new stock to be issued to it, said Mercantile Trust Company, as additional security, to secure said bonds of the Bay State Gas Company, of New Jer-

sey, under the trust agreements hereinbefore mentioned relating to the issue of said bonds.

Thereafter, said Mercantile Trust Company, in violation of said trust agreements, certified and delivered to said J. Edward Addicks $1,300,000, or thereabouts, in amount of the first series of said bonds, in addition to the several millions of dollars of said first series already issued, and said Addicks delivered said bonds to the defendant; and said bonds, which never had a value equal to their par value, are the only consideration the defendant ever received for the alleged surrender and cancellation of the $4,500,000 obligation, which then was worth at least $4,500,000. Prior to the delivery of said bonds to the defendant—to wit, in 1893—the fixed charges on the ten millions of dollars of bonds already issued were between seven and eight hundred thousand dollars per annum, and the aggregate dividends of the Boston gas companies were only $371,350, thus leaving an annual deficit of between three and four thousand dollars to be paid by the defendant to the Bay State Gas Company, of New Jersey, under the fraudulent agreement hereinbefore set out. After the issue of said new stock of the Bay State Gas Company, of Massachusetts, the dividends of said four Boston gas companies were, for the year ending June 30, 1894, only $509,400, and the fixed charges on the outstanding bonds amounting to ten millions of dollars, including the payment into the sinking fund, which became due the first day of May, 1894, were between seven and eight hundred thousand dollars; thus leaving a deficit of between $250,000 and $350,000 to be provided and paid by the defendant as aforesaid. The issue of $1,300,000 more bonds to the defendant gave it an income of five per cent, thereon, or $65,000 per annum, so long as it held them. But as the same have increased the annual amount which defendant was required to pay to the Bay State Gas Company of New Jersey by the amount of such interest, and also by the amount of $13,000 per annum, by which the annual payment into the sinking fund was thus increased, the issue of said bonds to the defendant company, instead of adding to its income reduced its income to the amount of $13,000 per annum. At that time the defendant had no other assets of any value. The cancellation of said $4,500,000 obligation, the issue of the new stock of the Bay State Gas Company of Massachusetts to the Mercantile Trust Company, as trustee, instead of to the defendant, and the issue of $1,300,000 of additional bonds, and their delivery to the defendant, were procured by said J. Edward Addicks through the exercise of his control over defendant's Board of Directors and otherwise, for fraudulent purposes of his own and in utter disregard of the interest of the defendant corporation and the rights and interests of the holders of the income bonds of the defendant.

Said J. Edward Addicks has claimed to be a creditor of the defendant company for large amounts, but the complainant, your orator, charges, upon information and belief, that such indebtedness is fictitious. The complainant further charges, upon information and belief, that the defendant has been caused, by said Addicks, to apply a substantial portion of said $1,300,000 bonds, or the proceeds thereof, to the settlement of its

alleged indebtedness to the said Addicks, said Addicks being all the time president and director of the defendant corporation, and in control of it and its Board of Directors. The complainant charges, upon information and belief, that the amounts so received by said Addicks, largely exceed any just claims which he has against the defendant company.

V. But for the said fraudulent acts of the defendant as induced by said Addicks, whereby the assets and income of the defendant have been fraudulently and illegally diverted, the net earnings of the company would have been sufficient to pay interest equal to seven per cent. upon the income bonds of the defendant up to and including the present time; and the defendant owes the complainant, in respect to said income bonds, such interest from April 1st, 1893, at said rate, to date. Your orator charges, upon information and belief, that the defendant has been compelled by said Addicks, by the exercise of his control over its Board of Directors, as aforesaid, to fraudulently dispose of nearly, if not all, of the said $1,300,000 of bonds which constituted its only valuable assets, for the purpose of making such fraudulent settlements with said Addicks, and for the purpose of making said payments to the Bay State Gas Company, of New Jersey. The only assets of the defendant of any value are such portions of said $1,300,000 of bonds, if any, as have not heretofore been disposed of, and the stock of the Bay State Gas Company, of New Jersey, which is of no value. Outside of its capital stock and the principal of its $2,000,000 of income bonds, its liabilities actually due consist of sundry floating indebtedness amounting, as your orator is informed and believes, to several hundreds of thousands of dollars, and of the accumulated interest upon said income bonds amounting to $420,000. On January 1st, 1897, the semi-annual interest upon the bonds secured by said trust agreements, amounting to at least $282,500, will become due, and the defendant will be obliged to make a large payment to the Bay State Gas Company, of New Jersey, to cover the deficit. The defendant company is insolvent. The defendant company intends to use any assets which may still remain to it for the purpose of continuing its payments to the Bay State Gas Company, of New Jersey, as the same become due. The defendant company will not, so long as it remains in the control of said Addicks, take any steps to avoid the fraudulent contracts, obligations and transfers hereinbefore mentioned, or to recover back any of its assets so wasted and misappropriated, as aforesaid. Unless restrained by this Court the defendant threatens and intends to remove its assets, bonds and papers into another State and district. The amount due to your orator from the defendant company, and in controversy hereunder, exclusive of interest and costs, exceeds the sum of $2,000. Your orator did not acquire knowledge or notice of the fraudulent acts hereinbefore set forth before the first day of September, 1896. Your orator is without any adequate relief at law. Your orator offers to do whatever equity requires in the premises. Wherefore, your orator prays as follows:

1. That a subpœna may issue out of this Honorable Court, directed to said defendant Bay State Gas Company, requiring and commanding it to appear in this cause upon a day certain and answer the several allegations in this bill of complaint contained, an answer under oath being hereby expressly waived.

2. That it may be adjudged and decreed by this Honorable Court that the said defendant was, at and before the time of the filing of this bill of complaint, and now is, insolvent.

3. That the said defendant Bay State Gas Company may be compelled to render a full, true and perfect account, under the direction of this Honorable Court, of all money, assets and property of whatsoever nature which have been received or owned by it since the date of its incorporation to the present time inclusive, and of the income thereon, together with all payments and all dispositions made by it of its moneys, assets and property of every nature and description since said date.

4. That it may be adjudged and decreed by this Honorable Court that, but for the illegal and fraudulent disposition of its assets by the defendant, its net earnings would have been sufficient to pay to your orator and other holders of said income bonds interest on the income bonds held by him and them as aforesaid, at the rate of seven per cent. per annum from the first day of May, 1893, to the present time, and that the defendent be ordered to pay the same to your orator and the other income bondholders, and that its remaining assets be divided among its creditors.

5. That for the purpose of preserving its assets of the defendant from further misappropriation, and for the purpose of recovering for its creditors so far as possible such portions of its assets as have been disposed of fraudulently and without consideration, one or more suitable persons may be appointed interlocutory receiver or receivers of the assets, effects and credits of the defendant, to preserve the same until the final decree herein, with all the powers conferred by Chapter 181 of the Laws of the State of Delaware for 1891, and such other powers in the premises as to this Honorable Court shall seem fit; and that said receiver herein be continued in the final decree to carry the same into effect.

6. That the said defendant and its officers, directors, agents, attorneys and servants may be perpetually enjoined and restrained by injunction of this Honorable Court from selling, alienating or in any manner disposing of any of the property, money, choses in action, securities, assets or effects whatsoever of the said defendant, or from removing from the District of Delaware or otherwise disposing of any documents, contracts, obligations, records, books, accounts or papers belonging to or in the possession or control of the said defendant or its officers, directors, agents, attorneys or servants, and that a preliminary injunction may issue out of this Honorable Court enjoining and restraining the said defendant, its officers, directors, agents, attorneys and servants in like manner until the further order of the Court.

7. That your orator may have for it other and further remedy in the premises as may be just, including its costs.

And your orator will ever pray, etc.

ANTHONY HIGGINS,
Solicitor for Complainant,
Wilmington, Delaware.

ANTHONY HIGGINS,
FREDERICK E. SNOW,
ROGER FOSTER,
Of Counsel.

([*District*] *Court of the United States, District of Delaware.*)

WILLIAM BUCHANAN,
AGAINST
BAY STATE GAS COMPANY.

STATE OF NEW YORK,
SOUTHERN DISTRICT OF NEW YORK, } ss.
CITY AND COUNTY OF NEW YORK,

WILLIAM BUCHANAN, being duly sworn, says: I reside in the City, County and State of New York, and I am the complainant herein. Each and every allegation in the foregoing bill of complaint is true to my own knowledge except as to the matters therein stated to be alleged upon information and belief, and as to these matters, I believe it to be true. I hereby incorporate the foregoing bill into this affidavit and refer to the same with the same effect as if it were herein repeated specifically and at length.

WILLIAM BUCHANAN.

Sworn to before me this 13th day of October, 1896.
(Notarial Seal.)

HENRY HIGGINS,
Notary Public,
N. Y. Co.

FORM XIX.—FRIENDLY BILL FOR APPOINTMENT OF RECEIVER.

[*Re* Metropolitan Railway Receivership, 208 U. S. 90.]

In the [*District*] *Court of the United States, for the Southern District of New York.*

THE PENNSYLVANIA STEEL COMPANY and THE DEGNON CONTRACTING COMPANY, Complainants,
against
NEW YORK CITY RAILWAY COMPANY, Defendant. } In Equity.

To the Judges of the [*District*] *Court of the United States, for the Southern District of New York:*

Your orators, The Pennsylvania Steel Company, a corporation duly organized and existing under the laws of the State of Pennsylvania, and

a citizen of said State, and The Degnon Contracting Company, a corporation duly organized and existing under the laws of the State of New Jersey, and a citizen of said State, bring this their bill of complaint on their behalf and on behalf of all other creditors of New York City Railway Company, defendant, who may hereafter join in the prosecution of this suit against the New York City Railway Company, a corporation organized and existing under and by virtue of the laws of the State of New York and a citizen of said State, resident in the Southern District of New York, and thereupon your orator alleges as follows:

FIRST.—That your orator, The Pennsylvania Steel Company, is a corporation duly organized and existing under the laws of the State of Pennsylvania and a citizen and resident of said State, and your orator. The Degnon Contracting Company is a corporation duly organized and existing under the laws of the State of New Jersey and a citizen and resident of said State.

SECOND.—On information and belief that the defendant was at all the times hereinafter mentioned and is a corporation, duly organized and existing under and by virtue of the laws of the State of New York and a citizen of said State, having its principal office in the City of New York, and a resident of the Southern District of New York.

THIRD.—On information and belief that the defendant, New York City Railway Company, was organized under the laws of the State of New York on or about the 25th day of November, 1901; that the defendant owns and operates certain lines of street railway in the Borough of the Bronx, in the City of New York, and also is in possession of and is operating as hereinafter set forth the system of street railways of the Metropolitan Street Railway Company in said city; that said defendant through ownership of capital stock also controls other companies owning other lines of street railway in said city; that the total mileage of the system of the defendant, including the mileage of leased lines and lines of companies controlled through ownership of stock, is upwards of five hundred (500) miles, and said system of the defendant embraces practically the entire surface traction system in the Borough of Manhattan and in the Borough of the Bronx, in said City of New York; that appurtenant to the railroads of said defendant are various rights, easements and privileges growing out of the same and connected therewith and the defendant has other franchises and easements and holds valuable contracts, including contracts for mail and express service.

FOURTH.—On information and belief, that the defendant is in possession of and operates the main lines of its system under a lease bearing date of the 21st day of March, 1902, made to it by said Metropolitan Street Railway Company, by which said lease said lessor leased to the defendant the entire system of the lessor then owned or thereafter to be acquired by said lessor during the term of said lease, for the term of nine hundred and ninety-nine years from the date of said lease; that

the system of said lessor so leased to the defendant embraced not only the lines owned by the said Metropolitan Street Railway Company, but also all lines leased to said lessor, embracing among others the lines of the Third Avenue Railroad Company, which, including as well all lines at the time owned as all subsequent additions, said Third Avenue Railroad Company, by indenture of lease, bearing date the 13th day of April, 1900, had demised to said Metropolitan Street Railway Company for the term of nine hundred and ninety-nine years from the date of said indenture of lease; that in addition to said lines of said Third Avenue Railroad Company, said lease made by the Metropolitan Street Railway Company to the defendant embraces the lines of the following companies theretofore leased to said Metropolitan Street Railway Company or its predecessors, by various indentures of lease:

[Next followed description]

and that by said lease, made by said Metropolitan Street Railway Company to the defendant, it is among other things provided that in case the defendant, said lessee, shall fail to pay the rent provided for in said lease as the same should accrue, and any such default should continue for the period of twelve months after written demand, and notice, the leasehold estate thereby created might at the option of said lessor be terminated.

FIFTH.—On information and belief, that said defendant has an authorized capital stock of Twenty million dollars, of which there has been issued and is outstanding stock to the amount of Thirteen million dollars; that the lines of railway owned by said defendant are not subject to mortgage, but the lines embraced in its system are subject to the following mortgage indebtedness, which is now outstanding, the refunding mortgage of said Metropolitan Street Railway Company being, and being expressed to be, subject to said lease of February 14, 1902, made by said last named Railway Company to the defendant:

That your orators are informed and believe that failure to meet the interest on such mortgage indebtedness, as such interest matures, will operate also as a default under the mortgage securing the indebtedness the interest on which shall so become in default, and render such mortgage enforceable.

SIXTH.—On information and belief that the defendant, since entering into possession as aforesaid under said lease from said Metropolitan Street Railway Company, has operated all the lines owned and leased by it as parts of a single system constituting routes over different lines or parts of lines, connecting separated lines over parts of intermediate leased lines or lines of controlled companies, interchanging equipment among the various lines and furnishing equipment as might be required to meet from time to time the varying requirements of particular lines, supplying power and using power houses, car barns and stations as seemed best for the effective and economical operation of the system as a whole, and also establishing a system of transfers between various lines and routes; that the defendant owns equipment

to a substantial amount, which has been used over the system as varying requirements of operation made necessary, without assignment to any particular line or lines; and your orators are informed and believe that many of the leased lines in defendant's system are without adequate equipment of their own; and your orators are further informed and believe that in many cases the motive power employed on leased lines or lines of controlled companies has been changed to electricity without supplying said lines with independent power houses or other independent sources of supply of power, leaving such lines dependent for power on other lines of the system.

SEVENTH.—Your orator The Pennsylvania Steel Company alleges positively and your orator The Degnon Contracting Company on information and belief that the defendant is indebted to your orator The Pennsylvania Steel Company in the sum of Thirty-six thousand eight hundred and thirty-one and 38/100 dollars ($36,831.38) for rails and track material furnished and supplied by your orator The Pennsylvania Steel Company to the defendant, at the request of the defendant, and for which the defendant agreed to pay your orator The Pennsylvania Steel Company said sum of Thirty-six thousand eight hundred and thirty-one and 38/100 dollars ($36,831.38) and payment of said sum has been duly demanded by your orator The Pennsylvania Steel Company from the defendant and payment thereof refused and the same is now wholly due and unpaid; that said rails and track material were so supplied to the defendant for the purposes of operation of its street railway system and to enable the defendant to comply with and fulfill the duty towards the public which the defendant as well as the respective lessors of the defendant, owed to the public, and to discharge its and their obligations, respectively under the franchises for the operation of their respective lines, and were used for the purposes aforesaid; that your orator The Degnon Contracting Company alleges positively, and your orator The Pennsylvania Steel Company on information and belief, that the defendant is indebted to your orator The Degnon Contracting Company in the sum of Eleven thousand one hundred and seventy-three dollars and twenty-seven cents ($11,173.27) for work and labor done for the defendant at the request of the defendant, for which the defendant agreed to pay your orator The Degnon Contracting Company said sum of $11,173.27 and that payment of said sum has been duly demanded by your said orator from the defendant and payment thereof refused and the same is now wholly due and unpaid.

EIGHTH.—That your orators are informed and believe that since entering into possession of the premises demised under said lease made by said Metropolitan Street Railway Company, the defendant has expended large sums, aggregating more than Twenty million dollars, in making extensions, improvements and additions, and other capital expenditures, to and upon lines of its system including its leased lines and lines of controlled companies, and has so expended large amounts in the electrification of various lines theretofore operated by horses, and that said expenditure has greatly benefited such lines of railroad and enhanced

the value of said leased properties, and properties of controlled companies; but that the expenditures required for that purpose have exceeded the resources of the defendant; that the defendant has recently entered into contracts for electrification, which are now in course of performance; that the ultimate liability of the defendant under such contracts is upwards of Four million dollars; that the defendant is and will be unable to meet such liability, and that notwithstanding large amounts have been expended in the purchase of materials and otherwise in connection with such electrification, such work must be suspended, thereby causing heavy loss to the defendant and subjecting the defendant to heavy liabilities; that the defendant has been required and will be required to make large expenditures for the maintenance and repair of its system and among other things has entered into contracts for new equipment to replace equipment destroyed, or otherwise requisite for the operation of its system; that said equipment will shortly be deliverable and that the defendant will be unable to pay therefor, although immediately necessary for the operation of its lines; that in the course of the operation of its lines, numerous accidents have occurred, in respect of which suits have been brought and are now pending, and that said suits to the number of several thousand are now upon the calendars of the courts awaiting trial, and that the defendants will be without means to meet judgments recovered in said suits.

NINTH.—That your orators are informed by the officers of the defendant and believe that the defendant has outstanding floating indebtedness for materials, equipment, taxes and supplies furnished, to the amount of upwards of Two million dollars; that said floating indebtedness is now overdue; that the defendant is unable to pay the same, and that the holders thereof are pressing for payment thereof, that the defendant also has outstanding obligations to the amount of several million dollars, the payment of which is secured by obligations of various companies controlled by the defendant or owning leased lines embraced in the defendant's system; that said obligations are payable on demand and that the defendant is without means to pay such obligations, or under existing financial conditions to effect new loans against such collateral and is without other collateral available for such purpose. Your orators are informed and believe that the defendant has no means at hand with which to meet its immediate pressing needs in operating its system; that many of the creditors to whom the defendant is liable are pressing the defendant for immediate payment, and that some of said creditors may bring suits in respect of their said claims, and may levy execution on the lines of railroad owned by the defendant and on the material supplies and other property of the defendant on hand and kept by the defendant for necessary use in operating said railway system, and your orators allege that there is grave danger that the lines of the defendant may no longer be operated in a single system, but the various lines which are now owned or controlled or leased by the defendant may be broken up and be separately operated; that there is likewise grave danger that suits may be instituted against the defendant in respect to the claims above stated;

and that it is essential to the interest of the defendant and to the interest of the public and to your orators that the property of the defendant should not be sacrificed; that the position of the defendant is the more acute by reason of the depressing financial situation; that the gross income of the system decreased during the last fiscal year and about Six hundred thousand dollars, while the expenses of operation and maintenance increased about the same amount, an aggregate difference of about One million two hundred thousand dollars; that the claims for special franchise taxes which are now in litigation, amount to over Three million dollars, and the Comptroller of the City of New York is pressing for the payment of these taxes, and that the defendant has not sufficient credit to obtain the funds required for the operation of its properties.

TENTH.—And your orators allege, on information and belief, that the only means whereby the defendant can meet its obligations under said lease from said Metropolitan Street Railway Company and pay its floating indebtedness and discharge its current obligations, is by the continued maintenance and operation of said system as a whole by an uninterrupted use thereof; that any suits upon or process against its properties or its revenues would seriously embarrass and cripple it, and diminish, if not destroy, its power successfully to operate said system, in the exercise of its franchises; that said system, together with all its appurtenances, rolling stock and other property connected therewith are now in reasonably good state and condition; that the railroads operated by the defendants are so numerous and extensive as to constitute practically the entire street surface railroad system in the County of New York; that during the last year the lines owned by or leased by the defendant carried about four hundred million passengers, and the average number of persons employed by the defendant and its various controlled and allied corporations will exceed six thousand; that it is of vital importance to the people of said County of New York that said system shall continue to be operated as a whole, and to this end it is of like importance that said system shall be preserved; that notwithstanding the fact that every effort has been made to provide funds for the payment of the indebtedness of the defendant, or for the extension of the time of payment thereof, such efforts have proved unsuccessful; that unless some definite action is taken on behalf of all the creditors so that the operation of defendant's system may be kept intact, great and severe loss will be inflicted on all creditors; that the credit of the defendant has been seriously impaired; that it has not money to pay the debts which have matured, and has no reasonable hope of finding assistance from any quarter to enable it to do so, and that the defendant is insolvent.

Your orators believe unless the Court, in view of the facts above set forth, shall take said system of the defendant into judicial custody for the protection of every interest therein, that immediately upon default, individual creditors will assert their rights and remedies in different Courts; that the result will be a multiplicity of suits and a race of diligence; that attempts will be made to secure judgments and priorities; that levies will be made upon cars, rolling stock, material and supplies

indispensable to the operation of the system, which will greatly interfere with, and ultimately prevent defendant from, the proper performance of its duties as a common carrier, and of its mail and express contracts, and will seriously diminish its earnings; that it will be impossible to operate the system as a whole, and the system of transfers among the lines in said system will be broken up, to the serious inconvenience of the public, and a most important and valuable property dismembered, which might be preserved by adequate judicial protection in this Court.

And your orators allege that an attempt by your orators to enforce at law their claims as general creditors would precipitate similar action on the part of other creditors, and this in turn would lead to wasteful strife and controversy, which your orators believe can be avoided, and the property preserved for equitable distribution among those entitled thereto, only by the intervention of a Court of equity and the granting of equitable relief, including the appointment of a Receiver.

ELEVENTH.—That under these circumstances the interference of a Court of equity for the protection of your orators' rights, is imperatively required, and especially for the timely appointment of a Receiver to take charge of and preserve the property of the defendant, continue the operation of its system for the accommodation of the public, and collect and receive and properly appropriate the income thereof until the final decree of the Court in the premises.

TWELFTH.—That this is a civil suit in nature of a claim in equity, and the matter in dispute exceeds, exclusive of interest and costs, the sum of Five thousand dollars.

THIRTEENTH.—Inasmuch, therefore, as your orators have no adequate remedy at law for their aforesaid grievances, and can have relief only in equity, your orators file this bill of complaint in behalf of themselves and other creditors of the defendant, who may come in and contribute to the expense thereof, and pray for equitable relief, as follows:

1.—That the rights of your orators and all the other creditors of the defendant may be ascertained and decreed, and that the Court will fully administer the fund in which your orators are interested, constituting the entire railroad system and other assets of the defendant, and will for such purpose marshal all the assets of the defendant and ascertain the several and respective liens and priorities existing thereon, and enforce and decree the rights, liens and equities of the creditors of the defendant, as the same may be finally ascertained and decreed by the Court upon respective interventions or applications of each and every such creditor or lienor in and to each and every portion of the assets and property of the defendant.

2.—That for the purpose of preserving the unity of the system of the defendant as it has been maintained and operated, a Receiver may be appointed for the defendant and of all the property of the defendant, real, personal and mixed, of whatsoever kind and description and wheresoever situated, including all railroads owned, leased or operated, tracks and terminal facilities, rolling stock, franchises, leases, rights and prop-

erties with full power to sue for, collect, receive and take into his possession, goods, chattels, rights, credits, moneys, effects, lands, tenements, books, papers and property of every description of the defendant, and with all the incidental powers ordinarily vested in Receivers in like cases, and with full power and authority to run and operate such railroads, estates and property, and to collect and receive all rents, issues, profits and income thereof, and to apply the said income and receipts thereof under the orders or decrees of the Court, for such period as the Court shall order, to protect and preserve the corporate franchises, privileges and property, and to preserve the corporate existence of the defendant and to protect and preserve the said railroads, estates and property, real and personal, from being sacrificed under any proceedings which can or may be taken, liable to prejudice or sacrifice the same and to do any and all acts which may be necessary to preserve valuable rights and franchises of the defendant, or otherwise requisite or proper.

3.—That temporarily and pending this suit, an injunction may issue against the defendant and all persons claiming and acting by, through or under it, and all other persons, to restrain them from interfering with said Receiver taking possession of said property, and that your orators may have such further relief in the premises as the nature of the case may require and as may be agreeable to equity.

4.—That the defendants be required to answer all and singular the matters above stated.

5.—That a writ of subpœna may be granted to your orators to be directed to the defendant, thereby requiring the defendant personally to appear on a certain day before the Court and then and there full, true, direct and perfect answer make to all and singular the premises (but not under oath, which is hereby expressly waived), and further to perform and abide by such further order, direction or decree therefor, as to the Court shall seem meet.

6.—That your orators have such further and other relief as the Court may deem proper and equitable.

And your orators will ever pray, etc.

(Sgd.) BYRNE & CUTCHEON,
Solicitors for Complainants.

(Sgd.) JAMES BYRNE,
Of Counsel.

STATE OF NEW YORK,
County of New York, } ss.
Southern District of New York.

JOHN V. W. REYNDERS, being duly sworn, deposes and says that he is the Vice-President of The Pennsylvania Steel Company, one of the complainants above named; that he had read the foregoing bill of complaint and knows the contents thereof and that the same is true of his own

knowledge except as to the matters therein stated to be alleged on information and belief and as to those matters he believes it to be true.

(Sgd.) JOHN V. W. REYNDERS.

Sworn to before me this 24th day of September, 1907.

(Sgd.) EDMUND KIRBY,
Notary Public,
New York County,
New York.

[SEAL.]

STATE OF NEW YORK,
County of New York,
Southern District of New York. } ss.

NATHANIEL J. HAYWOOD, being duly sworn, deposes and says that he is the Secretary of Degnon Contracting Company, one of the complainants above named; that he has read the foregoing bill of complaint and knows the contents thereof and that the same is true of his own knowledge except as to the matters therein stated to be alleged on information and belief and as to those matters he believes it to be true.

(Sgd.) NATHANIEL J. HAYWOOD.

Sworn to before me this 24th day of September, 1907.

(Sgd.) EDMUND KIRBY,
Notary Public,
New York County,
New York.

[SEAL.]

FORM XX.—BILL IN EQUITY FOR THE APPOINTMENT OF ANCILLARY RECEIVER.

[190 Fed. 794 in which the author has counsel.]

To the Honorable Judges of the [District] Court of the United States for the Southern District of New York:

Ridgeway Bowker, of Camden, in the State of New Jersey, who is a citizen of said State of New Jersey, brings this his bill against Haight & Freese Company, which is a corporation incorporated under the laws of the State of New York, and which is a citizen of and resident and doing business in the City, County and State of New York, and having its principal place of business at No. 53 Broadway, Borough of Manhattan, County and City of New York, and against the Seaboard National bank organized under the laws of the United States, and having its principal place of business in the City, County and State of New York, and against the Consolidated National Bank, which is a national bank organized under the laws of the United States, and having its principal place of business in the City, County and State of New York, and the

Produce Exchange Safe Deposit and Storage Company, which is a corporation incorporated under the laws of the State of New York, and having its principal place of business in the City, County and State of New York, and John Doe and Richard Roe, who are citizens of the City, County and State of New York, whose names are fictitious, the true names of the de fendants Doe and Roe being unknown to your orator.

And thereupon your orator complains and says that he brings this bill as a creditor of the said defendant, Haight & Freese Company, on his own account and on behalf of all such other creditors as may choose to join therein, and contribute to the expense of this action; that the said defendant, Haight & Freese Company, pretended, has pretended and pretends to carry on the business of buying and selling stocks, bonds, securities and commodities as brokers upon commission, and to execute orders for the purchase and sale of such stocks, bonds and securities; that with the purpose of deceiving and defrauding such persons as may be induced to deal with it, the said defendant has organized offices to carry on such pretended business in the cities of New York, Boston and Philadelphia, with branch offices and connections elsewhere; that the said defendant, although authorized by its charter to buy and sell stocks, bonds, securities and commodities upon commission, in reality executes no orders for the purchase or sale of the same, except when it becomes necessary to do so for the purpose of covering up and concealing the real nature of its business, which is in substance to accept all orders for the purchase and sale of any stocks, bonds, commodities and securities which may be given to it at the market prices, and by inducing its customers to execute powers of attorney or other authority for the purchase and sale of the same, and by permitting and inducing customers to trade upon very slight margins, to take advantage of market fluctuations in such a way that the account of each customer may be pretended and represented to have been sold out at prices showing losses to such customers. That in pursuance of the aforesaid fraudulent scheme, said defendant charges its customers commissions for the pretended execution of their orders of purchase and similar commissions for pretended execution of orders of sale, and interest computed upon the difference between the amount paid by such customers as margins and the whole market value of the securities supposed to have been purchased as aforesaid, and upon fictitious loans and balances, so that the interest so charged amounts to a very large sum; that for the purpose of carrying on the said pretended business the defendant has a special form of contract with its customers which is as follows:

"When stocks are purchased this order may be executed in any city or place, whether on any exchange through a member thereof and subject to its customs and rules, or by private purchase, as Haight & Freese Company may elect; and any other client of Haight & Freese Company may be the seller. But Haight & Freese Company is not to be obliged to disclose the name of any client in any event. The purchase may be made delivery on purchaser's demand. Haight & Freese Company may pledge for any amount the securities, when brought, mingled with the securities of other customers or of brokers themselves, and may loan any stock, giv-

ing borrowers the right to sell and to return different certificates, and may, without any demand of, or notice to me whatever, and on any exchange, or by private sale, close out all transactions on margin: (1) as to securities, whenever margin is less than one-half of one per cent of the aggregate of the par value of all the securities being carried for me on margin, and (2) as to commodities whenever margin is exhausted. All orders to buy, hereafter or heretofore given, are to be considered as subject to the above unless otherwise expressly stipulated therein.''

And when stocks are sold, as follows:

''This order may be executed in any city or place, either on any exchange through a member thereof and subject to its customs and rules, or by private sale, as Haight & Freese Company may elect, and any other client of Haight & Freese Company may be the buyer. But Haight & Freese Company is not to be obliged to disclose the name of any client in any event. Haight & Freese Company may, without any demand of, or notice to me whatever, and on any exchange, or by private purchase, close out all transactions on margin: (1) as to securities, whenever margin is less than one-half of one per cent of the aggregate of the par value of all the securities being carried by me on margin, and (2) as to commodities whenever margin is exhausted. All orders to sell hereafter or heretofore given, are to be considered as subject to the above unless otherwise expressly stipulated therein.''

That if the account of any customers dealing with said defendant is not closed out so as to show a loss, or if the result of the double charges for commissions and the interest charged upon fictitious loans and balances as aforesaid, does not exceed any apparent profit made by such customer, he is induced to continue his trading until the account shows a loss, or until the same has been closed out for lack of sufficient margin; but in fact no business is transacted, and all transactions are entirely fictitious and fraudulent as against its customers.

That your orator on or about the 20th day of July, 1903, intending to become a customer of the said defendant corporation, Haight & Freese Company, and intending to make investments in the purchase and sale of stocks, bonds and commodities through said defendant, went to the office maintained by it at Philadelphia, in the State of Pennsylvania, and was induced by the defendant to execute a power of attorney and deposit the same with it, and at or about the same time to deposit the sum of One Hundred and Fifty Dollars ($150), and subsequently and from time to time thereafter your orator did deposit other sums of money amounting in all to the sum of Three Thousand, three hundred and fifty dollars ($3,350). That at or about the same time one Daniels in the office of the defendant was introduced to your orator by the defendant's manager and director, one George G. Turner, and your orator was induced by him to execute the said power of attorney in such manner as to give the said Daniels authority to give orders for the purchase and sale of your orator's account, and exercise generally his discretion therein; and on or about the 1st day of October, 1903, your orator was informed by the defendant corporation that it had closed out your orator's account on account of

the slump in the prices of stocks; that your orator protested against said action, and thereafter was informed by said defendant that it would reinstate your orator on its books, but on or about the 1st day of January, 1904, your orator was again informed by defendant that his account had been closed out with the exception of about Forty Dollars ($40) on account of the fluctuations in the market prices of the stocks in which he supposed he was dealing. That the power of attorney was given to authorize defendant corporation and the said Daniels to exercise their discretion in regard to the buying and selling of stocks, securities and commodities, and that your orator supposed that such discretion was being honestly exercised, and that actual purchases and sales were being made in your orator's account; that your orator was ignorant of the practice of the defendant to charge double commissions and the interest computed as aforesaid upon fictitious loans and balances; in fact the said defendant corporation never bought nor sold any of the stocks, securities or commodities shown in their pretended accounts to your orator, and they never invested your orator's money in any way, and the whole transaction was a fraud upon your orator, and said accounts were so manipulated by the defendant as to show the loss of your orator's money, and the said account of your orator was wholly fraudulent and fictitious, and the defendant corporation now owes your orator the sum of Three Thousand, three hundred and fifty dollars ($3,350) deposited as aforesaid, and although often requested to pay the same to your orator has refused and still refuses so to do, that many other innocent persons are swindled and defrauded by the said defendant corporation in the same and similar manner as your orator.

Your orator further alleges that the defendant corporation is using its corporate form for the purpose of pretending to carry on a commission and brokerage business, and to conceal the real nature of its business in an attempt to shield and protect the individuals carrying on said business from personal liability, whereas in fact the said business is a mere swindling device for defrauding people and is a bucket shop; that by means of large advertisements in the newspapers and correspondence the public are induced to deal with the said defendant corporation in the manner above described, and the public are induced to believe that the defendant is engaged in legitimate business, whereas, in fact said business is a mere swindling device as hereinbefore alleged; that the defendant has made and is making large profits from its customers, which its officers and persons controlling its affairs constantly withdraw and appropriate to their own use. That the said defendant has no capital, and has no regular books of account, and in order to conceal the real nature of its business has prepared and keeps false and fictitious books of accounts; that said defendant has creditors exceeding five thousand in number, whose claims against the said corporation exceed a million dollars, and said defendant has not sufficient assets to pay the said creditors' claims, but is carrying on its business from day to day by means of the moneys received from the customers dealing with it; that in order to conceal the nature of its business, false and fictitious books of account have been prepared

and kept, and by means of an institution known as the Consolidated Stock Exchange of Philadelphia, fictitious transactions were and have been pretended to have been executed by the said defendant; that through the Attorney General of the State of Pennsylvania proceedings have been instituted against the Consolidated Stock Exchange of Philadelphia to annul its charter, and to restrain it from doing business, and a Receiver of said Consolidated Stock Exchange of Philadelphia has been appointed by the Courts of Pennsylvania; that the Freese, who was formerly one of the partnership known as Haight & Freese, is no longer connected with the said corporation, but has departed from the United States and is living in London, England, and the Haight whose name was used in the formation of the said corporation, and who was also a member of the said firm of Haight & Freese, is an employee of the said corporation at Philadelphia, Pennsylvania, upon a small salary; that the principal assets of said corporation are at Boston, in the State of Massachusetts; that the said Seaboard National Bank, and the Consolidated National Bank, and the Produce Exchange Safe Deposit and Storage Company, have their principal place of business in the City, County and State of New York, and have property and funds of the said defendant in their possession, and the said John Doe and Richard Roe are citizens of the City, County and State of New York, and also have funds of the defendant in their possession. That defendant's directors are William H. Little, who is a director, and Vice-President and Treasurer, Harvey Watson, who is a director and Secretary, and George C. Turner, who is a director and Manager, and also Assistant Treasurer; that it has other managers, one named Charles H. Poor, Jr., one William C. Conkling, and a Cashier named Beardsley, of said defendant.

To the end, therefore, that the defendant may, if it can, show why your orator should not have the relief hereby prayed, and may, according to the best of its knowledge and belief, full, true, direct and perfect answer make, but not upon oath, which is hereby waived, to the allegations herein contained; and inasmuch as your orator has no adequate remedy at law, he prays:—

1. That writs of injunction, not only by the final decree but also by an interlocutory writ, issue restraining the defendant, Haight & Freese Company, its officers, agents and servants, from paying over or delivering any of the money and property in its hands or control to any person other than a Receiver to be appointed by this Honorable Court as hereinafter prayed, and restraining and enjoining all other persons or corporations, the Seaboard National Bank, the Consolidated National Bank, the Produce Exchange Safe Deposit and Storage Company, John Doe and Richard Roe, and particularly all banks, trust companies and safe deposit companies having in their possession or control any property belonging to said defendant, whether standing in its name or in the name of Charles H. Poor, Junior, manager, or William G. Conkling, or in the name of William H. Lillis, Vice President or Treasurer, or of one Beardsley, cashier, or in the name of any of the directors of said corporation, including one George C. Turner and Harvey Watson, or in the indi-

vidual names of any of them, from paying over or transferring the same to any person other than such Receiver, or from permitting the defendant or either of said persons named other than a Receiver of this Court, from removing the same; and particularly from allowing the contents of any safety deposit box standing in the name of the defendant or of any or either of said persons mentioned, from being withdrawn, except by such receiver, until the further order of this Court.

2. That a proper and suitable person may be appointed both by an interlocutory order and by a final decree to receive, collect and take possession of all the property of said defendant, including all of its assets, choses in action, accounts and books of account, correspondence, papers and memoranda whether in the possession of said defendant, or of either of the persons above mentioned, or of any other person acting in the defendant's behalf; with authority to receive and hold the same as such Receiver of this Court, until further order of this Court.

3. That an account may be taken of the amount due to your orator, and of such other creditors as may join in this bill, and that such amounts as may be due upon an accounting as aforesaid, may be ordered to be paid.

4. That said defendant may be perpetually enjoined and restrained from carrying on the above described fraudulent business and transactions, and its property may be distributed among its creditors, and it may be ordered to be dissolved.

5. That your orator may have such other and further relief in the premises, including final and interlocutory writs and decrees, as the nature of the case shall require and to your Honors shall seem meet.

And may it please your Honors to grant also unto your orator, not only writs of injunction, both interlocutory and final decrees for the Receiver, but also a writ of subpœna to be directed to said defendant, Haight & Freese Company, commanding it to appear and make answer to the aforesaid bill of complaint, at a certain time, and to abide by the further order of the court.

WM. P. MALONEY,
Of Counsel and Solicitor for the Plaintiff.

State of New York,
City and County of New York. } ss.:

RIDGEWAY BOWKER being duly sworn, deposes and says: I am the plaintiff in the above-entitled action; I have read the foregoing bill of complaint, and know the contents thereof, and the same is true to my own knowledge, except as to the matters therein stated to be alleged on information and belief, and as to those matters, I believe it to be true.

RIDGEWAY BOWKER.

Subscribed and sworn to before
me this 9th day of May, 1905.

J. ALBERT WOOD,
Commissioner of Deeds,
in for City of New York.

FORM XXI.—PETITION FOR APPOINTMENT OF RECEIVER AT FOOT OF DECREE.

DISTRICT COURT OF THE UNITED STATES, FOR THE SOUTHERN DISTRICT OF NEW YORK.

CHRISTIAN DANCEL and MARY DANCEL as Administrators of the goods, chattels and credits of CHRISTIAN DANCEL, deceased,
Petitioners & Complainants,
against
GOODYEAR SHOE MACHINERY COMPANY of Portland, Maine, otherwise known as the United Shoe Machinery Company of Maine,
Defendant-Respondent.
} In Equity.

To the Honorable the Judges of the District Court of the United States in and for the Southern District of New York.

Christian Dancel and Mary Dancel, who are citizens of the State of New York, and residents of the County of Kings, of the Borough of Brooklyn, in the City and State of New York, and who sue as administrator and administratrix of the goods, chattels and credits of Christian Dancel, deceased, file this, their petition and bill of complaint, against the Goodyear Shoe Machinery Company of Portland, Maine, which is otherwise known as the United Shoe Machinery Company of Maine and which is a foreign corporation duly organized and existing under the Laws of the State of Maine and a citizen of the State of Maine. And thereupon your orators and petitioners complain and say:—

I. On October 26th, 1898, the Surrogate of the County of Kings duly issued to your orators and petitioners letters of administration of the goods, chattels and credits of Christian Dancel, deceased, who died intestate in the said County on October 12th, 1898, and who at the time of his death was a resident of said County. Said Surrogate was a Court of competent jurisdiction. Thereupon your orators and petitioners duly qualified as such administrators and have acted as such ever since.

II. On October 15th, 1900, your orators and petitioners duly commenced an action against the said Goodyear Shoe Machinery Company of Portland, Maine, in the Supreme Court of the State of New York in and for the County of New York. Said action was brought to enforce a certain agreement in writing made in the City, County and State of New York by said intestate with the Goodyear Shoe Machinery Company of Hartford, Conn., a corporation organized and existing under the Laws of the State of Connnecticut. Said contract was duly assumed by said Goodyear Shoe Machinery Company of Portland, Maine, on or about March 9th, 1893. Said

Maine corporation duly appeared in said action and on or about December 10th, 1900, duly removed said action into this Court by filing a petition for said removal and a bond conditioned for the entry in this Court of a copy of the record in said action, and for the payment of the costs awarded in case of a remand of said suit in accordance with the Statutes of the United States. Said action was subsequently continued in this Honorable Court as a suit in equity and on February 28th, 1905, a judgment and decree was duly made, entered and filed in said suit in the Clerk's Office of this Court, which decree and judgment, amongst other things, ordered, adjudged and decreed; that the complainants in said suit, who were your orators and petitioners, recover of the United Shoe Machinery Company of Maine, formerly known as the Goodyear Shoe Machinery Company of Portland, Maine, the sum of Thirty-eight thousand twenty-eight 11/100 ($38,028.11) dollars, and that the complainants in said suit, who were your orators and petitioners, should have an execution to collect the said sum of money from said defendant. Said decree and judgment further ordered, adjudged and decreed that said defendant corporation should pay to your orators and petitioners the additional sum of Four hundred sixteen and 66 2-3/100 ($416.66⅔) dollars on the last day of each month to and including August 31st, 1908, provided that certain letters patent therein named remained in force as a valid letters patent, and "that either party may apply at the foot of this decree for further relief not inconsistent with that previously awarded upon notice in writing addressed to the solicitor who has appeared for the opposite party at his present office or at such other address as either party may hereafter notify the other party in writing that he, she, it or they select for that purpose." Edwards H. Childs, Esq., is the attorney and solicitor, who in said action and suit in equity appeared for said defendant. His office and office address throughout said action and suit in equity was and still is Number 59 Wall Street, in the Borough of Manhattan, City, County and State of New York. The said defendant has not notified your petitioners and orators that it selects any other address for any notice at the foot of said decree.

III. On March 16th, 1905, a writ of execution was duly issued under said decree and in said suit from the office of the Clerk of this Court addressed to the Marshal of the United States for the Southern District of New York directing him to collect the amount awarded in said judgment and decree out of the personal and real property of said defendant in said district; and on the same day, the said Marshal duly returned said writ of execution to said clerk unsatisfied.

IV. On March 17th, 1905, a writ of execution was duly issued under said decree and in said suit from the office of the Clerk of this Court addressed to the Marshal of the United States for the Eastern District of New York directing him to collect the amount awarded in said judgment and decree out of the personal and real property of said defendant in said Eastern District; and on the same day the said Marshal duly returned said writ of execution to said clerk unsatisfied.

V. Subsequent to the appearance by defendant in said action, said de-

fendant revoked the authority and designation of the agent upon defendant had previously authorized and designated to accept service of process addressed to defendant in the State of New York. Since then, said defendant has not had, and defendant now has not any office nor agent within the State of New York.

VI. On or about September 1, 1900, said defendant executed a paper which purported to convey all the property of the defendant in this State and all of the other property of said defendant corporation in the United States and elsewhere except certain letters patent and except property in certain States outside of the Second Circuit of the Courts of the United States, to the United Shoe Machinery Company of New Jersey, which now is, and then was a corporation organized and existing under the Laws of the State of New Jersey. Said New Jersey corporation has an office in the City, County and State of New York. It transacts business in said State and County; and it has an agent in said City, County and State, who is duly authorized to accept service of process on its behalf.

VII. At the time of the execution of said paper purporting to be a conveyance, said Maine corporation was indebted to your orators and petitioners under said contract in a sum of money exceeding Eight thousand ($8,000.00) dollars; and said defendant anticipated and knew that the further sum of Four hundred and sixteen 66/100 ($416.66) dollars would fall due under said contract on the last day of each succeeding month. Said paper purporting to be a conveyance was executed with the design and object of preventing your orators and petitioners from collecting the indebtedness then due them, and that which would subsequently fall due them under said contract. Said paper purporting to be a conveyance was executed in fraud of the creditors of said defendant corporation including your orators. There was no consideration paid said New Jersey corporation to said defendant Maine corporation for said conveyance.

VIII. On said September 1, 1900, the said defendant Maine corporation was the owner of a large amount of personal property in the State of New York, located in the Counties of New York, Kings, Westchester and other Counties in said State. Said property consisted of certain machinery for the making of boots and shoes leased to certain manufacturers in said Counties of said State and also, the right to receive royalties from persons in this said State who are using certain letters patent owned and controlled by said defendant corporation. Since said date, defendant has maintained a merely nominal existence. It has kept its principal office and books in the City of Boston, County of Suffolk and State of Massachusetts in the office of said New Jersey corporation, and all of the officers and agents of said defendant Maine corporation have been agents, officers and employees of said New Jersey corporation.

IX. On or about September 1, 1900, said United Shoe Machinery Company of New Jersey took possession of all of said property of said defendant in this State; and the said New Jersey corporation is still in the possession of the same, and said New Jersey corporation has since said date used certain inventions patented and owned by said defendant. Said prop-

erty consists of equitable assets of the defendant, which cannot be reached by execution; but which are applicable in equity to the satisfaction of the debts of the defendant including the indebtedness of said defendant to your orators and petitioners.

Upon information and belief that there are other assets of said defendant Maine corporation in the Southern District of New York, which can be collected by proceedings in equity, but which cannot be seized or levied upon by execution; which include causes of action against different parties to your petitioners and orators unknown, the nature and value of which causes of action are to your orators and petitioners unknown, and the causes of action against said New Jersey corporation for infringement of patent rights owned by said defendant. The statutes and decisions in force in the State of New York give a judgment debtor the right to procure the appointment of a receiver of a foreign corporation by the Courts after a judgment against such foreign corporation has been entered and an execution thereunder has been issued and returned unsatisfied. If the said action and suit in equity had not been removed into this Court, a receiver would have been thus appointed by the State Court from which this case has been removed.

It will be impracticable for your orator to collect said equitable assets of said defendant Maine corporation and to apply the same to the satisfaction of the said judgment and decree, unless a Receiver of the assets of said defendant Maine corporation is appointed by this Court with authority in said Receiver to sue on behalf of said Maine corporation, and to defend suits brought against said defendant Maine corporation in this Court and in the Courts of the State of New York.

Said defendant Maine corporation has filed in this Court certain papers which it claims constitute an appeal from said decree to the Circuit Court of Appeals; but it has filed no bond such as is required to secure a supersedeas and no security for the payment of said decree upon its affirmance, nor to answer the damages if it fails to make its plea good, and it has made no application for a supersedeas. No transcript has been filed in the Circuit Court of Appeals.

The said defendant Maine corporation, acting through its officers, who are also officers and agents of the said New Jersey corporation, threatens and is about to procure a removal and concealment of the property of said defendant in the State of New York, and unless it and its officers are immediately enjoined from so doing, it will be impracticable for any receiver subsequently appointed to secure and to obtain its property in this State and it may be impracticable to collect said decree.

All of which acts and doing are contrary to equity and good conscience and tend to the manifest and irreparable injury of your orators and petitioners in the premises. For as much as your orators and petitioners can have no adequate relief except in this Court and to the end therefore, that said defendant may, if it can, show why your petitioners and orators should not have the relief hereby prayed, and may make a full disclosure and discovery of all the matters aforesaid and according to the best and utmost

of its knowledge, remembrance, information and belief, and that of its officers, full, true, direct and perfect answers made to the matters hereinbefore stated and charged, but not under oath; an answer under oath being hereby expressly waived; your orators and petitioners pray that your honors may grant the writs of injunction, both interlocutory and perpetual issuing out of and under the seal of this Honorable Court perpetually enjoining and restraining the said defendant, its Clerks, attorneys, agents, servants and assigns from transferring, interfering with and from removing any property to which said defendant may now be entitled and any property to which said defendant was entitled at any time during the year 1900; and that a Receiver both interlocutory and perpetual be appointed of all the assets and property of said defendant Maine corporation, including its assets, both legal and equitable, real, personal and mixed, with authority to sue in this Court, and in the Courts of the State of New York, and elsewhere to collect any and all assets and to enforce any and all causes of action now owned by said defendant and which said defendant owned during the year 1900; and with authority to defend any suits or actions which are now pending or which may hereafter be brought against said defendant; and that said Receiver be authorized and directed to collect said assets and to sell the same and out of the proceeds thereof first to pay the costs and expenses of said Receivership, including his compensation and his counsel fees; then to pay all amounts that may be then due to your orators and petitioners under said decree of this Court; and to apply the balance to pay the other debts of said defendant Maine corporation, and may it please this Honorable Court to grant to your orators and petitioners such other and further relief in the premises as may be just with the costs of this proceeding. May it please your Honors furthermore to grant unto your orators and petitioners not only the writs of injunction perpetual and interlocutory, and the appointment of a Receiver in accordance with the prayer of this petition and bill, but in case your Honors deem the issue of a writ of subpœna necessary to acquire jurisdiction of this application, to grant to your orators and petitioners a writ of subpœna of the United States of America directing that the United Shoe Machinery Company of Maine, otherwise named the Goodyear Shoe Machinery Company of Portland, Maine, appear and answer to this petition and bill of complaint and abide and perform such order and decree in the premises as to this Court shall seem just and proper as required by the principles of equity and good conscience.

J. PHILIP BERG,
Solicitor and Attorney for Petitioners-Complainants,
140 Nassau Street,
New York.
ROGER FOSTER, of Counsel.

UNITED STATES OF AMERICA,
Southern District of New York, } ss.
County of New York,

Christian Dancel, being duly sworn, deposes and says:—I reside in the City of Brooklyn, County of Kings, State of New York, and I am one of the petitioners and orators mentioned in the annexed petition and bill of complaint. Said petition and bill is true to my own knowledge, except as to the matters therein stated to be alleged upon information and belief; and as to those matters I believe the same to be true.

CHRISTIAN DANCEL.

Sworn to before me this
28th day of March, 1905.
HOWARD CAMPBELL,
Notary Public, Kings Co.
Certificate in New York County.

DISTRICT COURT OF THE UNITED STATES.

FOR THE SOUTHERN DISTRICT OF NEW YORK.

CHRISTIAN DANCEL and MARY DANCEL, as Administrators of the Goods, Chattels and Credits of CHRISTIAN DANCEL, deceased,
against
Petitioners & Complainants,
GOODYEAR SHOE MACHINERY COMPANY of Portland, Maine, otherwise known as the United Shoe Machinery Company of Maine,
Defendant-Respondent.
} In Equity.

COUNTY OF NEW YORK, SS:—

Christian Dancel, being duly sworn, deposes and says:—I reside in the City of Brooklyn, County of Kings and State of New York, and I am one of the petitioners and orators mentioned in the annexed petition and bill of complaint. Said petition and bill is true to my own knowledge, except as to the matters therein stated to be alleged upon information and belief; and as to those matters, I believe the same to be true. I hereby incorporate the said petition and bill hereto annexed into this my affidavit with the same effect as if the same were therein repeated and set forth specifically and at length. In the suit in equity described in said petition, one Elmer P. Howe, who is the Vice President of said defendant, and who is a director of the United Shoe Machinery Company of New Jersey, testified; That he held such office and directorship; that in September 1, 1900, the United Shoe Machinery Company of New Jersey acquired the legal title to certain machines, the property of defendant at Sing Sing, in the State of New York, at or near the Kings County Prison in Brooklyn of said State;

at Burt & Co.'s, at Lattimer's at Wickert and Gardner's and at other factories in New York City meaning by said phrase, the Borough of Manhattan, in said City, and in other factories in other parts of the State of New York; that said machines were immediately prior to September 1, 1900, owned by said defendant Maine corporation; that prior to March 9, 1893, said machines were the property of the Goodyear Shoe Machinery Company of Hartford, Conn.; that at least a year and a half before September 1, 1900, said New Jersey corporation acquired a majority interest in and a controlling interest in the stock of said Maine corporation; that certain letters patent were still owned by defendant Maine corporation; and that said New Jersey corporation had since September 1, 1900, used said patents without paying any Royalties to said defendant Maine corporation for said use, and without any written license by said defendant authorizing said New Jersey corporation to use the said patents; that he did not remember whether the said New Jersey corporation paid the said defendant Maine corporation any consideration for the property of said Maine corporation which said New Jersey corporation received. I have also seen a circular issued by said defendant Maine corporation of which the following is a copy, viz:—

"Office of
GOODYEAR SHOE MACHINERY CO.,
208 Lincoln Street.

"Boston, Mass., Aug. 31, 1900.

"TO THE LESSEES OF THE GOODYEAR SHOE MACHINERY COMPANY:—

"On September 4th the accounts of the Goodyear Shoe Machinery Company will be transferred to the books of the United Shoe Machinery Company, and thereafter all bills will be rendered by the United Shoe Machinery Company 'Goodyear Department,' and statements will be from the United Shoe Machinery Company, direct, to whom all remittances should be made.

"All orders for machines and spare parts should be addressed to the United Shoe Machinery Company, direct, to whom all remittances should usual to the local office of the district in which the factory of our lessee is located. Compliance with this request will oblige,

"Yours very respectfully,
"GOODYEAR SHOE MACHINERY COMPANY.
"By Fred'k G. King, Mgr."

The said defendant and its officers throughout the litigation described in said petition hereto annexed, which began October 15, 1900, have concealed and suppressed evidence of their liability, and have not hesitated to use false testimony for that purpose. The president of defendant, Sidney W. Winslow, when his deposition was taken in behalf of the complainants in Boston, Massachusetts, April 25th, 1904, made a number of false statements under oath. Amongst other false statements then made by him were the following: He testified that he did not know the name of the Treasurer

of the said defendant Maine corporation; that he did not know the position in the defendant's employ held by another witness who was present, and who a short time before he had said was the Secretary of said defendant; that he did not know who was the Treasurer of said defendant; that he did not know the names of any of the officers of said defendant elected at its last previous meeting, although he presumed that he attended the same; that he could not remember the name of any one who had ever been the Treasurer of said defendant nor of anyone who had ever been a bookkeeper of said defendant; that he did not know whether the names of the bookkeepers and other employees of defendant appeared in any book of the defendant; that he did not know whether certain books which he produced under a subpœna duce tecum directing him to produce certain books of account of defendant were the books of account of defendant. The said defendant through its officers and agents have also destroyed or concealed certain books of the Goodyear Shoe Machinery Company of Hartford, Conn., which were in its possession and which its officers were directed by a subpœna duce tecum to produce, and which it failed to produce at the time designated in said subpœna. Amongst other books thus destroyed or concealed by said defendants officers were the records of the meetings of the directors and stockholders of said Goodyear Shoe Machinery Company of Hartford, Connecticut.

CHRISTIAN DANCEL.

Sworn to before me this
28th day of March, 1905.
(L. S.) HOWARD CAMPBELL,
Notary Public, Kings Co.
Certificate filed in N. Y. Co.

FORM XXII.—BILL OF FORECLOSURE OF RAILWAY MORTGAGE.

[*District*] *Court of the United States for the Southern District of New York.*

MORTON TRUST COMPANY, Complainant, *against* METROPOLITAN STREET RAILWAY COMPANY, NEW YORK CITY RAILWAY COMPANY, ADRIAN H. JOLINE and DOUGLAS ROBINSON as Receivers of New York City Railway Company, ADRIAN H. JOLINE and DOUGLAS ROBINSON as Receivers of Metropolitan Street Railway Company, THE PENNSYLVANIA STEEL COMPANY and THE DEGNON CONTRACTING COMPANY, Defendants.	In Equity. Bill of Foreclosure.

To the Judges of the [*District*] *Court of the United States for the Southern District of New York:*

Morton Trust Company, a corporation organized and existing under the laws of the State of New York and a citizen of said State, brings this its

bill against Metropolitan Street Railway Company, a corporation organized and existing under and by virtue of the laws of the State of New York and a citizen of said State, New York City Railway Company, a corporation organized and existing under and by virtue of the laws of the State of New York and a citizen of said State, Adrian H. Joline and Douglas Robinson, both citizens of the State of New York, as receivers of said New York City Railway Company, said Adrian H. Joline and Douglas Robinson as Receivers of said Metropolitan Street Railway Company, The Pennsylvania Steel Company, a corporation organized and existing under the laws of the State of Pennsylvania and a citizen of said State, and the Degnon Contracting Company, a corporation organized and existing under the laws of the State of New Jersey and a citizen of said State; and thereupon your orator complains and says as follows:

I. Your orator is a corporation duly organized and existing under and by virtue of the laws of the State of New York and a citizen of said State.

II. On information and belief, the defendant Metropolitan Street Railway Company (hereinafter in this bill called the Metropolitan Company) is a corporation organized and existing under the laws of the State of New York and a citizen of said State, having been organized by a merger and consolidation at divers times of Houston, West Street & Pavonia Ferry Railroad Company, Broadway Railway Company, South Ferry Railroad Company, The Metropolitan Crosstown Railway Company, The Lexington Avenue & Pavonia Ferry Railroad Company and The Columbus and Ninth Avenue Railroad Company, all of said companies having been street surface railroad companies organized and existing under the laws of the State of New York.

On information and belief, the defendant New York City Railway Company (hereinafter in this bill called the New York Company) is a corporation organized and existing under the laws of the State of New York and a citizen of said State. Said defendant was so organized under the name and style of "Interurban Street Railway Company" and subsequently and pursuant to proceedings duly had, changed its name to "New York City Railway Company."

On information and belief, the defendant The Pennsylvania Steel Company is a corporation duly organized and existing under the laws of the State of Pennsylvania, and a citizen of said state, and the defendant The Degnon Contracting Company is a corporation duly organized and existing under the laws of the state of New Jersey and a citizen of said state.

III. Heretofore and prior to March 21, 1902, the defendant Metropolitan Company in the exercise of its powers under the laws of the State of New York, and in accordance with resolutions duly passed by its board of directors and by its stockholders at respective meetings thereof duly called and held, duly authorized the issue of a series of bonds to be executed under its corporate seal and attested by the signatures of its president or one of its vice-presidents, and attested by its secretary or an assistant secretary, and to be issued to an amount not exceeding in the aggregate the principal sum of sixty-five million dollars ($65,000,000) at any one

time outstanding; said bonds to be either coupon or registered, the coupon bonds bearing date April 1, 1902, and the registered bonds bearing date at the time of their respective issue; by the terms of which bonds the Metropolitan Company promised to pay, in the case of coupon bonds, to the bearer thereof, and, in the case of registered bonds, to the registered owner thereof or his assigns, at the office or agency of the Metropolitan Company in the city of New York on the first day of April in the year 2002, the sum of one thousand dollars ($1,000) in the case of coupon bonds and the sum of one thousand dollars ($1,000) or multiples thereof in the case of registered bonds, gold coin of the United States of America, of or equal to the then standard of weight and fineness, and to pay interest thereon, in the case of coupon bonds, from April 1, 1902, and, in the case of the registered bonds, from the first day of April or October, as the case might be, next preceding the date thereof, payable at its said office in like gold coin, semi-annually on the first days of April and October in each year, in the case of coupon bonds, upon presentation and surrender, as they might severally mature, of the interest coupons thereto annexed, and, in the case of registered bonds, to the registered owner thereof or his assigns. The form and tenor of said bonds are set forth at large in the mortgage hereinafter referred to.

IV. On or about March 21, 1902, the Metropolitan Company being thereunto duly authorized by the action of its board of directors and with the consent of stockholders owning at least two-thirds of the entire capital stock of the Metropolitan Company, such stock having been represented and voted upon in person or by proxy at a special meeting of the stockholders duly called for that purpose, in pursuance to the statute in such case made and provided, and with the consent of the board of railroad commissioners of the state of New York, the consent of said stockholders evidenced by a sworn certificate of the vote of said meeting and the consent of said board, both in due form, having been contemporaneously filed and recorded in accordance with law in the office of the register of the county of New York in which county the Metropolitan Company had its principal place of business and wherein its property was situated, duly made, executed and delivered to your orator, as trustee, its certain mortgage or deed of trust dated on that day, wherein and whereby in order to secure the payment of the principal and interest of all such bonds at any time issued and outstanding and to secure the performance and observance of all the covenants and conditions in said mortgage contained, it granted, bargained, sold, released, conveyed, assigned, transferred and set over unto your orator, as trustee, its successors and assigns forever, all and singular, the railroads, railroad routes, estates, leaseholds, properties, rights, privileges and franchises described as follows, to wit:

I.

STREET SURFACE RAILROADS IN THE COUNTY OF NEW YORK, CITY OF NEW YORK, AND STATE OF NEW YORK, OWNED BY THE METROPOLITAN RAILWAY COMPANY, DESCRIBED AS FOLLOWS:

[Next followed description of same.]

II.

REAL ESTATE OWNED BY THE METROPOLITAN STREET RAILWAY COMPANY, BEING THE FOLLOWING DESCRIBED PIECES AND PARCELS OF LAND WITH THE BUILDINGS AND IMPROVEMENTS THEREON SITUATE, LYING AND BEING IN THE COUNTY OF NEW YORK, CITY OF NEW YORK AND STATE OF NEW YORK.

A. REAL ESTATE NOT SUBJECT TO THE METROPOLITAN STREET RAILWAY COMPANY'S GENERAL AND COLLATERAL TRUST MORTGAGE.

[Next followed description.]

III.

STREET SURFACE RAILROADS AND RAILROAD ROUTES IN THE COUNTY OF NEW YORK, CITY OF NEW YORK, AND STATE OF NEW YORK, OPERATED BY THE METROPOLITAN STREET RAILWAY COMPANY AS LESSEE, UNDER THE LEASES HEREINAFTER MENTIONED:

[Next followed description.]

Together with all and singular the improvements on said properties, and all and singular, the railroads, lands, buildings, structures, fixtures privileges, franchises, rights of way, trackage rights, contracts, consents leaseholds, easements and other rights and interests then owned by the Metropolitan Street Railway Company; also all and singular the tracks, side tracks or sidings, switches, rails, bridges, fences, buildings, depots, station-houses, power-houses, car-houses, machine shops, repair shops and other shops, and all other buildings, improvements, erections and structures, and all dynamos, belting, engines, boilers, regulators, meters, poles, trolleys, conduits, feeders, cables, wires, switchboards, lamps and machinery for producing, generating and distributing electricity or power; and also all and singular the rolling stock, equipment, motors, engines, tenders, carriages, cars, trucks, horses, harness, tools, implements, furniture, fixtures, machinery, materials, coal, wood, oil, fuel and other supplies; and also all maps, drawings, profiles, licenses, records, deeds, contracts and agreements, patents and patented inventions and processes then owned by the Metropolitan Street Railway Company, all of which personal property was thereby declared to be fixtures and appurtenances of said railroads; and also all then present or future improvements and additions made or to be made upon and to any or all of said railroads or property, real and personal, and any and all equipment therefor and renewals or replacements of the same or of any part thereof or of the appurtenances; and also all and every other railroad, which the Metropolitan Street Railway Company should thereafter acquire or construct by means of the proceeds of any of the bonds thereby secured, and all power houses, real estate, equipment and other property, real or personal, appurtenant thereto.

And all and singular the tolls, fares, rents, issues, earnings, income, profits and other benefits and advantages of, or in any wise growing out of, all or any of the said several railroads, franchises and property, and all and singular the tenements, hereditaments and appurtenances to any of the said railroads or property belonging, or in any wise appertaining, and the reversion or reversions, remainder or remainders thereof, and all the

estate, right, title, interest, property, possession, claim and demand whatsoever, as well at law as in equity, of the Metropolitan Street Railway Company, in and to the same and every part and parcel thereof with appurtenances.

And also all the right, title and interest of the Metropolitan Street Railway Company in and to the following shares of stock which were then pledged and deposited with the Guaranty Trust Company of New York, under the mortgage dated February 1, 1887, from the Metropolitan Street Railway Company to said Guaranty Trust Company of New York, as trustee, securing the general mortgage and collateral trust five per cent. gold bonds of the Metropolitan Street Railway Company, viz.:

[Next followed description.]

To have and to hold the said described premises and property unto your orator, its successors in the trust, its or their assigns, in trust for the equal and proportionate benefit and security of all holders of the bonds and coupons issued and to be issued and secured by said mortgage and for the enforcement of the payment of the said bonds and interest when payable according to the tenor, purport and effect of such bonds and coupons and to secure the performance and observance of and compliance with the covenants and conditions of the said indenture, without preference, priority or distinction as to lien or otherwise of one bond over any other bond by reason of priority in the issue, sale or negotiation thereof or by reason of the purpose of its issue as in said mortgage or deed of trust more fully set forth.

All the property so conveyed and mortgaged to your orator as aforesaid is situated within the southern district of New York. Said mortgage was duly recorded in the office of the register of the county of New York in which the property thereby mortgaged was situated.

Your orator duly accepted the trusts therein created and it was and now is fully authorized and empowered to take and hold in trust the property conveyed to it therein and to execute the trusts reposed in it under and by virtue of the provisions thereof.

A copy of this mortgage marked Exhibit A is filed herewith and your orator prays leave to refer to the same as if it were fully set forth in this bill of complaint.

V. After the execution and delivery of said mortgage, the Metropolitan Company duly made and executed bonds of the issue described in said mortgage of the aggregate par value of sixteen million six hundred and four thousand dollars ($16,604,000) all of which bonds were duly certified by your orator in all respects as provided in said mortgage, and all of said bonds, as your orator is informed and believes, were duly issued by the Metropolitan Company for a valuable consideration and in accordance with the provisions of said mortgage; and said bonds are now outstanding in the hands of divers persons and corporations who are now the owners and holders thereof for value and your orator is advised and avers that said bonds so issued as aforesaid are now in all respects valid outstanding obligations of the defendant Metropolitan Company, and are entitled to the benefit and security of the said mortgage.

VI. Certain of the bonds so issued as aforesaid were certified and delivered by your orator and issued in accordance with the provisions of subdivision (2) of article second of said mortgage against the deposit with your orator, as security for the bonds issued and to be issued under said mortgage, of the following securities, viz.:

[Next followed description.]

Said securities so deposited with your orator ever since have been and now are held in trust by it subject to the trusts declared in said mortgage as additional security for the payment of the bonds issued thereunder.

VII. Of the property so conveyed to your orator as trustee by the said mortgage dated March 21, 1902, your orator in accordance with the provisions of said mortgage released from the lien of said mortgage, as it was authorized to do under the provisions thereof, a portion of the property hereinbefore specifically described as "146th Street, 147th Street, Lenox Avenue and 7th Avenue property," and included among the property enumerated in paragraph A of subdivision II of the description of the property conveyed to your orator as hereinbefore set forth as "Real estate not subject to the Metropolitan Street Railway Company's General and Collateral Trust Mortgage;" the property so released by your orator being described as follows:

[Next followed description.]

VIII. Your orator further shows that, as it is informed and believes, simultaneously with or immediately prior to the execution and delivery of the said mortgage, Exhibit A, filed herewith, the Metropolitan Company entered into a certain indenture of lease dated February 14, 1902, with the defendant the New York Company, under its then corporate name of Interurban Street Railway Company, and by said lease the Metropolitan Company did grant, lease and demise to the defendant New York Company under its said corporate name of Interurban Street Railway Company for the full term of nine hundred and ninety-nine years from February 24, 1902, all its railroads and railroad routes and all its real estate and the buildings and improvements thereon, and all its leasehold interests and leased lines, including all the street surface railroads and real estate owned by it, and all the street surface railroads and railroad routes operated by it as lessee which are described in the said mortgage or deed of trust to your orator, Exhibit A, and which were conveyed to your orator subject to the trusts thereof.

Said lease provided among other things that subject to the provisions therein contained and for the purposes therein specified, the Metropolitan Company, the lessor, might with the consent of the New York Company, the lessee, issue its bonds secured by mortgages upon its property and your orator is informed and believes that all the bonds issued by the Metropolitan Company under the aforesaid mortgage Exhibit A were issued in accordance with the provisions contained in said lease and for the purposes therein specified and with the consent of the lessee, the New York Company.

A copy of said lease is filed herewith marked Exhibit B and your orator

prays leave to refer to the same as if it were fully set forth in this bill of complaint.

Shortly after the execution of said lease, as your orator is informed and believes, the New York Company entered into possession of the said demised railroads and property and has operated the same and has collected the rents and profits thereof until the appointment of its receivers as hereinafter mentioned.

IX. On or about the 24th day of September, 1907, The Pennsylvania Steel Company and The Degnon Contracting Company filed their bill in this court against the defendant New York Company alleging facts, as your orator is advised, constituting insolvency of the New York Company and praying for the appointment of receivers of its property. Thereafter the New York Company filed its answer to said bill admitting the allegations thereof and thereupon and on or about September 24, 1907, by order of this court, the above named defendants Adrian H. Joline and Douglas Robinson were appointed receivers of said New York Company and of all its property, wherever situated, and they were thereby authorized, empowered and instructed among other things, to enter upon and take possession of all such property and to manage, operate and control the same.

Thereafter, the said Adrian H. Joline and Douglas Robinson, appointed receivers as aforesaid, duly qualified as such receivers and as such receivers entered upon and took possession of the property of said defendant New York Company, including the property which is described in the said mortgage dated March 21, 1902, and was conveyed to your orator subject to the trusts thereof, and they have since used and operated the same and are now, as such receivers, in possession of said property.

Your orator files herewith a copy of said bill and answer and order marked Exhibit C and prays leave to refer thereto for a precise statement of the contents thereof.

X. Your orator further alleges, that thereafter the Metropolitan Company presented its duly verified petition to this court wherein it alleged facts, as your orator is advised, constituting insolvency of the Metropolitan Company, and prayed that it might become a party defendant to said suit of The Pennsylvania Steel Company and The Degnon Contracting Company against the New York Company and that the receivership under the bill of complaint in the said cause be extended so as expressly to embrace the interests of the Metropolitan Company in said property.

Thereafter and on October 1, 1907, by an order of this court, the Metropolitan Company was made a party defendant in said cause and the receivership in said cause was extended to the properties of the Metropolitan Company as prayed in said petition and the said Adrian H. Joline and Douglas Robinson, theretofore appointed receivers in said cause, were appointed receivers of the properties of the Metropolitan Company.

Thereafter and on or about October 1, 1907, as your orator is informed and believes, the said Adrian H. Joline and Douglas Robinson duly qualified as such receivers and as receivers as aforesaid they are now in possession of all the railroads, properties and franchises of the Metropolitan Company described in said mortgage dated March 21, 1902.

Your orator files herewith a copy of said petition and of said order of this court marked Exhibit D and prays leave to refer thereto for a precise statement of the contents thereof.

XI. Thereafter and on or about October 9, 1907, your orator filed its bill in this court (leave having been granted to your orator so to do) against the Metropolitan Company, the New York Company, said Adrian H. Joline and Douglas Robinson as receivers of the New York Company, said Adrian H. Joline and Douglas Robinson as receivers of the Metropolitan Company, The Pennsylvania Steel Company and The Degnon Contracting Company alleging that unless the income and profits of the mortgaged premises were applied in accordance with the provisions of said mortgage the mortgaged premises would be wasted and the mortgage security become greatly impaired, and praying that a receiver of the mortgaged property be appointed and the income and profits thereof be applied in accordance with the provisions of said mortgage.

Thereafter and on or about October 9, 1907, said Adrian H. Joline and Douglas Robinson were by an order of this court appointed under the said bill of complaint in said cause receivers of all the railroads, properties and premises mortgaged and pledged under the said mortgage dated March 21, 1902, and of all the tolls, earnings, income, rents, issues and profits of said railroad, property and premises, and thereafter duly qualified as such receivers.

Your orator files herewith a copy of said bill of complaint marked E and of said order marked F and prays leave to refer thereto for a precise statement of the contents thereof.

XII. Further complaining, your orator shows that the property granted and conveyed to your orator under the said mortgage dated March 21, 1902, Exhibit A, was so granted and conveyed to secure the performance and observance of all the covenants and conditions contained in said mortgage, and that in and by said mortgage, Exhibit A, the Metropolitan Company did agree and covenant, among other things, that it would from time to time punctually observe and perform all of the obligations and pay and discharge all amounts payable under or by virtue of any lease thereby mortgaged so that the interest of the Metropolitan Company in any such leasehold estate might be at all times preserved unimpaired as security for the bonds issued under said mortgage.

XIII. Your orator alleges that among the leasehold estates mortgaged to your orator under said mortgage, Exhibit A, is the leasehold estate demised to the Metropolitan Company under a certain indenture or lease made on or about April 13, 1900, between The Third Avenue Railroad Company (hereinafter in this bill of complaint called the Third Avenue Company) and the defendant Metropolitan Company, which lease was subsequently by an agreement made on or about May 13, 1900, between the said parties, in certain respects modified and corrected.

A copy of said lease marked Exhibit G and of said agreement marked Exhibit H is filed herewith and your orator prays leave to refer to the same as if they were fully set forth in this bill of complaint.

XIV. In and by said lease, Exhibit G, the lessee, the defendant Metropolitan Company did agree among other things to pay to the lessor the Third Avenue Company a certain annual rental and as a part of such annual rental did agree from and after the expiration of six years from the date of said lease, to wit, from and after the 13th day of April, 1906, for a period of four years thereafter, to pay to the lessor, the Third Avenue Company, quarter yearly, a dividend upon the outstanding capital stock of the Third Avenue Company at the rate of six (6) per centum per annum.

XV. Your orator is advised that in accordance with the provisions of said lease there became due and payable on October 13, 1907, to the Third Avenue Company an instalment of rent for the quarter ending on that day amounting to a dividend of one and one-half per centum on the said outstanding capital stock of the Third Avenue Company.

Your orator is informed and believes that the defendant Metropolitan Company has not paid or caused to be paid the said instalment of rent payable as aforesaid, but has wholly failed and neglected so to do and the said Metropolitan Company has therein wholly made default and the said instalment of rent remains and is now wholly due and unpaid and in default; that the entire property of the Metropolitan Company is in the hands of said Joline and Robinson, receivers as aforesaid, and that said Joline and Robinson, both as receivers of the New York Company and as receivers of the Metropolitan Company, acting in accordance with the directions of this court in respect thereto have failed to pay said instalment of rent, and have made default in respect thereto.

Your orator is advised and so charges that such default in the payment of the aforesaid rent due and payable under said lease. Exhibit G, is and constitutes a default by the Metropolitan Company in the due observance and performance by it of the covenants and conditions required in said mortgage, Exhibit A, to be kept and performed by it, and that the Metropolitan Company ever since has been and now is in default in respect thereto.

XVI. Further complaining, your orator alleges on information and belief, that the various lines of railway embraced in said lease of the Metropolitan Company to the New York Company, Exhibit B, as well the lines owned by the Metropolitan Company as the lines leased to it, are subject to funded indebtedness secured by mortgage which is now outstanding and that failure to meet the interest on such underlying funded indebtedness as such interest matures, will operate also as a default under the mortgage securing the indebtedness the interest on which shall so become in default and will render said mortgage enforceable; and that the total of such funded indebtedness now outstanding secured by mortgages (exclusive of the bonds issued and secured under the mortgage to your orator dated March 21, 1902) amounts to upwards of eighty-three million dollars ($83,000,000) and that the annual interest charges thereunder amount to upwards of three million seven hundred and fifty thousand dollars ($3,750,000).

Your orator charges, that by said lease made by the Metropolitan

Company to the New York Company, the Metropolitan Company parted with the possession of its entire railroad system; that the Metropolitan Company has no other resources wherewith to meet the fixed charges on the mortgage indebtedness of its said system so leased and embraced in said mortgage to your orator or to meet the accruing rentals of said lines so leased to the Metropolitan Company or its predecessors and by the Metropolitan Company so leased to the New York Company and embraced in said mortgage to your orator or to meet other indebtedness or liabilities of the Metropolitan Company than the rentals reserved under said lease made by the Metropolitan Company to the New York Company as part of which said New York Company agreed to pay such fixed charges and such rentals and to perform the other covenants therein contained, and that said Metropolitan Company is now insolvent and unable to meet its obligations, and by reason of the matters hereinbefore alleged, it is and will be unable to perform its covenants and obligations under said mortgage dated March 21, 1902.

Your orator further charges that the New York Company is insolvent and unable to meet its obligations, and that by a decree made by this court on or about October 25, 1907, in the suit above mentioned of The Pennsylvania Steel Company and The Degnon Contracting Company against the New York Company this court did order, adjudge and decree and find that the said New York Company was insolvent, and your orator alleges that the said New York Company and said receivers thereof have failed and neglected to pay the instalment of rent due and payable by it on October 15, 1907, under the said lease of the Metropolitan Railway Company to the New York Company, Exhibit B, and have therein wholly made default and have also failed and neglected to pay the instalment of rent due on October 13, 1907, under the lease of the Third Avenue Company to the Metropolitan Company and are in default thereunder as hereinbefore alleged.

XVII. It is provided among other things by said mortgage to your orator, Exhibit A, that upon filing a bill in equity or upon other commencement of judicial proceedings by your orator to enforce any right under said mortgage, your orator should be entitled, as a matter of right, to the appointment of a receiver of the railroad's property and premises thereby mortgaged and pledged to your orator and of the tolls, earnings, revenue, rents, issues, profits and other income thereof with such powers as the Court or Courts making such appointment should confer. Your orator alleges on information and belief that the property subject to the lien of the mortgage to your orator, Exhibit A, is inadequate security for the protection of the holders of the bonds issued thereunder, and unless receivers of such mortgaged property be appointed the interests of your orator and of the bondholders it represents will be greatly injured and the value of the security which your orator has for their protection will be further greatly impaired and diminished and that it is necessary for the protection of your orator and of the holders of said bonds that a receiver or receivers be appointed in this cause of the railroad property and prem-

ises mortgaged and pledged to your orator and of the tolls, earnings, revenue, rents, issues, profits, and other income thereof.

XVIII. Your orator has been requested by persons owning or representing a large number of the bonds issued under and secured by said mortgage to your orator dated March 21, 1902, to enforce their rights under said mortgage and to institute proceedings for the foreclosure of the property mortgaged and pledged thereunder.

XIX. Your orator further shows that no proceedings at law or suits in equity have been begun or commenced by your orator save as above mentioned or, as your orator is informed and believes, by any holder of any of the bonds secured by said mortgage dated March 21, 1902, or of any coupons thereto attached, to enforce the payment of the sums so covenanted to be paid by the Metropolitan Company under the terms of the said mortgage and that the amount in controversy in this suit exceeds five thousand dollars.

XX. The said property mortgaged and pledged to your orator as aforesaid, is now in the possession of this Court through its receivers, appointed by its orders as hereinbefore set forth, and upon application by your orator leave has been granted to your orator to include as defendants herein the said Adrian H. Joline and Douglas Robinson as receivers of the New York Company and the said Adrian H. Joline and Douglas Robinson as receivers of the Metropolitan Company.

In consideration whereof and for as much as your orator is remediless in the premises according to the strict rules of the common law and can only have relief in a Court of Equity where matters of this kind are properly cognizable, your orator therefore prays the aid of this Honorable Court:

1. That the said defendants may be required to make answer respectively unto all and singular the matters hereinbefore stated and charged as fully and particularly as if the same were herein expressed and they thereunto particularly interrogated but not under oath, answer under oath being hereby expressly waived.

2. That an account may be taken of all property subject to the lien of said mortgage dated March 21, 1902, and that said mortgage may be decreed to be a valid lien upon all and singular railroads, railroad routes, estates leaseholds, properties, premises, rights, privileges and franchises therein described, and upon all the stocks, bonds and other securities mortgaged and pledged to your orator or held by it subject to the provisions of said mortgage (save and except such property as has been released from the lien thereof as in this bill particularly described), that an account be had of all improvements and additions made since the date of said mortgage upon and to any of said railroads or property, real and personal, and any and all equipment therefor and renewals or replacements of the same or of any part thereof or of the appurtenances and also of all and every other railroad which the defendant Metropolitan Street Railway Company has acquired or constructed since the date of said mortgage by means of the proceeds of any of the bonds secured by said mortgage and

all power houses, real state, equipment and other property, real and personal, appurtenant thereto, and that said mortgage or deed of trust may be declared to be a valid lien upon all such property.

3. That unless the defendant the Metropolitan Street Railway Company pay within a short day to be fixed by this Court into this Court or unto the Third Avenue Railroad Company or to the persons entitled thereto the rental due and payable on October 13th, 1907, under the lease between the Third Avenue Railroad Company and the defendant Metropolitan Street Railway Company dated April 13, 1900, and unless the said defendant pay to your orator the costs, expenses and allowances of this suit in that behalf incurred or expended, then that the said defendant Metropolitan Street Railway Company and all persons claiming under or through it may be forever barred and foreclosed of and from any equity of redemption of and claim of and in the railroads, property and premises conveyed to your orator as Trustee and described in said mortgage dated March 21, 1902, and all other property declared to be subject to the lien of said mortgage; that all and singular the railroads, railroad routes, estates, leaseholds, properties, premises, rights, contracts, equipment, privileges and franchises mortgaged and pledged to your orator (save and except such property as has been released from the lien of said mortgage as aforesaid), and all stocks, bonds and other securities mortgaged and pledged to your orator or held by it subject to the lien of said mortgage, and all other property which may be declared by this Court to be subject to the lien of said mortgage, may be sold in one parcel and as an entirety under a decree of this Honorable Court; that it may be decreed that upon such sale the whole of the principal sum of the bonds secured by said mortgage be immediately due and payable; that the proceeds of said sale may be brought into this Court to be administered by it as may be equitable and proper; that an account may be taken of the bonds secured by said mortgage dated March 21, 1902, and of the amount due and on said bonds for principal or interest or otherwise; and that in case of the insufficiency of such proceeds or of such portion thereof as may be applicable thereto to pay in full the amount of the principal and interest so due and unpaid upon the bonds secured by said mortgage dated March 21, 1902, then outstanding, a judgment may be rendered in the cause for such deficiency against the defendant Metropolitan Street Railway Company.

4. That pending this suit a receiver or receivers be appointed with the usual powers of receivers in like cases of the railroads, property and premises mortgaged and pledged in said mortgage to your orator, dated March 21, 1902, and of the tolls, earnings, income, rents, issues and profits thereof and that such directions may be made with respect to such receivership as may be equitable and proper, and that pending this suit a writ of injunction may be issued out of and under the seal of this Honorable Court directing, commanding, enjoining and restraining the said defendant Metropolitan Street Railway Company, its officers, directors and agents and

all other persons whomsoever from interfering with, transferring, selling or disposing of any of the property of the said Metropolitan Street Railway Company under the control of said receiver or receivers and from selling, transferring, conveying or otherwise disposing of or encumbering any of the property, rights or franchises of the said Metropolitan Street Railway Company.

5. That your orator may have such other and further relief in the premises as may be just and equitable and as to your Honors shall deem just.

May it please your Honors to grant to your orator a writ or writs of subpœna to be directed to the said defendants Metropolitan Street Railway Company, New York City Railway Company, Adrian H. Joline and Douglas Robinson as Receivers of New York City Railway Company and Adrian H. Joline and Douglas Robinson as Receivers of Metropolitan Street Railway Company, The Pennsylvania Steel Company and The Degnon Contracting Company, therein and thereby commanding them and each of them at a certain time and under a certain penalty therein to be named, to be and appear before your Honors in this Honorable Court then and there severally to answer all and singular the matters aforesaid, but not under oath, answer under oath being hereby expressly waived, and to stand to abide and perform such other and further orders or decrees as to your Honors shall seem meet.

[SEAL]

MORTON TRUST COMPANY,
By H. M. FRANCIS, Secretary,
Complainant.
BRONSON WINTHROP,
Solicitor for Complainant and of Counsel.

UNITED STATES OF AMERICA,
Southern District of New York, } ss.
City and County of New York.

Harry M. Francis being duly sworn deposes and says, that he is the Secretary of Morton Trust Company, the above named complainant; that he has read the foregoing bill of complaint and knows the contents thereof; that the same is true of his own knowledge except as to the matters therein stated to be alleged on information and belief and as to those matters he believes the same to be true, that the seal affixed to said bill of complaint is the corporate seal of said complainant and was so affixed by its authority.

H. M. FRANCIS.

Sworn to before me this 9th day of November, 1907.

[SEAL]

E. J. BLEZZARDE,
Notary Public, Richmand Co.
Certificate filed in New York Co.

FORM XXIII.—BILL OF REVIVOR.

United States [District] Court, Southern District of New York.

THE WEBSTER LOOM COMPANY
against
EMMA L. HIGGINS, EUGENE HIGGINS and JOSEPHINE BROOKS, as Executors of the last Will and Testament of ELIAS S. HIGGINS, Deceased,
and
JULES REYNAL and JOHN H. HIGGINS, surviving trustees, and NATHALIE FLORENCE REYNAL, residuary legatee under the last Will and Testament of NATHANIEL D. HIGGINS, deceased.
} In Equity.

To the Honorable the Judges of the [District] Court of the United States for the Southern District of New York:—

The Webster Loom Company, a corporation organized under and pursuant to the Laws of State of New York, and having its principal place of business in the City of New York in said State, brings this its bill of revivor against Emma L. Higgins, Eugene Higgins and Josephine Brooks, as Executors of the last Will and Testament of Elias S. Higgins, deceased, and Jules Reynal and John H. Higgins, surviving trustees,—and Nathalie Florence Reynal, residuary legatee under the last Will and Testament of Nathaniel D. Higgins, deceased. Said Emma L. Higgins, Josephine Brooks, Eugene Higgins, Jules Reynal, John H. Higgins and Nathalie Florence Reynal being citizens of the State of New York and residents of the City of New York in said State; and thereupon your orator complains and says that on or about the 19th day of June, 1874, your orator filed a bill in equity in this Court against Elias S. Higgins and Nathaniel D. Higgins, alleging infringement by them of certain Letters Patent of the United States, which were Numbered No. 130, 961 and dated August 27th, 1872, of which your orator was at that time, and is now, the owner.

That thereafter the said Elias S. Higgins and Nathaniel D. Higgins, having been duly served with the writ of subpœna, appeared by counsel and filed their answer to said bill of complaint, to which answer a replication was filed on the part of your orator.

That thereafter your orator proceeded to take proof in support of its said bill of complaint; and thereafter said defendants proceeded to take proofs in support of their said answer and in defense of said actions.

That thereafter said suit was brought to final hearing before the Honorable Hoyt H. Wheeler; that said judge filed his decision on the 31st day of May, 1879, adjudging invalidity of the fifth claim of the patent—being the claim in suit—and dismissing the said bill of complaint, as by reference to said decision reported in 15 Blatchford, 446, will more fully and at large appear.

That thereafter your orator appealed to the Supreme Court of the

United States from the decision of the [District] Court for the Southern District of New York; that the said appeal was argued before said Supreme Court of the United States, and a decision made by said court, the opinion being written by Justice Bradley, adjudging the validity of said patent and that defendants had infringed the same, and remanded the cause to this court, ordering a decree against said defendants restraining them from further infringement, and also granting a reference to a master to ascertain and report damages and profits caused by said infringement,—all of which will more fully and at large appear by reference to said decision reported in 15 Otto, 580.

That thereafter the accounting in this cause was commenced and voluminous proofs taken.

That thereafter the master filed his report awarding nominal damages to your orator, against said defendants.

That thereafter, on exceptions duly filed to said report, argument was had before His Honor Judge Shipman on motion to confirm said master's report; that said judge filed an opinion on the 26th day of July, 1889, recommitting said accounting to the master for further action in accordance with the said opinion. That no order has yet been entered on Judge Shipman's decision.

That during the pendency of said accounting the defendant Nathaniel D. Higgins died, leaving a last will and testament, which on the 31st day of January, 1882, was admitted to probate in the Surrogate's Court of New York County, New York, and letters executory thereupon were on said 31st day of January, 1882, duly issued out of said Surrogate's Court unto Elias S. Higgins, Jules Reynal and John H. Higgins.

That said will, after directing the payment of an inconsiderable percentage of the testator's estate as specified legacies to certain persons therein named, directed the said executors to hold in trust for the benefit of the testator's grandchildren, for a period of time that has not yet expired, the sum of one million and five hundred thousand dollars, and to pay the rest and residue of testator's estate unto his daughter Nathalie Florence Reynal.

That on the 31st day of December, 1888, said executors filed their final accounting in the office of the Surrogate of the County of New York, N. Y., whereby it appeared that they had paid said specific legacies, and that after paying to Nathalie F. Reynal aforesaid a sum amounting to between three and four millions of dollars, they still retained in trust for the benefit of said grandchildren of said testator the sum of one million and five hundred thousand dollars.

That said account was approved by said Surrogate and an order was entered in the court of said Surrogate on the 31st day of December, 1888, discharging and releasing said Elias S. Higgins, Jules Reynal and John H. Higgins from their duties as executors under said last will and testament, but directing them to continue to hold said trust fund of one million and five hundred thousand dollars as directed in said last will and testament.

That said Elias S. Higgins, Jules Reynal and John H. Higgins thenceforth continued to so act as trustees under said will as to said trust fund, and said Jules Reynal and John H. Higgins are now so acting.

That the aforesaid Elias S. Higgins died upon the 18th day of August, 1889, leaving a last will and testament, which on the 14th day of September, 1889, was admitted to probate in the Surrogate's Court of New York County, New York, and letters executory thereupon were on said 14th day of September, 1889, duly issued out of said Surrogate's Court unto Emma L. Higgins, Eugene Higgins and Josephine Brooks, and still remain in full force and virtue.

Wherefore, your orator prays that the said cause may be revived by the decree of this Honorable Court, and that it may proceed to a decree in its favor in accordance with the prayer of the original bill of complaint herein.

Your orator further prays that a writ of subpœna may issue in due form of law, directed to the aforesaid defendants Emma L. Higgins, Eugene Higgins and Josephine Brooks, as executrices and executor of the estate of Elias S. Higgins, deceased, and Jules Reynal and John H. Higgins as trustees, and Nathalie Florence Reynal as residuary legatee under the will of Nathaniel D. Higgins, deceased, and requiring them to appear and show cause, if any they have, why this cause should not be revived; and if no cause shall be shown by said defendants why said suit should not be revived, that a decree be entered reviving said suit in favor of your orator.

And your orator will ever pray, etc.

WEBSTER LOOM COMPANY,
by WM. G. SMITH, Prest.

BROWN & JONES,
Solicitors and of Counsel for Complainant,
5 Beekman Street, New York.

STATE OF NEW YORK,
City and County of New York. } ss.

William G. Smith, being duly sworn, says that he resides in the City and County of New York, and is the president of the Webster Loom Company, the complainant herein; that he has read the foregoing bill of revivor and knows the contents thereof, and that the same is true of his own knowledge.

Deponent further says that the reason why this verification is not made by the complainant is, that it is a corporation; that deponent is an officer of the same, to wit, president. WM. G. SMITH.

Sworn to before me this 3d day of December, 1889.
[SEAL.] A. G. N. VERMILYE,
Notary Public, N. Y. Co.

FORM XXIV.—SUPPLEMENTAL BILL.

United States [District] Court for the Southern District of New York.

RIDGWAY BOWKER, *Plaintiff*, *against* HAIGHT AND FREESE COMPANY, SEABOARD NATIONAL BANK, CONSOLIDATED NATIONAL BANK, PRODUCE EXCHANGE SAFE DEPOSIT AND STORAGE COMPANY, JOHN DOE AND RICHARD ROE, Defendants.	In equity.

To the Honorable the Judges of the [District] Court of the United States for the Southern District of New York:

RIDGWAY BOWKER, of Camden, in the State of New Jersey, who is a citizen of said State of New Jersey and resident therein, presents the following supplemental bill against the said Haight & Freese Company, Seaboard National Bank, Consolidated National Bank, Produce Exchange Safe Deposit & Storage Company, John Doe and Richard Roe, all of whom are citizens and residents of the Borough of Manhattan, City, County and State of New York, and thereupon your orator complains and says:

That heretofore and on or about the 9th day of May, 1905, your orator duly filed his original bill of complaint in this Honorable Court against the defendants, in which your orator prayed for certain relief, the particulars of which are set forth in full in the said original bill filed in the office of the Clerk of this Court on the said 9th day of May, 1905, reference to which is hereby made the same as if the same were set forth herein in full. And your orator further shows to your Honors that said above-named defendants were duly served with process or subpœna in said suit, and that none of the said defendants have appeared except the Haight & Freese Company, which appeared herein by its solicitor, Franklin Bien, Esq., and put in its answer in due course.

That pursuant to orders duly made herein one James D. Colt, Esq., of Boston, Massachusetts, and one Beverley Randolph Robinson, Esq., of New York, were duly appointed receivers of the property of the defendant Haight & Freese Company until the final decree herein, with the powers enumerated in the order, appointing them, which said order has been filed in this Court, and which has been duly served with notice of entry upon said defendant Haight & Freese Company. The time of the defendants to answer other than the Haight & Freese Company has expired.

Your orator further shows that after the answer of the said defendant Haight & Freese Company your orator duly filed his replication to said answer. That the proofs herein have not yet been closed as by the said bill and proceedings now remaining, as of record in this Honorable Court, reference being had thereto, will appear.

Your orator further shows that subsequent to the joining of issue in said suit, and on or about the 16th day of October, 1905, the defendant Haight & Freese Company, by its sole surviving directors George G. Turner and Harvey Watson, filed under oath a petition in the Supreme Court, State of New York, said Haight & Freese Company being a corporation organized and existing under the laws of the State of New York praying for a voluntary dissolution of the said corporation pursuant to the statutes of the State of New York in such cases made and provided, on the ground that the said defendant Haight & Freese Company was insolvent, and alleging that said defendant Haight & Freese Company was insolvent. Said petition was thereafter filed in the office of the Clerk of the County of New York, in which County the said defendant Haight & Freese Company had its principal office and place of business, and such proceedings were therein had that an order was made by the said Supreme Court of the State of New York, appointing a receiver, to wit, Arthur D. Truax, of all the property of the said Haight & Freese Company, the above named defendant, said proceedings being entitled,—"Supreme Court, New York County, in the Matter of the Voluntary Dissolution of the Haight & Freese Company, a corporation," and thereafter said receiver by order of the said Court had conferred upon him all the powers of a permanent receiver, except that the said receiver should not make any distribution of the assets of the said company amongst the creditors and stockholders thereof before the final order in the said proceeding, unless otherwise specially directed so to do by the said Court, and no further order otherwise directing has been made by the said Court.

On or about the 22d day of January, 1906, the said Arthur D. Truax as such receiver, in a petition duly sworn to and verified by him the said 22d day of January, 1904, alleged that the said corporation was insolvent, and that its total assets in all jurisdictions do not amount to fifty (50) per cent. of the amount of undisputed claims against it, and your orator further alleges that by instrument in writing, dated the 3d day of November, 1905, and duly acknowledged on said day, said defendant Haight & Freese Company made a general assignment of all of the property and assets of the said Haight & Freese Company to the said Arthur D. Truax for the benefit of its creditors, and your orator alleges and says that the said defendant Haight & Freese Company is, and at all times since the commencement of this action has been insolvent. To the end, therefore, that the defendants may, if they can, show why your orator should not have the relief hereby prayed, and *may*, according to the best and utmost of their several and respective knowledge, remembrance, information and belief, full, true and direct answer make to the allegations in the bill, but not under oath, an answer under oath being expressly waived, your orator prays for the relief hereinbefore prayed in the original bill of complaint filed herein on the 9th day of May, 1905, reference to which is hereby made, the same as set forth herein in full, and the prayer for relief in which is hereby reiterated

herein in full, and for such other and further additional relief as to the Court may seem just and proper.

WM. P. MALONEY,
Plaintiff's Solicitor.

41 Wall Street,
Borough of Manhattan,
New York City.

STATE OF PENNSYLVANIA,
City and County of Philadelphia. } ss.

RIDGWAY BOWKER, being duly sworn, deposes and says: That he is the petitioner herein; that he has read the foregoing supplemental bill and knows the contents thereof, and the same is true to his own knowledge, except as to the matters therein stated to be alleged on information and belief, and as to those matters he believes it to be true.

RIDGWAY BOWKER.

Sworn to before me this 16th day of April, 1906.

EDGAR J. PERSHING,
Notary Public.
Com. expires March 16, 1907.

[SEAL]

FORM XXV.—BILL TO PERPETUATE TESTIMONY.

[Address and Jurisdiction Clause.]

Humbly complaining, showeth unto your honors the plaintiff A. B., of etc., that C. D., late of, etc., deceased, before and at the time of making his will hereinafter mentioned, was seised in fee of and in divers freehold estates, which are hereinafter more fully mentioned and described; and the said C. D., being so seised as aforesaid, and being of sound and disposing mind, memory and understanding, duly made and published his last will and testament in writing, bearing date the —— day of ——, signed by him, the said C. D., and subscribed and attested according to law; and which said will, with attestation thereof, is in the words and figures following; that is to say [*set out the will and the attestation verbatim*], as by the said will and the attestation clause thereof, reference being thereto had, will appear.

And the plaintiff further showeth unto your honors that the said C. D. departed this life on or about the —— day of ——, without having revoked or altered his said will, leaving his brother E. D., of, etc., the defendant hereinafter named, his heir at law; and upon the death of the said testator, the plaintiff, under and by virtue of the said will, entered upon and took possession of all the said freehold estates thereby devised to the plaintiff for life, and the plaintiff is now in possession thereof. And the plaintiff hoped that no disputes would have arisen respecting the devises contained in the said will, or the validity thereof. But now so it is, etc., the said E. D. pretends that the said will is void and ineffectual;

and although he will not dispute the validity thereof during the lives of the subscribing witnesses thereto, yet he threatens and intends to do so when they are dead, so that the plaintiff may be deprived of their testimony.

And the plaintiff further showeth that all of the said subscribing witnesses are upwards of seventy years of age and in feeble health [*or*, are about to depart from the Commonwealth *or* State], and that the plaintiff fears the testimony of the said witnesses may be lost by their death [*or*, departure from the Commonwealth *or* State] before the cause can be investigated in a court of law.

In consideration whereof, etc.; and that the plaintiff may be at liberty to have the several subscribing witnesses to said will examined, and that the plaintiff, if necessary, may have a commission or commissions for the examination of the said subscribing witnesses to the said will, to the end that their testimony may be preserved and perpetuated; and that the plaintiff may be at liberty to read and make use of the same on all future occasions, as he shall be advised. May is please your honors. [Prayers for relief and for process, signatures and affidavit.]

FORM XXVI.—BILL OF REVIEW FOR ERRORS APPARENT.

[Title and Address.]

Complaining, showeth unto your honor, your orator A. B., of, etc. That on or about ——, C. D., of, etc. (the defendant hereinafter named), exhibited his bill in this honorable court against your orator, and thereby set forth that [*insert substance of original bill*], and praying [*set out prayer verbatim*]. And your orator being served with a subpœna for that purpose appeared and put in his answer to the said bill, to the effect following: [*Insert substance of answer.*] And the said C. D. replied to the said answer, and issue having been joined, and witnesses examined, and the proofs closed, the said cause was brought to a hearing before your honor on the —— day of ——, when a decree was pronounced, which was afterwards settled and entered; by which it was ordered, adjudged and decreed that [*set forth the decree*].

And your orator further shows unto your honor that the said decree has since, and on or about the —— day of ——, been duly signed and enrolled; which said decree your orator insists is erroneous, and ought to be reviewed, reversed and set aside for many apparent errors and imperfections, inasmuch as it appears by your orator's answer [*here insert the apparent errors*]. And no proof being made thereof, no decree ought to have been made or grounded thereon, but the said bill ought to have been dismissed for the reasons aforesaid. For all which errors and imperfections in the said decree, appearing on the face thereof, your orator has brought this his bill of review, to be relieved in the premises.

In consideration whereof, and inasmuch as such errors and imperfections appear in the body of the said decree, your orator hopes that the

said decree will be reversed and set aside, and no further proceedings had thereon.

To the end, therefore, that the said C. D. [*interrogatories in usual form*], and that for the reasons and under the circumstances aforesaid the said decree may be reviewed, reversed and set aside, and no further proceedings taken thereon.

May it please, etc. [*prayer for relief and process. Signatures and affidavit.*].

FORM XXVII.—PETITION FOR LEAVE TO FILE A BILL OF REVIEW FOR NEW MATTER.

[Title.]

The petition of A. B., the above complainant, respectfully showeth that on or about the —— day of —— your petitioner filed his bill in this honorable court against C. D. for the purpose of [*state general object of original bill*], and praying [*state the prayer verbatim*].

And your petitioner further shows that the said C. D., being served with process of subpœna, appeared to the said bill and put in his answer thereto, to which a replication was filed. And the said cause was thereupon examined on both sides, and the proofs closed. And that the said cause was brought to a hearing before your honor on ——, whereupon a decree was made to the following effect [*set forth substance of decree*].

And your petitioner further shows that such decree has since been duly enrolled.

And your petitioner further showeth that since the time of pronouncing the said decree your petitioner hath discovered new matter of consequence in the said cause; particularly that E. F., deceased, the uncle of the said C. D., of whom the said C. D. claims to be sole heir-at-law, left two sons and a daughter him surviving, named respectively, etc., who were his heirs-at-law; and that such sons and daughter are still alive and residing at, etc.; which new matter your petitioner did not know, and could not by reasonable diligence have known, so as to make use thereof in the said cause, previous to and at the time of pronouncing the said decree.

Your petitioner therefore prays that he may be at liberty to file a bill of review for the purpose of having the said decree reviewed, reversed and set aside, and that no further proceedings may be had under the same.

And your petitioner will ever pray.

[*Signature and affidavit.*]

FORM XXVIII.—BILL OF REVIEW FOR NEW MATTER.

[Title and Address.]

Humbly complaining, showeth unto your honors the plaintiff A. B., of, etc., that on or about ——, C. D., of, etc., the defendant hereinafter

named, exhibited his bill of complaint in this honorable court against the plaintiff, and thereby set forth that, etc. [*Here insert the original bill.*] And the plaintiff being duly served with process for that purpose, appeared and put in his answer to the said bill, to the effect following: [*Here state the substance of the answer.*] And the said C. D. replied to the said answer, and issue having been joined and witnesses examined, and the proofs closed [*or*, the said C. D. joined issue on the answer, and], the said cause was set down to be heard, and was heard before your honors on the —— day of ——, when a decree was pronounced, whereby your honors decreed that the plaintiff's title to the premises was valid and effectual, after which the said C. D. petitioned your honors for a rehearing, and the said cause was accordingly reheard, and a decree of reversal made by your honors on the ground of the said C. D. being the heir-at-law of the said E. F., deceased, and which said decree of reversal was afterwards duly signed and enrolled, as by the said decree and other proceedings now remaining filed as of record in this honorable court, reference being thereto had, will appear. And the plaintiff showeth unto your honors, by leave of this honorable court first had and obtained for that purpose, by way of supplement, that since the signing of the said decree of reversal the plaintiff has discovered, as the fact is, that the said E. F. was, in his life-time, seized in his demesne as of fee, of and in the hereditaments and premises in question in the said cause, and that the said E. F., while so seized, and when of sound mind, duly made and published his last will and testament in writing, bearing date on the —— day of ——, which was executed by him, and attested according to law, and thereby gave and devised unto the said J. W., his heirs and assigns forever, to and for his and their own absolute use and benefit, the said hereditaments and premises in question in the said cause (to which the plaintiff claims to be entitled as purchaser thereof from the said J. W.). And the plaintiff further showeth unto your honors that since the said decree of reversal was so made, signed and enrolled as aforesaid, and on or about ——, the said C. D. departed this life intestate, leaving G. H., of, [&c.] (the defendant hereinafter named,) his heir-at-law, who, as such, claims to be entitled to the said hereditaments and premises, in exclusion of the plaintiff. And the plaintiff is advised and insists that, under the aforesaid circumstances, the said last-mentioned decree, in consequence of the discovery of such new matter as aforesaid, ought to be reviewed and reversed; and that the first decree, declaring the plaintiff entitled to the said hereditaments and premises, should stand and be established and confirmed; and for effectuating the same, the said several proceedings, which became abated by the death of the said C. D., should stand and be revived against the said G. H. as his heir-at-law.

To the end, therefore, etc. And that the said suit may be revived against the said G. H., or that he may show good cause to the contrary, and that the said last decree, and all proceedings thereon, may be reviewed and reversed, and that the said first-mentioned decree may stand and be established and confirmed, and be added to, by the said will being declared a

good and effectual devise of such hereditaments and premises as aforesaid; and that the said G. H. may be decreed to put the plaintiff into possession of the said hereditaments and premises, and in the same situation, in every respect, as far as circumstances will now permit, as the plaintiff would have been in case such last decree had never been pronounced and executed; and that the plaintiff may have such other, etc. May it please, etc.

[*Prayer for subpœna to revive and answer against the said G. H. and signatures and affidavit.*]

FORM XXIX.—NOTICE OF LIS PENDENS.

[Title.]

SIRS: Please take notice that a suit in equity has been duly begun on this 2d day of April, in the [District] Court of the United States for the District of New Jersey, by Walter Althause, who sues in his own right and on behalf of all stockholders of the DeForest Wireless Telegraph Company who may come in and contribute to the expenses of this suit against DeForest Wireless Telegraph Company, American DeForest Wireless Telegraph Company, Atlantic DeForest Wireless Telegraph Company, DeForest Occidental and Oriental Wireless Company, United Wireless Company, Mutual Securities Company, Abraham Schwarts, otherwise known as Abraham White, Cora Theresa White, Abraham White Realty and Improvement Corporation, John Doe and Richard Roe, the names John Doe and Richard Roe being fictitious, and their true names being unknown to the plaintiff. That the general object of said suit is for a declaration that the title to the land hereinafter described and to the other property therein described is in the DeForest Wireless Telegraph Company; for the appointment of a receiver thereof and the sale of said land; for an injunction against the sale and incumbrance of said land and property; for the appointment of a receiver of the property of all said wireless companies and of all said companies except the Mutual Security Company; for an injunction against the infringement of certain patents therein described and the use of certain inventions therein described by each and all of the defendants except DeForest Wireless Telegraph Company and said Mutual Security Company; for certain discovery therein specified; and for other and for general relief.

That a description of the land to be affected by said suit is as follows: [Such description was next inserted.]

The said several three tracts of land being the same premises conveyed to Abraham White by P. Sanford Ross, Myron H. Oppenheim and others by deed dated August 12th, 1906, and recorded in the office of the clerk of Monmouth County in Book 780 of Deeds at page 450 thereof. And also a certain laboratory in Jersey City, in the State of New Jersey, the exact location of which is to the complainant unknown and which is now occupied and used by one or more of said defendants for purposes con-

nected with wireless telegraphy by the socalled DeForest system; and certain wireless telegraph stations on the Atlantic Coast in the State of New Jersey and elsewhere, the exact location of which is to the complainant unknown, which are now used and occupied by one or more of said defendants for purposes connected with wireless telegraphy by the socalled DeForest system. Trenton, New Jersey, April 20, 1907, yours, etc. Walter Althouse by James A. Allen and Roger Foster, his attorneys, solicitors and counsel, 35 Wall St., New York.

To all whom it may concern and to Joseph McDermott, clerk of Monmouth County, New Jersey.

FORM XXX.—ANSWER TO BILL FOR INJUNCTION.

[*District*] *Court of the United States for the Southern District of New York.*

JOHN HALFORD AND RICHARD DAVIS
against
HENRY HAWES.

The answer of the above-named defendant to the bill of complaint of the above-named plaintiffs.

In answer to the said bill, I, Henry Hawes, say as follows:—

1. I admit that I was on the first day of June, 1864, seized in fee-simple of the premises in the first paragraph of the said bill mentioned. And I admit that the indenture in the said first paragraph of the said bill mentioned was of such date, and made between such parties as in the first said paragraph of the said bill alleged, and that the same was executed by me. I believe that the said indenture was not executed by Henry Baker in the said bill mentioned. I believe that the said indenture was of or to the purport and effect in the said first paragraph of the said bill in that behalf set forth; but for my greater certainty I crave to refer to the same when produced to this Honorable Court.

2. I do not know and cannot set forth as to my belief or otherwise, whether the said Henry Baker died on the seventh day of May, 1867, or when he died; or whether or not having by his will and whether or not dated the tenth day of January, 1867, or of what other date, devised to the plaintiffs and their heirs, all estates vested in him by way of mortgage, or appointed the plaintiffs to be his executors; nor whether the said will was or was not on the first day of July, 1867, or when, in fact, proved by the plaintiffs in the Surrogate's Court for the city and county of New York, or how otherwise; nor whether the said plaintiffs thereby or in fact became, nor whether they now are, the legal personal representatives of the said Henry Baker; but I have no reason to doubt that the facts are as in that behalf alleged in the said bill.

3. The said Henry Baker was a bachelor, without any near relations,

and for many years previously to the year 1864, and thenceforward to his death, he suffered from continual ill-health and infirmity. My mother, Sarah Hawes, was in the service of the said Henry Baker as housekeeper from the year 1855 down to the time of the death of the said Henry Baker, and was in continual attendance upon him; and the said Henry Baker frequently expressed to my said mother his gratitude for her attention to his comfort in that his illness.

4. I attained my age of twenty-one years in the year 1864. In the early part of that year my said mother applied to the said Henry Baker to advance me the sum of one thousand dollars to enable me to enter business, which he agreed to do on having the repayment thereof with interest secured by the said indenture of the first day of June, 1864.

5. In the month of May, 1864, the said Henry Baker wrote, signed and sent to me a letter bearing no date, containing the words and figures following (that is to say): "All is arranged about the security you are to give me. I hope I shall never have occasion to enforce it; and that nothing will compel me to change my intention of rewarding your mother and yourself for her long and faithful services to me,"—as by such letter when produced will appear.

6. I have never made any payments whatsoever on account of interest due on the said indenture, and I was never called upon to pay interest thereon by the said Henry Baker in his lifetime.

7. My said mother died on the twenty-seventh day of December, 1867.

8. Under the circumstances hereinbefore appearing I submit that nothing is due on the said indenture from me to the plaintiffs, whether as such alleged personal representatives or otherwise, but I admit that nothing has ever been paid on account of the principal money secured thereby.

9. I do not know, and cannot set forth, as to my belief or otherwise, whether the plaintiffs did on the seventh day of April, 1873, discover, but I admit that it is the fact, that I intend to pull down the said house in the said bill mentioned, and that I have advertised the bricks composing the same to be sold as building materials. I deny that it is true that I have entered into a contract with John Smithers or with any other person for the execution of the work of pulling down the same.

10. I admit that if the said house be pulled down, the said premises would be insufficient security for the sum of one thousand dollars with interest thereon at the rate of five per centum per annum from the first day of June, 1864. But I submit that I have a right to pull down the said house, and to sell the bricks composing the same as building materials, and that the injunction awarded against me by this Honorable Court on the sixteenth day of April, 1873, ought to be dissolved, and that the said bill ought to be dismissed with costs.

HENRY HAWES.

ROBERT JONES,
Solicitor for Henry Hawes,
111 Broadway, New York.

DEFENDANT'S OATH TO ANSWER.

STATE OF NEW YORK,
City and County of New York, } ss.
Southern District of New York.

Henry Hawes, being duly sworn, deposes and says: I am the above-named defendant. So much of the foregoing answer as concerns my own acts and deeds is true to the best of my own knowledge; and so much thereof as concerns the acts or deeds of any other person or persons, I believe to be true.

HENRY HAWES.

Sworn to before me this 20th day of July, 1875.

SYLVANUS BROWN,
[SEAL.] Notary Public, New York County.

FORM XXXI.—ANSWER IN COPYRIGHT SUIT IN EQUITY.

[District] Court of the United States, Southern District of New York.

EDWARD THOMPSON COMPANY,
Complainant,
vs.
AMERICAN LAW BOOK COMPANY,
Defendant.
} In Equity. No. 7951.

The answer of the American Law Book Company, the above-named defendant, to the bill of complaint exhibited against it by the above-named complainant.

This defendant now and at all times hereafter saving and reserving to itself all and all manner of benefits and advantages of exception which may be had or taken to the many errors, uncertainties, imperfections and insufficiencies in the complainant's said bill of complaint contained, for answer thereunto, or unto so much or such parts thereof as this defendant is advised that it is material or necessary for it to make answer unto, answering, says:

1. Defendant admits that complainant is a corporation organized under the laws of the state of New York, with its principal office and place of business at the village of Northport, Long Island, and also admits that defendant is a corporation duly organized under the laws of the State of New Jersey, having a publication office and resident agent in the city of New York, in said district, and that both complainant and defendant are citizens of the United States.

2. Further answering, defendant denies that complainant is or at any time was the author of any of the books or publications mentioned and referred to in the bill of complaint, to wit: The "American and English Encyclopædia of Law, Second Edition" and the "Encyclopædia of Pleading and Practice;" and further, upon information and belief, denies that

the complainant is the proprietor of any material or substantial part of any of said books or publications; further denies upon information and belief, that said books or publications were edited, prepared, published or otherwise produced from original sources of information; on the con trary this defendant alleges that the said books and publications referred to in said bill as being the complainant's, were produced and made up by the unlawful use and appropriation of numerous copyright publications, which were not and have never been the property of complainant, and which were appropriated, used, copied, pirated and employed by complainant, in defiance of the rights of the authors and proprietors of the same and in violation and infringement of the copyrights thereof.

3. Further answering defendant denies, on information and belief, that the "American and English Encyclopædia of Law, Second Edition" is a new or original work, and likewise alleges that the said "Second Edition" is based upon the "First Edition" thereof; and that neither editions of said books is original work, but that both said First Edition and said Second Edition are made up by the piratical use of copyrighted publications which were and are the works of authors whose labors the complainant and writers employed by complainant and its predecessor in business unlawfully and piratically appropriated.

4. Further answering this defendant alleges, upon information and belief, that complainant has unlawfully appropriated and piratically used, in the preparation and production of the forty volumes of its Encyclopædias particularly set out in the bill of complaint, a great number of volumes of law reports, text books, law dictionaries and other legal publications, all of which are and were duly copyrighted and the copyrights of which are and were the property of other writers or publishers, and among others the following:

The American Digest, Annual 1887, title recorded April 24, 1888.

The American Digest, Annual 1888, title recorded April 6, 1889.

The American Digest, Annual 1889, title recorded May 16, 1890.

The American Digest, Annual 1890, title recorded December 1, 1890.

Defendant further says upon like information and belief, that in the case of each of the above-named volumes of the American Digest, the printed title of each volume respectively was deposited in the mail by the West Publishing Company before the publication of each volume addressed to the Librarian of Congress at Washington, District of Columbia, for record, furthermore that in the case of each of said volumes two complete printed copies thereof, were also duly deposited in the mail by the West Publishing Company within ten days after the publication of each volume respectively, addressed to the Librarian of Congress, at Washington, District of Columbia, to complete the copyright therein, and that the fees required to be paid to the Librarian of Congress were all duly paid. That the notice of copyright required by law, was also duly inscribed in the page immediately following the title page thereof, in the several copies of every edition published of each of said volumes as such notice appears in the several volumes of the same.

Deponent further says upon like information and belief that in the case

of the following books published by the West Publishing Company, the copyright thereof was duly taken out by said West Publishing Company as follows: In the case of each volume, before the publication of the same, the printed copy of the title thereof was deposited in the mail within the United States, to wit: at St. Paul, Minnesota, addressed to the Librarian of Congress, at Washington, District of Columbia; and that not later than the day of publication of each of said volumes two complete printed copies of the same, printed from plates made from type set within the limits of the United States, were also deposited in the mail within the United States, addressed to the Librarian of Congress, at Washington, District of Columbia, to complete the copyright in each volume, and that the notice of copyright required by law was also duly inscribed in the several copies of every edition published of said books in the page immediately following the title page thereof as such notice appears in the published volumes of said books, and the titles thereof are duly recorded in books of the Library of Congress, as follows:

[Next followed dates of record.]

Defendant further alleges upon information and belief that in the case of said Jacob Fisher's Digest a printed copy of the title of each volume was before the publication of each volume deposited in the mail addressed to the Librarian of Congress, at Washington, District of Columbia, and recorded by the Librarian of Congress on the days above set out; that within ten days after the publication of each volume, two complete printed copies of each volume were deposited in the mail addressed to the Librarian of Congress, at Washington, District of Columbia, in order to complete the copyright, and the fees required by law were all duly paid. That in the several copies of every edition of each of said volumes in the page immediately following the title page thereof, the notice of copyright required by statute was also duly inscribed in the words prescribed by statute, and as such notice appears in each volume of said Jacob Fisher's Digest.

[Next followed dates of record of United States Digest.]

Defendant further alleges upon information and belief that, in the case of said United States Digest, First Series, and said United States Digest, New Series, a printed copy of the title of each volume was before the publication of each volume deposited in the mail, addressed to the Librarian of Congress at Washington, District of Columbia, and recorded by said Librarian of Congress on the days above set out; that within ten days after the publication of each volume two complete copies of each volume were deposited in the mail addressed to the Librarian of Congress at Washington, District of Columbia, in order to complete the copyright, and the fees required by law were all duly paid. That in the several copies of every edition of each of said volumes, on the page immediately following the title page thereof, the notice of copyright required by statute was also duly inscribed, in the words prescribed by statute, and as such notice appears in each volume of said United States Digest, First Series and New Series.

Defendant further alleges that in the case of all of the foregoing books

set out in paragraph 4 of this Answer, the authors thereof were citizens of the United States and entitled to copyright in said several books under the laws of the United States.

Defendant further alleges, upon like information and belief, that said complainant further also pirated upon and copied from and infringed the copyright in a number of other books duly protected by copyright in the United States in preparing and publishing the said "American and English Encyclopædia of Law, Second Edition," and also in the First Edition, and in said "Encyclopædia of Pleading and Practice," but such other books and the dates when the titles thereof were recorded are not at present definitely known to the defendant, and defendant prays leave, as soon as the titles thereof and the dates of recording the same are ascertained, to set up the same as part of this answer by due and proper amendment.

5. Further answering on information and belief, defendant denies that complainant's said forty volumes of Encyclopædias or any of them are original compilations, or are derived from original sources of information, and avers that said forty volumes consist chiefly and mainly of copyright matter contained in the legal publications described and referred to in the paragraph numbered 4 above, which copyright matter has been piratically paraphrased, colorably altered and copied out of such copyright books, all of which have been duly copyrighted in the United States and have been and are the property of others than the complainant, with the addition of some matter copied out of English and Canadian law books and digests.

6. Further answering, defendant denies upon information and belief, that complainant's American and English Encyclopædia of Law, Second Edition, is a new or original work; and likewise denies that it is not based upon the first edition of such work; and likewise alleges that the second edition of said work is largely based upon the first edition of the same, and that such first edition was also prepared by the unlawful and piratical use of, and infringement of a number of the copyrights of books described or referred to in paragraph 4, above.

7. This defendant denies that complainant became and was the author of the 19 volumes of the "American and English Encyclopædia of Law, Second Edition," which are mentioned and referred to in the bill herein, and of the 21 volumes of the "Encyclopædia of Pleading and Practice," likewise set out in the bill herein, and on information and belief denies that complainant is the proprietor of any substantial or material part of said volumes or of any of them.

8. Further answering, defendant upon information and belief denies that complainant performed any of the acts looking to the obtaining of copyrights for said American and English Encyclopædia of Law, Second Edition, or said Encyclopædia of Pleading and Practice, or of any volumes thereof, in accordance with the statutes of the United States; defendant admits that complaint represented to the Librarian of Congress, that complainant was the author and proprietor of said books and thereupon sought to obtain

copyright for the same, but defendant denies that complainant's acts in that respect were in accordance with the statutes of the United States enacted for the purpose of copyright, and alleges on information and belief that complainant's sets were in fraud of the statutes of the United States, and constitute an unlawful attempt to obtain copyright by complainant for material and substantial parts of the writings and literary works of other persons, for whose protection copyrights had been theretofore granted under the laws of the United States.

9. Further answering, defendant denies that it has any knowledge or information save that derived from the bill, as to when the titles of any of complainant's said 40 volumes of its Encyclopædias were deposited in the mail or whether such deposit was not later than the day of publication of each book, and leaves complainant to make such proof thereof as it may be advised.

10. Further answering, defendant denies upon information and belief that complainant has done all or any of the acts or complied with all or any of the legal requirements necessary to establish its right to copyright under the statutes of the United States, in said "American and English Encyclopædia of Law, Second Edition," or in said "Encyclopædia of Pleading and Practice" or in any volume of either of said Encyclopædias.

11. Further answering, defendant on information and belief denies that any of complainant's said 40 volumes were composed or edited or prepared or arranged, or compiled from original sources of information, or otherwise than by copying and paraphrasing from prior published books which were duly copyrighted and the property of persons other than the complainant, and likewise denies that complainant's said books contain a large, or any substantial or material amount of matter which is original with the complainant, or which is the private property of the complainant, and further likewise denies that complainant, either as author or proprietor ever obtained any valid copyright for the said books or for any of said 40 volumes.

12. Further answering, defendant denies, on information and belief, that complainant has complied with the legal requirements necessary to maintain any rights or copyrights in said 40 volumes of Encyclopædias or in any of them, and further likewise denies that complainant is the proprietor of any copyrights therein, or that it has any sole or exclusive right to publish the same or any of them, or that the alleged copyrights therein are of great or any value whatever.

13. Further answering, defendant admits that at one time Charles W. Dumont, mentioned in the bill of complaint, was treasurer and one of the stockholders of complainant the Edward Thompson Company, and thereby became fully conversant with the plans and methods of said company as alleged in the Bill of Complaint.

14. Defendant further alleges that said Dumont has been engaged in the business of dealing in and selling law books for about twelve years. That during that time he traveled extensively throughout the United States in said business, and trained and employed a number of agents in and for

his said business and became acquainted with a large number of judges, lawyers, text book and other legal writers, and contributors to the legal periodicals published throughout the United States and became thoroughly acquainted with the requirements of the members of the legal profession, and that among the books dealt in and sold by him and his agents were the American and English Encyclopædia of Law, Second Edition, and the Encyclopædia of Pleading and Practice, both being works published by the complainant.

15. That while thus engaged said Dumont learned of many of the objections to the complainant's said publications, but in spite of the same said Dumont established a large and profitable business therein. That being engaged in the book selling business, with his headquarters at Chicago, said Dumont was not able to regulate or control the objectionable plans or methods of said complainant company.

16. That among the objections to said complainant's books, were the endless chain system of new editions adopted by complainant for its Encyclopædias, the division of the same into what complainant designates Substantive Law, on the one hand, and Pleading and Practice on the other hand, and thereby a large duplication of matter requiring the examination of at least two sets of books upon any subject by reason of the cross references from one set to the other; and further the piratical appropriation of matter from text book writers. This last objection was especially serious where the authors resided whose works had been pirated and among those lawyers who were friends of the writers of such books.

17. That having become thoroughly acquainted with the requirements of the profession for properly edited books of such character, published upon a reasonable plan, said Dumont had in contemplation the preparation of a set of such books and upon more enlightened lines, but in 1897, the complainant company invited said Dumont to come to Northport, to organize a selling department for the complainant and place his trained agents therein, to purchase stock in the complainant's company, and to become one of its officers, at a handsome salary.

18. That said Dumont, believing that by accepting such position he would be able to control the plans and methods of said complainant company so as to make the publication of said company more attractive to the profession, accepted the offer of the complainant company, broke up his home and business at Chicago, removed his family to Northport and established his home there, organizing a selling department for complainant, and turned over his trained agents and salesmen to the business of complainant company and prepared large quantities of advertising matter for said complainant company. This work required all of said Dumont's attention for over three years, and then he discovered that he not only had no influence upon the plans or methods of the complainant company, but from certain indications he then found that the object of that company had been principally to have him bring his trained agents and salesmen over to make contracts directly with said company, and to organize its sales department upon a solid and satisfactory basis in order that the

profits which said Dumont had realized in his business from the sales of the complainant's books prior to said arrangement, might be realized by said complainant company.

19. That said Dumont did not fully realize his position until July, 1900, when the other officers who were directors of the company, elected one of their number as treasurer, and largely increased the salary of such other officers and in that manner deprived him not only of his agents and salesmen, but of the lucrative business which he had theretofore established and carried on at Chicago.

20. Said Dumont thereupon, in association with legal writers of high standing and great experience, organized the American Law Book Company for the purpose of publishing a leading Cyclopædia upon a new plan, and entirely by new methods, such as would obviate all the objections with which he had become acquainted during his long experience in dealing in and selling law books, including those of the complainant company.

21. That after organizing the said American Law Book Company, the defendant herein, the Editors in Chief, appointed by said company, William Mack and Howard P. Nash, selected suitable and competent writers to be employed by said company for the purpose of preparing the books about to be published under the best conditions. With this object in view, defendant established its editorial department in the City of New York where there is access to the great law libraries and where many of the best writers resided or desired to reside, and there established an Editorial Department and purchased and fitted up one of the best and most complete Law Libraries in the United States.

22. That upon consultation it was determined to arrange, in the preparation of defendant's books, for the use of the best publications issued by other publishers in the United States. Defendant at once opened negotiations with the West Publishing Company, with the Lawyer's Co-Operative Publishing Company, and with the Bancroft-Whitney Company, for the use of their publications, and for valuable considerations obtained certain rights and privileges and certain property now belonging to the defendant company as follows, to wit:

23. The sole right to use, in books of an Encyclopædic character the American Digests, Century and Annual Editions, all of them the property of and copyrighted by the West Publishing Company as hereinbefore set out; and of these unbound sheets in duplicate for the use of being cut up to facilitate their use in defendant's business.

24. The undivided one-third interest in all the several copyrights in the United States Digest, First and New Series, herein above more particularly referred to, together with the sole right to use the said United States Digests, First and Second Series, in books of an Encyclopædic character.

25. The sole right to use the law reports of the National Reporter system, also the property of and copyrighted by the West Publishing Company in books of an Encyclopædic character. These reports include the Atlantic Reporter, the Northeastern Reporter, the Northwestern Reporter, the Southeastern Reporter, the Southwestern Reporter, the Southern Reporter, the

Pacific Reporter, the New York Supplement, the Federal Reporter, and Supreme Court Reporter.

26. The sole right to use the Federal Cases and Digests of the same, and Black's Law Dictionary, hereinabove more particularly referred to, also the property of and copyrighted by the West Publishing Company, in books of an Encyclopædic character.

27. The license to use, in books of an Encyclopædic character, the publications of the Bancroft-Whitney Company, consisting of the American Decisions, American Reports, and American State Reports, having notes and also digest volumes.

28. The license to use, in books of an Encyclopædic character, the publications of the Lawyer's Co-Operative Publishing Company, including the General Digest, published annually, and the reports, which now include those generally cited as L.R.A. and also the Circuit Court of Appeals Reports, generally cited C. C. A. and Supreme Court Reports of the U. S. Lawyers' edition.

29. The copyrights of the English Digest known as Jacob Fisher's Digest, consisting of eleven volumes. All of the books set up in paragraphs numbered 23 to 29, both inclusive, being duly copyrighted in the United States.

30. The president of defendant company having learned of the prejudice against publications of the complainant company, by reason of the piratical use of a number of text books in preparing the Encyclopædias of that company, it was determined not only that under no circumstances should matter out of any book be used without permission in preparing articles for defendant's Cyclopedia, but that wherever practicable authors of distinguished position should be engaged to prepare and write articles for defendant's "Cyclopedia of Law and Procedure," or where that could not be done, that such authors should be engaged to edit, revise and thus make themselves responsible for articles prepared by the Editorial Department of the defendant company.

31. In accordance with this policy the following prominent authors and jurists have prepared or are preparing articles for defendant's said Cyclopedia:

HON. SEYMOUR D. THOMPSON, Author of "Thompson on Corporations," etc.

HON. JOHN F. DILLON, Author of "Dillon's Municipal Corporations."

HON. JAMES SCHOULER, Author of "Schouler on Domestic Relations," etc.

HON. SAMUEL C. BENNETT, of Boston, Mass.

HON. GEORGE HOADLY, of New York.

HON. W. H. HAMILTON, of New York.

Justice GILBERT COLLINS, of New Jersey.

Judge THOMAS A. MORAN, of Chicago.

Justice CHARLES L. LEWIS, of Minnesota.

Ex-Chief Justice JONATHAN ROSS, of Vermont.

Justice JOHN S. WILKES, of Tennessee.

Ex-Justice C. C. COLE, of the District of Columbia.
Justice EMIL MCCLAIN, of Iowa, Author of "McClain on Criminal Law," etc.
Ex-Attorney-General W. A. KETCHAM, of Indiana.
Justice H. A. SHARPE, of Alabama.
Justice CHARLES V. BARDEEN, of Wisconsin.
JOYCE & JOYCE, Authors of "Joyce on Electricity," etc.
JOHN M. GOULD, Author of "Gould on Waters," etc.
GEORGE F. TUCKER, Joint Editor of "Gould and Tucker's Notes on the U. S. Statutes," etc.
Justice WALTER CLARK, of North Carolina, Author of "Clark's Annotated Code of Civil Procedure of North Carolina."
Justice W. A. JOHNSTON, of Kansas.
Hon. GEO. H. BATES, of Delaware.
Justice H. C. MCWHORTER, of West Virginia.
Hon. JOSEPH F. RANDOLPH, Author of "Randolph on Commercial Paper," etc.
Hon. LEONARD A. JONES, Author of "Jones on Mortgages," etc.
Chief Justice A. C. KILLAM, of Manitoba, Can.
Hon. A. B. BOLLES, Author of "Bolles on Banking."
Hon. JOHN NORTON POMEROY, JR., Editor last edition of "Pomeroy on Equity."
ROGER FOSTER, Author of "Foster's Federal Practice," etc.
MARION C. EARLY, Author of last edition of "Bishop on Statutory Crimes."
ARDEMUS STEWART, of Philadelphia, Pennsylvania.
Hon. J. D. LAWSON, Author of "Lawson on Contracts," etc.
Ex-Presiding Judge R. E. ROMBAUER, of St. Louis Court of Appeals.
H. W. WELLS, Author of "Wells on Replevin."
Hon. CHARLES F. CHAMBERLAYNE, Editor of "Best on Evidence."
Ex-Judge FRANK IRVINE, Prof. on Equity at Cornell University.
Prof. HENRY WADE ROGERS, of Yale School, Author of "Rogers on Expert Testimony," etc.

32. That while the first and second volumes of defendant's said Cyclopedia were in preparation, it was considered desirable among other things to ascertain whether the plans adopted by defendant were adequate to meet the competition which would arise between the defendant's volumes and those published by complainant.

It was determined at the outset that every writer selected by the Editors in Chief should be require to stipulate that he would not look into any of the complainant's publications, for the reason that otherwise questions of infringement of copyright might arise, and these, of course, it was desired to avoid, and in pursuance of this policy the president of defendant personally made the aforesaid stipulation with each writer employed.

33. Thus there was no method of comparison between the volumes of cases, collected by defendant's writers and that collected by complain-

ant's writers. Nor was there any way of tracing up the numerous errors of citation in complainant's publications. In order to get at this information defendant consulted competent counsel, was advised that such comparison could lawfully be made by checking off the cases cited in defend ant's publications by those cited in complainant's publications.

34. In order to do this without permitting defendant's writers to use the volumes of complainant's publications, some of defendant's stenographers were employed to collect all the cases from a number of the articles published in complainant's publications. These cases, viz.: the bare citations were copied on slips of paper about 4x8 inches. On each slip was the volume and page from which taken, and the title of the case, *e. g.*, *Jones v. Smith*, 10 N. Y. 40. There was nothing to indicate what point was decided by the case, but only that it was a case cited in the article.

35. Further answering, defendant alleges, upon information and belief, that each writer was instructed generally to make a thorough and complete article on the subject assigned to him, and was informed that he would be held responsible for a complete collection of all the authorities on such subject, to the date of its preparation. The writers were notified that the American Law Book Company had made arrangement for the use of the publications of the Bancroft-Whitney Company, of the Lawyer's Co-Operative Publishing Company, and of the West Publishing Company, and the Digest slips of the last named company were furnished to the writers, together with the bare names of cases from complainant's encyclopædias as a starting for that purpose, with instructions to check off the material collected by the writers, but defendant's writers were required to write their articles from the cases in the original law reports.

36. That from quite a number of complainant's articles the cases were thus copied and turned over to complainant's writers in connection with articles in volumes 1 and 2. Some of defendant's writers worked on this plan with the first articles written, but thereafter refused to spend the extra time required, for the reason that by defendant's plan of work involving the thorough examination of all the Digests and reports, all that was valuable and authoritative in the reports was obtained, and that the checking off system involved a great amount of labor without any corresponding benefit. The checking system was therefore abandoned and the cases which had been copied from a number of complainants' articles were thrown away without being used even for advertising purposes.

37. Defendant further answering on information and belief, denies that the volumes 1 and 2 of its Cyclopedia contained a large or any amount of complainant's original or copyright matter, or any matter whatever pirated or copied from complainant's publications or from any of them, and upon like information and belief alleges, that there is not in either of defendant's said volumes so much as one line copied out of the complainant's publications or any of them, set up in the bill of complaint herein.

38. Defendant further answering denies that it has, in its said volumes one and two, as a substitute for, or in lieu of a resort to original sources, unfairly or otherwise used the results of complainant's labor as set forth in complainant's publications, or has incorporated such result in defendant's said volumes, and likewise denies that defendant's publications are to a large or any extent the product of complainant's original work, either as alleged in the bill or otherwise; likewise denies that defendant instead of resorting to original sources for citations of cases, definitions of terms, statements of legal principles, and similar legal information, has to a very large extent, or to any extent, obtained the same from complainant's publications or from any of them; and likewise denies that it has unfairly availed itself of any of complainant's work, either as alleged in the bill or otherwise; likewise denies that it has published any of complainant's work in unfair competition, or in violation of any of complainant's alleged copyrights; on the contrary it alleges that in so far as there has been competition between the publications of defendant and complainant, such competition has been fair and open, and that the superiority of the plan of defendant's publications over that of the complainant's and the superiority of the work contained in the defendant's books, has always been pointed out to prospective customers, in order that being made acquainted therewith and seeing the work for themselves such customers might be in position to select the best.

39. Defendant denies that it has in any way or manner availed itself of the alleged good name or standing of the complainant, and on the contrary alleges that it has always adverted to and advertised the fact prominently brought before the public that it not only had no connection with the complainant but was engaged in the publication of a legal cyclopedia much superior to that produced by the complainant.

40. Defendant admits that some of the better class of writers who at one time were engaged in writing for complainant, have come to work for defendant, for reasons best known to themselves, and that some of the salesmen and agents who had been trained by said Dumont, have returned to him, preferring apparently to be associated with him in the work of introducing defendant's books to purchasers, rather than to remain with complainant, and that such writers and salesmen, and agents, had perfect legal and moral rights to do so, so far as known to defendant.

41. Defendant denies that it has skillfully or otherwise simulated the title of complainant's publications or of complainant's advertising matter, or that it has used quotations or apt phrases long or otherwise associated with complainant's publications, denies that it has pirated upon complainant's publications or done anything to conceal any alleged piracy upon complainant's publications; denies that it has availed itself of any original copyrighted work or methods or ideas of complainant in making, preparing or selling defendant's publications; and further denies that by such means or by any means defendant has been enabled to prepare and

publish its books with greater ease or accuracy than would be otherwise possible; on the contrary defendant alleges that it has always been careful to avoid the ideas and methods of complainant in preparing and selling the books prepared by defendant, for the reason that defendant has learned before the plan of its cyclopedia was developed, that the ideas and methods of complainant in preparing its books and in employing many cheap writers of inferior capacity, and the publication of the same upon the endless chain editions plan adopted by complainant, were to be carefully avoided.

42. Further answering defendant admits that its volumes one and two are much more accurate than the books of complainant, but denies that defendant's books were prepared with greater ease or at less expense than the books published by complainant, and alleges that it has required much harder and more skillful work to prepare defendant's volumes than to prepare books in the manner in which the complainant's books are prepared; and that so far as defendant knows the prices paid by defendant to its writers and editors are higher than those paid by complainant for work upon its publications.

43. Defendant further denies that any infringement, copying or piracy of defendant upon the books of complainant will appear upon an examination or comparison of said Cyclopedia of Law and Procedure, volumes one and two, with the alleged copyrighted books of complainant; further denies that there has been any infringement or copying or piracy; and denies that defendant's said books, volumes one and two, are infringements or piracies upon the alleged copyrights of complainant; defendant denies that by any unfair acts or devices it has been selling its cyclopedia to persons who would otherwise have bought or would now buy the books of complainant; it admits that it has been selling numbers of its books to persons in the legal profession who purchased defendant's said books in the belief as they represent to defendant, that defendant's books are much superior to those prepared and published by complainant, and that they are published upon a plan much more desirable than the endless chain edition plan of complainant's publications.

44. Further answering defendant alleges that it has organized a large and valuable business in which more than three hundred and twenty thousand dollars have been expended; that five volumes of its Cyclopedia have been published, and matter for from eight to ten additional volumes has been prepared; that it has a large and highly competent staff of writers in its employment and has outstanding contracts amounting to many thousands of dollars with numerous prominent law writers and judges, for the writing and editing of articles for its cyclopedia, many of which have been completed and many others are in the course of preparation, and that the high standard of work set in its early volumes will be maintained throughout, that in so far as defendant's books have superseded or may hereafter supersede the books of complainant, it will be by reason of the fact that members of the bench and bar are

intelligent enough to understand the particular kind of books they require and competent to compare the books of the defendant with those of complainant, and select the particular publication which will best satisfy their requirements.

45. Further answering, upon information and belief, defendant alleges that by reason of the piratical use made by complainant of many and various publications, and the infringement of the copyrights in such publications, in the preparation of the volumes of the "American and English Encyclopædia of Law, Second Edition," and in the preparation of the volumes of the "Encyclopædia of Pleading and Practice," which are particularly set out in the bill, and by reason of a like piratical use and infringement by the predecessor of complainant in preparing the "American and English Encyclopædia of Law" referred to in the bill as the first edition, neither the complainant nor its predecessor obtained any lawful or valid copyright in the said books or in any of them, and that the alleged copyrights upon which this action is based, are one and all of no effect and void.

46. Defendant denies that it has in any wise infringed upon the rights of complainant as alleged in the said bill, or otherwise, and denies that it has in any wise infringed the alleged copyrights in complainant's books referred to in the bill, or any of such alleged copyrights.

47. Defendant denies that complainant is entitled to any relief whatsoever or any part of the relief in said bill of complaint demanded, and alleged that complainant has no standing in this court or in any Court of Equity.

48. And defendant prays in all things the same benefit and advantages of this, its answer, as if it had pleaded or demurred to said bill of complaint.

49. And defendant denies all and all manner of unlawful acts whatsoever, whereof it is in any wise by the said bill of complaint charged; all of which matters and things this defendant is ready and willing to prove as this Honorable Court shall direct, and prays to be hence dismissed with its reasonable costs and charges in this behalf most wrongfully sustained.

AMERICAN LAW BOOK COMPANY,
by CHARLES W. DUMONT,
President.

AUGUSTUS T. GURLITZ,
Solicitor for Defendant and of Counsel.

STATE OF NEW YORK,
City and County of New York.

Charles W. Dumont, being duly sworn deposes and says that he is president of the American Law Book Company, the corporation defendant above named, and is well acquainted with its business, that he has read the foregoing answer and knows the contents thereof; that the

same is true to the knowledge of deponent, except as to matters therein stated to be alleged on information and belief, and that as to those matters he believes it to be true.

CHARLES W. DUMONT.

Subscribed and sworn to before me this 26th day of December, 1902.
[L. S.]

ELMER A. ALLEN,
Notary Public,
New York Co.

FORM XXXII.—ANSWER IN SUIT AGAINST DIRECTORS.

[In suit by receiver under leave of court to recover $161,530.24 for negligence of directors. Judgment for defendant affirmed Howland v. Corn and others, 232 Fed. 35.]

[Title.]

The answer of the defendant, Robert E. Dowling, to the bill of complaint of the complainant above named, by Roger Foster, his attorney, respectfully shows to the Court:

FIRST: Said defendant is without knowledge of each and all of the following allegations in the first article of said complaint contained. That an order was made and filed on November 26, 1912, and that an order was made at any time, in the suit described in said bill, wherein Alwyn Ball, Jr., is complainant, appointing the defendant Joseph J. O'Donohue, Jr., receiver in a suit in which the Empire Trust Company, as trustee under a mortgage dated May 24, 1909, is complainant, and that such an order was made in such suit last described. That by such an order as is described in said bill, and that by any order, the said O'Donohue was directed to turn over to himself, as receiver of the property of Improved Property Holding Company of New York, covered by its mortgage dated May 24, 1909, all of said property. That by any such order, and that by any order, said O'Donohue was continued as sole receiver of all the property of said Improved Property Holding Company of New York, with the exception of that covered by its mortgages dated June 1, 1906, and May 24, 1909. That the said O'Donohue duly qualified as receiver at any time. That after May 31, 1912, the said O'Donohue acted as receiver. That on April 10, 1913, and that at any time, an order of this Court was made in said cause, wherein Alwyn Ball, Jr., is complainant, directing the said O'Donohue to cease to act as receiver of the property of said company not covered by said mortgages. That the complainant was by said order, and that said complainant was by any order, appointed receiver during the pendency of said cause of all the property of said company not covered by its said mortgages. That said complainant was by any order made by this Court at any time given authority to institute and prosecute in his own name, or in the name of said company, all such suits as might be necessary in his judgment for the proper protection of the trust estate

and the discharge of his trust as provided by said order. That said complainant at any time qualified as receiver of any property of the said company. That by an order and decree of this Court made and filed May 6, 1913, and that by an order and decree of this Court made at any time in said suit, wherein Alwyn Ball, Jr., is complainant, it was adjudged and decreed that said Improved Property Holding Company of New York is insolvent, that its assets are a fund in which its creditors are interested, that its assets should be marshaled, and that the extent and amount of claims, liens and priorities should be determined. That it was referred in any such order to Edwards H. Childs, Esq., a Special Master, to take proof of the amount of all claims and demands against said company and to report thereof, and that it was further provided in any such order that all such claims and demands should be presented to said Special Master before a day therein fixed. That pursuant to such an order, and that pursuant to any order, claims and demands against said company aggregating $1,890,809.70 have been filed with said Special Master. That this suit is brought by said complainant, as receiver, in the exercise of the power and authority conferred upon him by this Court. That the defendants Corn, Ball, O'Donohue and General Realty & Mortgage Company, and that any of them, have wrongfully, and that they, and that any of them, have illegally diverted from said Improved Property Holding Company of New York, and have converted to their own use, gain and advantage, certain assets and property; and that they, and that any of them, have at any time wrongfully, and that they, and that any of them, have at any time illegally, diverted and converted to their own use, gain and advantage any property of said company; and that they, and that any of them, at any time did any of such things. That any loss and that any damage has been suffered by said company by reason of any diversion of its assets made by anyone, and that any loss and that any damage has been suffered by said company by reason of any diversion of its property by anyone. That the said last-named defendants, and that any of them, have profited by any such diversion. This defendant denies that he has wrongfully, and denies that he has illegally disregarded, and denies that he has in any way disregarded, and denies that he has in any way violated, and denies that he has by culpable negligence violated, any obligation to the Improved Property Holding Company of New York, as a director thereof. He denies that he has failed to protect said company against, and that he has failed to prevent, any diversion of the assets and any diversion of the property of said company. This defendant has no knowledge that the said defendant Barlow has done any of such things. This defendant has no knowledge that the complainant has procured from this Court authority to bring this suit. This defendant admits that he is a citizen and resident of the City, State and Southern District of New York. This defendant has no knowledge that the defendants Corn, O'Donohue, Jr., and Barlow, and that any of them, is or are citizens and residents of the City, State and Southern District of New York. This defendant has no knowledge that the defendant Alwyn Ball, Jr., is a citizen of the State

of New Jersey, and that said Ball is a resident of said State. This defendant admits that he resigned as vice-president and director of the Improved Property Holding Company of New York on March 9, 1910, and that his resignation was accepted. This defendant has no knowledge that on May 26, 1909, the beneficial interest in many thousands of dollars par value of the capital stock of said company, represented by stock trust certificates, was held and owned by persons other than the voting trustees named in said bill. This defendant is without knowledge as to each and all of the following allegations in said bill. That the General Realty & Mortgage Company was at all the times mentioned in the said bill, and that at any time the said company was, controlled by the said Ball and O'Donohue. That they were officers thereof. That they were directors thereof. That the total issued and outstanding stock of said company, including treasury stock, consisted of approximately 10,000 shares. That the said Ball at the times mentioned in the said complaint, and that said Ball at any time, owned more than 4,800 shares of said stock. That the said O'Donohue at the times mentioned in the said complaint, and that the said O'Donohue at any time, owned more than 1,000 shares of said stock. That the said O'Donohue's wife, his brother T. J. O'Donohue and the wife of said T. J. O'Donohue, owned at said times, and that they, and that any of them, owned at any time, in the aggregate upwards of 3,000 shares of said stock. That they, and that any of them at any time, owned any shares of stock of the said General Realty & Mortgage Company. That the said Ball, and that the said O'Donohue, and that either of them, were at any time personally interested in said General Realty & Mortgage Company, and in all matters and transactions affecting said company. That in such matters and transactions, they and the immediate relatives of said O'Donohue, and that any of them, would participate in the profits of any advantageous transactions made by the said General Realty & Mortgage Company. That shortly before May 24, 1909, and that at any time, the defendants Ball and O'Donohue, and the defendant General Realty & Mortgage Company, through its officers and directors, and that any of them, entered into a combination, and that they, and that any of them then, and that they, and that any of them at any time, entered into a conspiracy, to cause said Improved Property Holding Company of New York to issue and deliver its negotiable 6 per cent. coupon bonds, secured by a mortgage upon its property, in the aggregate principal amount of $1,000,000, without receiving fair or adequate consideration therefor. That they, and that any of them, entered into such a combination to obtain for themselves $5,000 face value of said bonds, without giving any fair or adequate consideration therefor, upon terms grossly inequitable, burdensome and unconscionable as to said Improved Property Holding Company of New York, and greatly to the advantage of said Corn, Ball and O'Donohue, and said General Realty & Mortgage Company. That they and that any of them then, and that they and that any of them at any time, entered into a combination, and that they and that any of them then, and that they and that any of them at any time,

entered into a conspiracy, to do any of such things. That they and that any of them then, and that they and that any of them at any time, entered into a combination, and that they and that any of them then, and that they and that any of them at any time, entered into a conspiracy, to obtain for themselves any money as interest on said bonds, to transfer from said General Realty & Mortgage Company and said Corn to said Improved Property Holding Company of New York any unprofitable and any rapidly deteriorating parcel or parcels of real property, to transfer certain property known as Number 476 Broadway and Number 395 Broadway, in the Borough of Manhattan, City and County of New York, and to shift from said General Realty & Mortgage Company and said Corn to said Improved Property Holding Company of New York, the burdens and obligations incident to the operation and ownership of said property, and to obtain for themselves large sums of money through the ownership of the bonds to be issued as aforesaid, by selling or by otherwise disposing of any of said bonds and by causing any of said bonds to be redeemed at a premium and otherwise. This defendant is without knowledge as to each and all of the following allegations in said bill: That the said defendants Corn, Ball and O'Donohue, and General Realty & Mortgage Company, and that any of them, at any time entered into a combination, and that they and that any of them at any time entered into a conspiracy, to do any of such things. That pursuant to any such combination, and that pursuant to any such conspiracy, and with any such purpose and with any such intent as aforesaid, the said defendants Corn, Ball and O'Donohue, and said General Realty & Mortgage Company, and that any of them, advised, and that any of them consummated, any wrongful and any illegal scheme and any wrongful and any illegal schemes as is set forth in said bill or otherwise. That pursuant to any such combination, that pursuant to any such conspiracy, that as part of any wrongful scheme, that as part of any illegal scheme, that with any such purpose, that with any such intent, the said last-named defendants caused a meeting of the board of directors of the Improved Property Holding Company of New York to be held on or about May 26, 1909. That pursuant to any of such things the said last-named defendants caused said Improved Property Holding Company of New York to authorize, to ratify and to confirm the execution of the mortgage dated May 24, 1909, described in said bill. That the said last-named defendants caused the board of directors to authorize, to ratify and to confirm such an execution. This defendant denies that any such mortgage as is described in article "Sixth" of said bill was made, and that any such mortgage dated May 24, 1909, was executed, by the Improved Property Holding Company of New York.

SECOND: This defendant admits: that on or about May 26, 1909, he, this defendant, voted in favor of certain resolutions authorizing and confirming the making of a mortgage, dated May 24, 1909, by said Improved Property Holding Company of New York; but he denies that said mortgage is correctly described in said bill. He admits: that he at said time voted in favor of authorizing the issue of bonds secured by said mort-

gage and for the purchase of the premises known as Number 395 Broadway and Number 476 Broadway, respectively, for $555,000 face value of said bonds and for other considerations; and he avers that there were other valuable considerations than those which are described in said bill for the said mortgage and for the issue of bonds of the face value of $555,000 and for the delivery to the owner of the premises known as Numbers 395 and 476 Broadway of such bonds as were delivered to such owner upon any purchase of such premises as was made by said Improved Property Holding Company of New York. He avers: that in voting to authorize the making of a mortgage, and that in voting to authorize the issue of certain bonds thereunder, and that in voting to authorize the purchase of said Broadway premises, he acted in good faith, with due care, in the exercise of his reasonable judgment and in accordance with his duties as a director of the said Improved Property Holding Company of New York. This defendant is without knowledge: that on or about June 9, 1909, at a meeting of the board of directors of said Improved Property Holding Company of New York, and that at any time, papers purporting to be minutes of said board of directors' meeting, held on or about May 26, 1909, were read and approved.

THIRD: This defendant is without knowledge: that on May 26, 1909, and that at any time, substantially all of the stock of the General Realty & Mortgage Company was owned by the defendants Ball and O'Donohue and the immediate relatives of said O'Donohue. He is without knowledge: that said premises were subject to a mortgage with the terms described in said bill; and that the description of said mortgage set forth in said bill is correct in any particular thereof. He denies that said premises then had little value over and above the amount of the mortgage thereupon. He denies that the said premises had no value over and above the amount of said mortgage. He denies that the said premises were then deteriorating in value. He denies that the issuance of $450,000 face value of said bonds of Improved Property Holding Company of New York on said premises was inequitable; he denies that the same was burdensome; he denies that the same was unconscionable; as to said last-named company. He denies that the same was greatly to the advantage of said General Realty & Mortgage Company. He denies that the same was greatly to the advantage of the said Ball and O'Donohue and the immediate relatives of the said O'Donohue, as aforesaid. He is without knowledge, that the building upon said premises was such a building as is described in said bill. He is without knowledge, as to the date of the erection thereof, and that the same was erected between the years 1901 and 1903. He is without knowledge, that the expense of the erection was more than $576,000. He denies that on May 26, 1909, it was certain for a long time to be impracticable to obtain from said premises any income save through the renting of space in said building. He denies that by reason of any fact, and that by reason of any condition, and that by reason of the facts and conditions set forth in said bill, the net revenue then and the net revenue theretofore derived from said building, and the estimated net

revenue thereof likely to be derived therefrom, established a sure basis for determining the maximum possible value of said premises. He is without knowledge, that the income derived from said premises by said General Realty & Mortgage Company during the period of six fiscal years completed shortly before May 26, 1909, had averaged less than $4,100 per annum in excess of the amount required for the fixed charges, taxes, operating and other expenses of said premises, and a reasonable charge for depreciation in the value of the building thereon. He is without knowledge, that such an excess for any of said years was the amount specified in said bill. He denies: that the character of the neighborhood in which said premises were situated, and he denies that the value of real estate therein, were on and before May 26, 1909, rapidly deteriorating; that it was then and that it was at any time becoming, and that it was then and that it was at any time reasonably certain to become, difficult, and that it was then and that it was at any time reasonably certain to become impossible, to let space in said neighborhood and in said building to responsible and desirable tenants at rates theretofore prevailing; that all, and that substantially all, leases then in force in said building were for short terms; that it was reasonably certain that the tenants who had theretofore occupied said building, and that it was reasonably certain that a very considerable number of them, would remove therefrom upon the expiration of their leases; that the vacancies in said building were growing; that the vacancies in said building were reasonably certain constantly to grow more numerous; that they were growing more difficult to fill, and that they were reasonably certain constantly to grow more difficult to fill. He is without knowledge: that the annual net income from said premises had never been, that it was not then, and he denies that there was no possibility that it would thereafter be, nearly sufficient to enable said company to pay said interest. He denies that it was reasonably certain that the annual net income to be derived from said building would not be sufficient to enable said company completely to pay therefrom the necessary annual operating expenses, taxes and fixed charges of said building.

FOURTH: He is without knowledge: that the premises known as Number 476 Broadway were on May 26, 1909, subject to mortgages with and of the terms described in the paragraph or article marked "Eighth" in said bill; and that the description of the said mortgages upon said premises set forth in said bill is correct in any particular thereof. He denies that the said premises then had little value over and above the amount of the mortgages thereupon. He denies that the said premises were then deteriorating in value. He denies that the issuance of $105,000 face value of bonds of Improved Property Holding Company of New York for said premises was inequitable as to said Improved Property Holding Company of New York. He denies that the same was burdensome as to said company. He denies that the same was unconscionable as to said company. He denies that the same was greatly to the advantage of the defendant Corn. He is without knowledge: that said building was, and that the same is, constructed as described in said paragraph and article. He is with-

out knowledge: that said building was erected between the years 1902 and 1904; and that the expense of said erection was more than $300,000. He denies that on May 26, 1909, it was certain to continue for a long time impracticable to obtain from said premises any income save through the renting of space in said building. He denies that by reason of any fact, and that by reason of any condition, and that by reason of the facts and conditions set forth in said bill, the net revenue then and the net revenue theretofore derived from said building, and that the estimated net revenue likely to be derived therefrom, established a sure basis for determining the maximum possible value of said premises. He is without knowledge: that the net income derived from said building for the period immediately prior to May 26, 1909, had been barely equal to the amount required for the fixed charges, taxes, operating and other expenses of said premises, and a reasonable charge for depreciation in the value of the building thereon. He denies that the character of the neighborhoods in which said buildings were situated, and he denies that the real estate therein, were on May 26, 1909, rapidly deteriorating and that they were rapidly deteriorating before said date. He denies that it was reasonably certain to become difficult, and that it was often impossible, to let space in said neighborhoods and in said buildings to responsible and desirable tenants at rates theretofore prevailing. He is without knowledge: that all, and that substantially all, of the leases then in force in said buildings were for short terms. He denies that it was reasonably certain that tenants who had theretofore occupied said buildings would remove therefrom on the expiration of their leases, and he denies that it was reasonably certain that a considerable number of them would so remove. He denies that the vacancies in said buildings were reasonably certain constantly to grow more numerous and that they were reasonably certain constantly to grow more difficult to fill. He is without knowledge: that the annual net income from said premises never had been and that it was not then, and he denies that there was no possibility that it would thereafter be, sufficient to enable said Improved Property Holding Company of New York to pay interest upon the $105,000 par value of said bonds to be issued in payment of said premises. He denies that it was reasonably certain that the annual net income to be derived from said premises would not be sufficient to enable said company completely to pay therefrom the necessary annual operating expenses, taxes and fixed charges of said buildings. He denies that he knew each and every of the matters set forth in paragraph or article designated as "Eighth" in said bill. He is without knowledge: that the other defendants and the other officers and the other directors of said company knew such matters. He denies that he was negligent and remiss in the discharge of the duties as director of the real estate corporation, in not taking steps to inform himself as to any of said matters concerning which he failed to inform himself. He denies that he in any respect failed to exercise that degree of care which an ordinary prudent and diligent man would exercise as such a director. He denies that in voting for the purchase of said premises known as Numbers 395

and 476 Broadway, he was negligent, and he denies that in so voting and that in any way he was remiss in the discharge of his duties as director of the Improved Property Holding Company of New York. He denies that in so doing he failed to exercise the degree of care which an ordinary prudent and diligent man would have exercised under like circumstances, and he denies that in so doing he failed to exercise that degree of care which as director of said company he was under obligation to exercise. He denies that when he voted in favor of said purchases he had given no thought and consideration to the transaction save such as was involved in the formal action taken at the directors' meeting of May 26, 1909. He denies that in the exercise of ordinary prudence and diligence he should have informed himself before voting of any of the facts and circumstances set forth in the article or paragraph marked "Ninth" in said bill. He is without knowledge, as to the assessed valuation of the premises known as Number 395 Broadway and as to the assessed valuation of the premises known as Number 476 Broadway; in the year 1908. He denies knowledge that the assessed valuation of property throughout Manhattan generally in 1908 was on an average of 89 per cent. of its market value. He denies that if he had exercised the care which as a director of said company he was under obligation to exercise, he would have known that alleged fact. He denies that he did not ascertain the net income from said premises previously to said purchase. He denies that any, and he denies that all, of the circumstances alleged in the paragraph or article described as "Tenth" in said bill were calculated to put an ordinary prudent and diligent man on his guard and to make him more than ordinarily vigilant in investigating the purchase by said company of the said premises known as Numbers 395 and 476 Broadway. He denies that he knew that the defendant O'Donohue directly or indirectly owned a substantial interest in the premises known as Number 395 Broadway. He denies that he knew that the appraisal, on the basis of which the said premises known as Number 395 Broadway were offered to and taken over by Improved Property Holding Company of New York, had been made for the defendant O'Donohue. He denies that he did not at the date of the said directors' meeting, which he attended, on May 26, 1909, have confidence in the defendant Corn. He denies that he was not on said date insufficiently acquainted with the defendants O'Donohue and Ball to have reasonable ground for confidence in their business judgment, and in that of each of them. He denies that on May 26, 1909, and he denies that for many months previously, it had been a matter of common and general knowledge, comment and reputation: that the value of real estate generally was rapidly deteriorating; that the value of real estate, and that the value of premises, occupied by loft and office buildings on Broadway, Borough of Manhattan, City of New York, in the neighborhood in which said premises known as 395 and 476 Broadway are situated, were rapidly deteriorating; that wholesale merchants and other tenants, who had theretofore occupied buildings in said neighborhoods, were removing in increased numbers to other neighborhoods, and that they were

particularly removing to the section of the said Borough of Manhattan above 14th Street; that tenants to take the places of those so removing were to be obtained only by large reductions in the rent then and theretofore received for space in said neighborhoods; that the amount of vacant space in said neighborhoods was constantly increasing; that there was little, or no likelihood that real estate in said neighborhoods would for many years again become so valuable as it had been in the year preceding 1909. He denies that he well knew each and every of the matters set forth in the paragraph or article of said bill designated as "Eleventh." He denies knowledge that any and all of the other officers and directors of General Realty & Mortgage Company then knew the same. He denies that in not taking steps to inform himself as to said matters, he, this defendant, was negligent and remiss in his duties as a director of said real estate corporation. He denies that in not taking steps to inform himself as to said matters, he, this defendant, failed to exercise the degree of care which an ordinary prudent and diligent man would exercise as such a director. He denies separately each and all of the allegations set forth in the paragraph or article of said bill designated as "Eleventh."

FIFTH: He denies: that the conveyance of Number 395 Broadway to the Improved Property Holding Company of New York, and that the conveyance of Number 476 Broadway to said company, were made, and that either of said conveyances was made, in pursuance of any combination; that the same, and that either of the same, was made in pursuance of any conspiracy; that the same, and that either of the same, was made as part of any wrongful or illegal scheme or schemes, in which this defendant took part; and that so far as this defendant is concerned that the same, and that either of the same, was made with any purpose and with any intent that is set forth in said bill. He denies that he, the defendant Dowling, caused said Improved Property Holding Company of New York to issue $450,000 face value of bonds to the General Realty & Mortgage Company in consideration of the transfer of said premises known as Number 395 Broadway. He denies that he, this defendant Dowling, caused said company to issue and deliver to the defendant Corn $105,000 face value of said bonds in consideration of the transfer of said premises known as Number 476 Broadway. He is without knowledge: that from June 1, 1909, to May 20, 1912, the total income derived by said company from said premises known as Number 395 Broadway was less by $15,758.75 than the total amount of necessary expenditures for operating expenses, fixed charges and taxes upon said premises for said period. He is without knowledge that the deduction of a reasonable charge for depreciation of the value of the building and of an amount representing the fair proportion chargeable to Number 395 Broadway of the general administrative expense of said company makes a deficit for the said period of at least $65,318.75. He denies that he, this defendant Dowling, has caused said company to pay out large sums of money as interest upon the bonds issued in payment for said property. He denies that he has caused said company to pay out the sum of $67,500 as interest upon said bonds. He

denies that he, this defendant Dowling, has caused said company to pay out any sum of money as interest upon any of said bonds. He denies that he, this defendant Dowling, has caused said company to assume any mortgage of $750,000, subject to which said premises were taken. He is without knowledge of each and all of the following allegations in said bill: that in a suit to foreclose such a mortgage a decree of foreclosure and sale has been made; that any such decree adjudges any amount to be due to said company under said mortgage. That said sum and that no part of said sum has been paid by said company. That the receiver of said property has no funds with which to pay the same. That pursuant to any such decree said premises have been sold. That the purchase price named in such a sale was that mentioned in said bill. That any such sale has resulted in any deficiency of upwards of $50,000. That any such sale has resulted in any deficiency. That from June 1, 1909, to May 20, 1912, the total income derived by said Improved Property Holding Company of New York from said premises known as Number 476 Broadway was $1,388.51 in excess of the total amount of necessary expenditures for operating expenses, fixed charges and taxes on said premises for said period. That the deduction of a reasonable charge for depreciation on the value of the building and an amount representing the fair proportion chargeable to Number 476 Broadway of the general administrative expense of the said company makes a net deficit for said period of $26,211.49. He denies that he, this defendant Dowling, has caused said company to pay during said period any sum of money on account of the principal of any mortgage, subject to which said premises were taken. He denies that he, this defendant Dowling, has at any time caused said company to pay the sums of money specified in the paragraph or article designated as "Twelfth" in said bill. He denies that he, this defendant Dowling, has caused this company to pay out large sums of money as interest upon the $105,000 face value of bonds issued in payment for the property known as Number 476 Broadway. He denies that he, this defendant Dowling, has caused said company to pay as interest upon said bonds the amount specified in said paragraph or article in said bill described as "Twelfth." He denies that he has caused said company to pay any sum as interest upon any of said bonds. He is without knowledge of each and all of the following allegations in said bill: That suits are now pending in this court to foreclose mortgages upon said property, held by the president of the Adams Express Company. That a decree of foreclosure and sale has been made and filed in said suits. That the sum due under said mortgage and that any part thereof has not been paid. That the said company and that the receiver thereof have no funds wherewith to pay the same. That said premises have been sold pursuant to any such decree of foreclosure and sale. That any such sale has resulted in any deficiency. He denies that the said property known as Number 395 Broadway, and he denies that the said property known as Number 476 Broadway, was at the time of the acquisition thereof of no value to said company. He denies that either of the same

was at any time of no value to said company. He denies that either of the same was at the time of its acquisition of no value to the creditors of said company. He denies that either of the same was at any time after its acquisition of no value to the creditors of said company. He is without knowledge: that the issue of said $550,000 face value of said bonds was at any time illegal and that the same was at any time void. That any of said bonds, and that any coupons appertaining thereto, was not a valid or enforceable obligation of said company, nor a debt or liability of said company.

SIXTH: This defendant is without knowledge as to each and all of the following allegations in said bill: That pursuant to any combination, and that pursuant to any conspiracy, and that as part of any wrongful scheme, and that as part of any illegal scheme, and that as part of any wrongful schemes, and that as part of any illegal schemes, and with any such purpose and with any such intent as is alleged in said bill, the defendants Corn, Ball, O'Donohue and General Realty & Mortgage Company, from time to time, have sold, transferred and negotiated many of said $555,000 face value of said bonds. That they have received large sums of money therefor. That any of said bonds were wrongfully issued, and that any of said bonds were illegally issued. He is without knowledge concerning each and every allegation in the paragraph or article designated as "Fourteenth" in said bill. He is without knowledge of each and all of the following allegations in said bill: That there were issued and outstanding, in all, in or about the month of March, 1910, $855,000 face value of bonds, secured by a mortgage dated May 24, 1909, and that such an amount of bonds was issued and outstanding at any time. That the Improved Property Holding Company of New York, in or about the month of March, 1910, and that said company at any time, caused $223,000 face value of said bonds to be redeemed at 110 per cent. of their face value and accrued interest to April 1, 1910. That the face value of any bonds so redeemed included many thousands of dollars of the face value of bonds issued for said buildings, as set forth in said bill. That the defendants Corn, Ball, O'Donohue and General Realty & Mortgage Company received many thousands of dollars of the moneys paid by Improved Property Holding Company of New York for the redemption of such bonds so issued. He is without knowledge as to each and all of the allegations in the paragraph or article designated as "Fifteenth" in said bill. He denies that the Improved Property Holding Company was on May 26, 1909, barely solvent. He denies that it was at all times thereafter barely solvent, and that its income was insufficient to meet its obligations as they matured. That its income at all times thereafter became so insufficient that its credit was inordinately extended. That its credit at all times thereafter was inordinately extended. That it was then obliged to invest in extravagant building operations large sums of money, for which there was no prospect of prompt return, and from which the ultimate possibility of substantial return was highly speculative and doubtful. He denies that at all times thereafter

it became so obligated. He denies that he, this defendant Dowling, knew at any time any of such alleged facts. He avers that said Improved Property Holding Company of New York was on May 26, 1909, solvent. He is without knowledge that no profit, and he is without knowledge that no advantage, has in fact been realized from such building operations. He denies that the acts of the defendants described in said bill resulted in serious impairment of the capital and property of said company; that said acts resulted in great loss and damage to the holders of stock in said company; that said acts resulted in great loss and damage to the persons and corporations who were then and theretofore, and who subsequently became, creditors of said company; that the said acts resulted in great loss and damage to the persons and corporations who are, and to those who were prior to May 26, 1909, owners and holders of bonds of said company. He denies that by reason of said acts, and that by reason of any acts committed by this defendant Dowling, the insolvency of said company is now hopeless. He denies knowledge that the liabilities of said company are hundreds of thousands of dollars in excess of its assets in the hands of the receiver. He denies that if such insolvency exists, it is by reason of any act of this defendant. He is without knowledge of each and all of the following allegations in said bill: That any of the acts and transactions described in said bill were part of, and that any of the same constituted, a conspiracy and scheme on the part of the defendants Corn, Ball, O'Donohue and General Realty & Mortgage Company, to derive benefit and profit for themselves at the expense, regardless and in violation of the rights and interest of said Improved Property Holding Company of New York. That any of said acts were committed in violation of any trust and of any confidence imposed in said Corn, Ball and O'Donohue. That the purpose and object of the said Corn, Ball and O'Donohue in causing the purchase of said properties by said Improved Property Holding Company of New York, and in causing the issue of bonds for the same, and the assumption of mortgages, was to rid themselves, and each of them, and the defendant General Realty & Mortgage Company, of the burdens, responsibility and obligations incident to the ownership of rapidly deteriorating properties, including the burdens and obligations of mortgage debts to which said properties were subject. He denies that the said last-named defendants had a further purpose, to obtain for themselves a very large amount of bonds of said Improved Property Holding Company of New York for their own benefit and interest, without benefit or advantage to said company. He is without knowledge as to each and all of the following allegations in said bill: That a further purpose on their part was to obtain money and property for themselves, and each of them, by collecting the interest payable on said bonds and by selling and negotiating said bonds and by receiving the proceeds of the redemption of said bonds. That such purposes and objects, and that any of them, were accomplished by the said Corn, Ball and O'Donohue, and by any of them. That the defendant General Realty & Mortgage Company participated in any such scheme or schemes. That

said defendant company participated in any such conspiracy. That said defendant company was at any time the tool and dummy of the defendants Ball and O'Donohue. That the said Ball and O'Donohue with their relatives and intimate associates owned substantially all the stock and had substantially the whole beneficial interest in all the property, income and profits of said last-named corporation. That said corporation had no independent object and interest. That said corporation was subservient at any time to the said Ball and O'Donohue. That said corporation had any knowledge, and that said corporation had any notice, of any wrongful character of any transactions to which it was a party. That the acts of said corporation, and that the participation of said corporation in any acts or transactions, ought in fairness and good conscience to be deemed the acts and participation of the defendants Ball and O'Donohue, and that they are in the eyes of a court of equity the acts and participation of the defendants Ball and O'Donohue. He denies that he, this defendant Dowling, participated in the consummation of any conspiracy; that he participated in the consummation of any scheme; that he participated in the consummation of any schemes; that he participated in the consummation of any wrongful act; that he participated in the consummation of any wrongful transaction; that he participated in the consummation of any illegal act; that he participated in the consummation of any illegal transaction, by voting as a director of Improved Property Holding Company of New York to authorize the purchase of said properties for $555,000 face value of said bonds, as aforesaid, and by voting to cause said company to accept said properties and to issue therefor said bonds, and by not opposing and by not preventing and by not seeking to prevent the acceptance by said company of said properties and the issuance of said bonds. He is without knowledge that the defendant Barlow participated in the consummation of any such matters by so voting. He denies that all, and he denies that any, loss and damage suffered by said company at any time was the consequence of the fault of him, the said defendant Dowling, in voting for and in acquiescing in the acquisition of said properties and in the issuance of said bonds on the premises described in said bill. He denies that any damage suffered by said company was the consequence of any negligence by him, said defendant Dowling, in so voting and in so acquiescing. He is without knowledge that any loss and that any damage was suffered by said company by the fault or by the negligence of the said defendant Barlow, in voting for and by acquiescing in any of said acts, as aforesaid. He denies that he, this defendant Dowling, has received any moneys, and that he has received any property, by reason of any matters set forth in said bill, and he denies that he is liable to account for any such money or any such property. He denies that he, this defendant Dowling, because of any acts, has become accountable, either severally or jointly with others, to pay to the plaintiff any compensation for any loss and damage incurred by said company and its creditors by reason of any act committed by him. He is without knowledge that none of the money and property for which

any of the defendants Corn, Ball, O'Donohue, Barlow and General Realty & Mortgage Company, jointly or severally, are accountable, has ever been paid or returned to said Improved Property Holding Company of New York; and that no money or property has ever been received by said last-named company or by the complainant, as compensation for any loss and damage caused to said last-named company and its creditors and stockholders by any wrongful or by any illegal acts committed by said defendants. He admits that the amount in controversy in this suit exceeds the sum of $3,000, exclusive of interest and costs.

And this defendant further alleges as a Second distinct and separate defense to said bill:

That in voting to authorize the purchase of the properties known as Numbers 395 and 476 Broadway, and in voting to authorize the issue of bonds in payment for the same, this defendant, Dowling, acted in good faith, in the exercise of his reasonable judgment as a director of said Improved Property Holding Company of New York, and that it then was and still is believed by him that the said premises known as Numbers 395 and 476 Broadway then were of the value of at least the amount paid for the same, and that the transaction was for the advantage of said company.

And this defendant further alleges as a Third distinct and separate defense to said bill:

That the acts of this defendant, Dowling, in voting for the purchase of said properties known as Numbers 395 and 476 Broadway, and in voting to issue bonds to pay for the same, were ratified and authorized by two-thirds of the stockholders of the said Improved Property Holding Company of New York.

And this defendant further alleges as a Fourth distinct and separate defense to said bill:

That by the *laches* and delay of the said Improved Property Holding Company of New York and of the different receivers of the same, including the complainant herein, the said Improved Property Holding Company of New York, and the complainant as receiver thereof, are estopped and barred from instituting and from prosecuting any suit against this defendant because of any of the matters set forth in said bill in equity.

And this defendant further alleges as a Fifth distinct and separate defense to said bill:

That the complainant has an adequate and complete remedy against this defendant at common law.

Wherefore, this defendant prays that said bill be dismissed, with costs.

ROBERT E. DOWLING.

ROGER FOSTER,
Attorney for Defendant,
Robert E. Dowling,
No. 55 Liberty Street,
New York.

FORM XXXIII.—ANSWER TO FRIENDLY BILL FOR RECEIVER.

[Re Metropolitan Railway Co. Ownership 208 U. S. 90.]

IN THE DISTRICT COURT OF THE UNITED STATES,

FOR THE SOUTHERN DISTRICT OF NEW YORK.

THE PENNSYLVANIA STEEL COMPANY and DEGNON CONTRACTING COMPANY, Complainants, AGAINST NEW YORK CITY RAILWAY COMPANY, Defendant.	In Equity.

New York City Railway Company, the defendant in this cause, for answer to the bill of complaint, or unto so much and such parts thereof as the defendant is advised it is necessary or material for this defendant to make answer unto, answering, says:

FIRST. The defendant admits all the allegations of said bill of complaint.

SECOND. The defendant, reiterating the admissions of the preceding article of this answer, joins in the prayer of said bill of complaint and prays that this Court sitting in equity may take possession of the system of the defendant through the appointment of a Receiver as prayed in said bill of complaint and thereby preserve the unity of the system of the defendant as it has been maintained and operated and protect and preserve the corporate franchises, privileges and property and preserve the corporate existence of the defendant and protect and preserve its said system and its said property, real and personal, from being sacrificed under any proceedings which can or may be taken, liable to prejudice or sacrifice the same, and do any and all acts which may be necessary to preserve the valuable rights and franchises of the defendant, and it accordingly prays that inasmuch as there is no adequate remedy at law in the premises for the complainants or for this defendant, that this Court will, for the purposes aforesaid, appoint a Receiver as prayed for in said bill of complaint, and empower and authorize such Receiver to take possession of the entire property of this defendant and to preserve, manage, operate and control the same, pay all indebtedness due or to become due by this defendant, and otherwise discharge all the duties ordinarily imposed by Courts upon Receivers in similar cases; that on the final hearing in this cause, this Court will, under said bill of complaint and this answer or such supplemental bill as shall be filed herein, make such decree or decrees with respect to the property of this defendant as shall deal with the same on general equitable principles, and that this Court will cause all the liens upon said property or any part thereof and all rights and claims in equity of persons interested therein to be ascertained, defined and determined, and that the proceeds arising from the sale of said property or any part thereof be applied under

the said orders or decrees of this Court according to the rights, interests and equities of the parties interested therein, and that this Court will direct all persons in possession of the property of this defendant or any part thereof, to surrender the same to such Receiver or to hold such property under said Receiver.

JAMES L. QUACKENBUSH,
Solicitor for Defendant.

ALFRED A. GARDNER,
Of Counsel.

SOUTHERN DISTRICT OF NEW YORK,
State of New York,
COUNTY OF NEW YORK, } ss.:

CHARLES E. WARREN, being duly sworn, doth depose and say that he is the Secretary of the New York City Railway Company, the defendant in this suit; that he has read the foregoing answer to the bill of complaint in this suit and knows the contents thereof and that the same is true to his own knowledge except as to the matters therein stated to be alleged upon information and belief and that as to those matters he believes it to be true.

CHARLES E. WARREN.

Sworn to before me this 24th day of September, 1907.

EARL E. STODDARD,
[L. S.] Notary Public.
Filder 24th September, 1907.

FORM XXXIV.—AMENDMENTS TO BILL IN EQUITY.

[119 Fed. 217.]

[TITLE.]

And now, February 24, 1902, complainant, by leave of the court, amends its bill of complaint by adding to the said bill the following paragraphs:

1. "Your orator further shows that it has caused to be printed and inserted in the several copies of each volume of every edition of the said book called 'American and English Encyclopædia of Law, Second Edition,' and in the several copies of each volume of every edition of the said book called 'Encyclopædia of Pleading and Practice,' on the page immediately following the title pages thereof the word 'copyright,' together with the year the copyright was entered, and the words, 'Edward Thompson Company,' as required by law.

2. "Your orator hereby waives all penalties or forfeitures to which the respondent might be liable by reason of the alleged infringement of complainant's copyright and unfair competition with complainant's work, and elects to proceed against the defendant only for an injunction and accounting."

Complainant further amends its said bill by withdrawing and striking from its bill the following prayers for discovery and relief, namely:

"And especially to answer and set forth:

"1. The date of the publication of each of its said volumes.

"2. The number of copies of each of its said volumes published.

"3. The number of subscribers to its said volumes, and how many of said volumes have been sold, and the price at which they were severally sold.

"4. How many of its said volumes are still in the possession of and in the control of the defendant.

"And that all of said books published as aforesaid, and the stereotyped plates thereof be declared forfeited to and for the benefit of your orator, and that the defendant be required to surrender and deliver the same to your orator."

EDWARD THOMPSON COMPANY,
By JOHN W. HILTMAN,
Treasurer.

WALTER LARGE,
Solicitor for Complainant.
Office and Post Office Address, Temple Court,
Borough of Manhattan, New York City.
FRANK P. PRICHARD,
Of Counsel.

UNITED STATES OF AMERICA, }
Southern District of New York. } ss.

John W. Hiltman, being duly sworn, deposes and says that he is the treasurer of the corporation, the complainant above named, and is familiar with its business; that he has read the foregoing amendments to the bill of complaint herein and knows the contents thereof, and that the same are true to the knowledge of deponent, except as to the matters therein stated to be alleged on information and belief, and as to those matters he believes them to be true.

JOHN W. HILTMAN.

Subscribed and sworn to before me this 24th day of February, 1902.

GEO. BABCOCK,
[SEAL.] Notary Public.

FORM XXXV.—PETITION FOR INTERVENTION IN STOCKHOLDERS' SUIT WITH ALLOWANCE THEREOF.

[Granted 154 Fed. 142 in which the author was counsel.]

In the Matter of the Petition of Walter Althause for leave to Intervene.

To the Honorable William L. Putnam, United States Circuit Judge, and to the other judges of the District Court of the United States for the District of Maine:

The petition of Walter Althause, who is, and at the time of the com-

mencement of the suit in equity herein described was, a citizen and resident of the City, County and State of New York, respectfully shows:

1. On or about the 13th day of February, 1906, one Henry B. Snyder, a citizen and resident of the State of New York, duly began a suit in equity in this court and filed in the office of the clerk thereof a bill in equity in such suit against the DeForest Wireless Telegraph Company, the American DeForest Wireless Telegraph Company, the Atlantic DeForest Wireless Telegraph Company and the DeForest Occidental and Oriental Wireless Company. The said suit was brought by the said Snyder on his own behalf and on behalf of all other stockholders of the DeForest Wireless Telegraph Company who may come in and contribute to the expenses of such suit. In the said suit all the said defendants have been served or appeared; and all of the said defendants have filed in the office of the clerk of this court on the 16th day of June, 1906, pleas, demurrers and answers to such bill in equity. In such suit and on or about the 2d day of March, 1906, the Honorable William L. Putnam, United States Circuit Judge, granted a restraining order restraining the said defendants, and their officers, agents and servants, from transferring and incumbering various letters patent of the United States therein described and the wireless laboratory in the State of New Jersey formerly in the possession of the said DeForest Wireless Telegraph Company and the wireless telegraph stations on the Atlantic seaboard and from issuing and selling any bonds which purport to be secured by pledge of or mortgage upon any of the said property. On or about the 13th day of February, 1906, the said Honorable William L. Putnam, United States Circuit Judge, granted an order to show cause in such suit why a receiver of the property of the said defendants should not be appointed therein and directed that the same be published in the *Portland Eastern Argus* and in the *New York Sun*, which order to show cause was so published in accordance with the directions thereof; and the motion for such receiver under the said order to show cause has been from time to time adjourned and is still pending undetermined. Exceptions to the said answers for insufficiency have been filed in the office of the clerk of this court and rules setting the said demurrer and plea for hearing have been forwarded to the clerk thereof. . No subsequent proceedings have been taken in such suit for the reason, as your petitioner has been informed and believes, that the plaintiff in the said suit has been unable to make service of a subpœna upon Abraham White, *alias* Abraham Schwartz, the president of certain of the said defendants and has been unable to take his testimony, which is material to prove the plaintiff's case in the said suit..

2. Your petitioner is a holder in his own right of 900 shares of stock of the DeForest Wireless Telegraph Company, which he has acquired for value. Said shares of stock are of the value of $10 each; and upon information and belief, each of said shares is of the value of at least the par value of the same *provided* that the relief prayed in said bill in equity by said Snyder for the benefit of the stockholders of said corporation is granted. Fifty of said shares are in a certificate in the name of Henry

B. Snyder. Your petitioner acquired said shares in or before the month of November, 1903, before the acts, of which complaint is made in said bill. Your petitioner has been unable to procure a transfer of said shares to his own name on the books of said corporation; for the reason your petitioner has been unable to learn where the office and where the transfer books of the said corporation are situated, and the names of any of its officers, except the defendant Galbraith. The said Galbraith has testified in a proceeding in the case hereinafter described: that he is vice president of the said DeForest Wireless Telegraph Company; and that he does not know of any office occupied by said corporation since January 1st, 1904; and that he does not know where to locate the books of the company. The defendant Butler has testified: that he was formerly secretary and treasurer of said corporation, and that the defendant Schwartz, *alias* White, was formerly president thereof; that they have since resigned as officers and directors; and that so far as he knows, no one has been elected to succeed either of them; that both of them have resigned as directors; that he knows of no directors of said corporation, except said Galbraith. Moreover, the defendant Schwartz, *alias* White, and the other defendants, except said DeForest Wireless Telegraph Company have seized possession of the assets of the same, and their character is such that your petitioner believes that if your petitioner should surrender the said certificates of stock to them, or to anyone of them, the same would never be returned to him unless he obtained an order of the Court for said purpose.

3. Your petitioner wishes to intervene and join in said suit as an additional party plaintiff therein; and he is ready and willing and hereby offers, in my office, to contribute to the expenses of the said suit, his just proportion thereof, to an amount which the said Court shall deem proper.

Wherefore your petitioner prays that an order may be entered allowing your petitioner to intervene in said suit as an additional party plaintiff in the same; and for such other and further relief in the premises as may be just; and your petitioner will ever pray, etc.

JAMES A. ALLEN,
Solicitor for Petitioner,
35 Wall Street, New York.

Of which petition Mr. Verrill, attorney for Respondents, who appears in open court, has notice and acknowledges receipt of copy.

And on the 4th day of February, A. D., 1907, the said Walter Althause, Dec. 20, 1906, the same intervention not to effect any right of any respondent to have the bill dismissed or otherwise disposed of which stockholder, is made party plaintiff, by intervention per petition filed accrued before the petition was filed.

FORM XXXVI.—ORDER OF SUPREME COURT FOR INTERVENTION, INJUNCTION AND RECEIVER.

[State of Oklahoma v. State of Texas, 252 U. S. 363.]

[Title.]

This cause coming on to be heard on the motion of the United States for leave to intervene herein for an injunction and for the appointment of a receiver, and on the responses made to such motion by the State of Oklahoma and the State of Texas, respectively, and the court being fully advised in the premises,

It is now considered, ordered and decreed as follows, until the further order of the court:

1. That said motion for leave to intervene herein be, and the same is hereby, granted.

2. The defendant, the State of Texas, her officers and agents, are hereby enjoined from selling any purported rights or making or issuing any grants, licenses or permits to any person, corporation or association covering or affecting any lands, or any part of the bed of Red River, lying north of the line of the south bank of such river as said south bank existed at the date of the ratification of the Treaty of 1819 between the United States and Spain, that is to say, on the twenty-second day of February, 1821, and between the One Hundredth degree of West Longitude and the southeastern corner of the State of Oklahoma.

Here was inserted description of land.

Thence continuing up said River along the foot of the Texas bluffs as the south bank, through Ranges 15 and 16 to the intersection of the west boundary line of Range 16 extended to the foot of the Texas bluffs.—

3. Thence north along said boundary line of Range 16 to mid channel of said River as the same meanders through the broad stretch of sand which in some places extends to and is bounded by the bluffs on either side and in other places by the margin of the alluvial flood plain on either side, and which is covered with water at times of freshets and entirely devoid of flowing water during the annual dry seasons,—and of all machinery, fixtures, tools and other property of whatever kind or character now on said lands and used in connection with the extraction, storage, transportation, refining or diposal of the oil or gas products of said lands. And the said receiver is hereby authorized and empowered to take possession of said lands and property forthwith, to take all appropriate measures to conserve the oil and gas within such lands and to control all operations thereon for the production and disposal of such oil and gas.

4. Within thirty days after taking possession the receiver shall formulate and report to this court full and complete plans for prospecting such lands and developing and producing the oil and gas within the same; and until such report is made and acted upon by the court the receiver shall operate the existing oil and gas wells on said lands, or permit them to be operated by their respective claimants under his direction and super-

vision, or close down said wells if he shall deem it advisable to do so; and he shall sell at market prices the oil and gas so produced and pay out of the proceeds the necessary expenses of operation and supervision. Full and accurate accounts shall be kept by the receiver of all oil and gas so produced and of the proceeds derived from their sale and the expenses paid therefrom; and these accounts shall be kept in such way that they will show separately the production, proceeds and expenses pertaining to each well so that the net proceeds may be ultimately awarded to the rightful claimant.

5. Before entering upon his duties the receiver shall execute a bond to be approved by the court in the sum of One Hundred Thousand Dollars for the faithful performance of his duties including the disbursement and payment according to the court's direction of all moneys which may come into his hands in the course of the receivership.

6. The receiver shall receive such compensation for his services as may be fixed hereafter by the court.

7. The defendant, the State of Texas, and the complainant, the State of Oklahoma, and their respective officers, agents and employees, and all persons now in possession of any of the said lands or claiming any right, title or interest therein, are directed to deliver possession thereof to the said receiver and are enjoined until the further order of this court from removing any of the property hereinbefore described from said lands and from conducting any oil or gas mining operations thereon save under the direction and supervision of the receiver and from interfering with the possession, control or operations of the receiver.

8. As to such of the land before described as is not claimed by the defendant, the State of Texas, in its proprietary capacity said State shall have fifteen days within which to file a response to the intervener's motion for an injunction and receiver; and on the filing of such response the State of Texas or any claimant claiming under a patent lease or permit from that State shall be at liberty to request any modification of this order deemed essential or appropriate for the right or full protection of the interest of such State or claimant.

9. Either the plaintiff, the State of Oklahoma, or the intervener, the United States, may by an amendment of its pleading make any claimant claiming under the State of Texas or any other claimant a party to the cause and have the requisite process issued and served, so that all parties claiming an interest in the subject-matter may be before the court. And the like permission is granted to the State of Texas in respect of parties claiming under the State of Oklahoma or the United States.

FORM XXXVII.—ORDER OF INTERVENTION AS DEFENDANTS.

[Ex parte Jordan, 94 U. S. 248.]

[Title and recitals.]

It is hereby ordered that the said petitioners have leave, and leave is hereby granted to them, to intervene in this suit for their own interests,

and the interests of those whom they represent, and to that end to appear in the suit within three days, as defendants, in the same manner and with like effect as if they were named in the original and supplemental bills as defendants having or claiming an interest: *Provided*, that said petitioners all appear by the same solicitor or solicitors. This order to be without prejudice to proceedings already had; but this is not to be construed as depriving the petitioners of leave to apply for a rehearing or review of any order heretofore made, upon due notice to the parties interested.

FORM XXXVIII.—NOTICE OF MOTION TO DISMISS BILL.

[*District*] *Court of the United States, for the Southern District of New York.*

JOHN ABER
against
WILLIAM WATERS.

SIRS:—

PLEASE TAKE NOTICE, That upon the bill of complaint herein, which was filed in the office of the clerk of this Court on the 19th day of March, 1913, I shall move, this Court on Monday, April 7th, 1913, at the opening of Court on that day, or as soon thereafter as counsel can be heard, for an order dismissing said bill of complaint for want of equity and for such other and further relief in the premises as may be just.

Dated, New York, April 2d, 1913.

Yours, &c.,
JAMES BROWN,
Plaintiff's Attorney,
35 Wall Street, New York.

To
MESSRS. GREEN & BLACK,
Solicitors for Defendant,
115 Broadway, New York.

FORM XXXIX.—RESTRAINING ORDER AGAINST STRIKE.

IN THE DISTRICT COURT OF THE UNITED STATES.
District of Indiana.

[In Equity.]

United States of America, *Plaintiff*,
v.
Frank J. Hayes, et al., *Defendants*.
No. ———

[Temporary Restraining Order.]

And now, on this thirty-first day of October, 1919, at 10:40 A. M., this cause coming on to be heard on the motion of the Plaintiff for a tem-

porary restraining order, as prayed in said Bill, and Plaintiff having exhibited its sworn Bill to the Honorable Albert B. Anderson, Judge of the United States District Court for the District of Indiana, and the Court now being fully advised in the premises and having heard read said Bill,

It is ordered that a temporary restraining order issue out of and under the seal of this Court commanding the said defendants, Frank J. Hayes, John L. Lewis [here were inserted the names of other defendants], both individually and in their representative capacities as officers of the International Union, United Mine Workers of America, or as members of said organization or any of its district or local unions or any committee thereof, and all persons combining, conspiring, agreeing or arranging with them, and all other persons whomsoever, not to issue any message that the strike of the miners and mine workers in the bituminous coal fields of the United States, heretofore ordered by the said Defendants, or some of them, to take effect at midnight on October 31, 1919, is to be enforced as previously announced or otherwise and to desist and refrain from doing any further act whatsoever to bring about or continue in effect the above described strike and cessation from work on the part of the miners and mine workers in the bituminous mines; from issuing any further strike orders to local unions and members of local unions or to district unions for the purpose of keeping such strike in effect, or for the purpose of supporting such strike by bringing about or maintaining any other strikes; from issuing any instructions, written or oral, covering or arranging for the details of enforcing such strike ordered to begin at midnight on October 31, 1919; from issuing any messages of encouragement or exhortation to striking miners or mine workers or unions thereof to abstain from work and not to return to the mines in pursuance of such strike; and from issuing and distributing or taking any steps to procure the issuance or distribution, to miners and mine workers striking and abstaining from work in pursuance of such strike, of socalled strike benefits or sums of money previously accumulated or subsequently acquired to assist such striking miners and mine workers to subsist while striking or to aid them in any way by reason of or with reference to such strike and abstaining from work, and from conspiring, combining, agreeing or arranging with each other or any other person to limit the facilities for the production of coal, or to restrict the supply or distribution of coal or from aiding, or abetting the doing of any such act or thing.

It is further ordered that the aforesaid temporary restraining order shall be in force and binding upon such of said Defendants as are named herein from and after the service upon them severally of this writ by delivering to them severally a copy of this writ, or by reading the same to them, and the service upon them respectively of this writ of subpoena herein.

It is further ordered that this cause be set down for hearing, upon the application for temporary injunction, on the 8th day of November, 1919,

at 10 o'clock, A. M., in the United States District Court Room, in the City of Indianapolis, Indiana; and the said Defendants and each of them are hereby notified of said hearing and this temporary restraining order shall remain in full force and effect until said hearing and the further order of the Court.

ALBERT B. ANDERSON,
United States District Judge.

FORM XL.—INJUNCTION ORDER AGAINST INFRINGEMENT OF TRADEMARK.

[Baglin v. Cusenier Co., 221 U. S. 580, in which the author was counsel.]

[Title.]

This cause coming on to be heard upon the order to show cause, and upon the bill of complaint and the annexed affidavits and exhibits therein referred to, and upon the answering affidavits of the defendant, and Philip Mauro, Esq., being heard from the motion, and Hubert Howson, Esq., being heard in opposition, and the Court being fully advised in the premises, now, upon motion of complainant's solicitor, it is this day

Ordered, that the Cusenier Company, its associates, successors, assigns, officers, managers, servants, clerks, agents and workmen, and each of them, be and they hereby are enjoined until further order of this Court from selling or offering for sale any cordial, not made by the Carthusian Monks, in packages which, by the collocation of emblems and inscriptions found upon the packages or upon the bottles, simulate the well-known packages or bottles in which complainant's association have heretofore offered their cordial for sale in this country; or from offering for sale any cordial, not made by the Carthusian Monks, in bottles bearing the yellow label having the lettering, etc., which simulate the bottles or the labels in which complainant's association has heretofore offered their cordial for sale in this country; or from making use of any labels upon bottles (or upon the corks of bottles), containing cordial not made by the Carthusian Monks, which simulate the labels which complainant's association have heretofore used upon its cordial for sale in this country.

(Signed) E. HENRY LACOMBE,
U. S. C. J.

FORM XLI.—NOTICE OF INJUNCTION.

[The Colliery Engineer Co. v. Ewald and others, 126 Fed. 843, in which the author was counsel.]

[Title.]

To the above defendants and each of them:

You are herewith served with a copy of the decree and injunction which have been entered and issued in the above suit and we particularly call your attention to the following:

1. That by the injunction you are required by the Court to abstain henceforward from directly or indirectly publishing, printing, selling or exposing for sale or otherwise disposing of or giving away or causing or being in any way concerned in publishing, selling or exposing for sale or otherwise disposing of or giving away any of the books or drawing-plates designated in said injunction, or any part thereof, and from, in any way, infringing the copyrights designated in said injunction.

2. That by the decree you are furthermore required, among other things, to surrender and deliver up to the Clerk of this Court to be cancelled and destroyed, all copies on hand of the infringing books and drawing-plates designated therein. The Clerk of the Court will be prepared to receive this surrender and delivery from you at his office in the Post Office Building in this City, on Saturday, January 11, 1902, at 11 A. M.

Dated N. Y., January 9, 1902.

Yours etc.,
GIFFORD & BULL,
Complainant's Solicitors.

FORM XLII.—WRIT OF INJUNCTION AGAINST INFRINGEMENT OF COPYRIGHT.

[126 Fed. 843, in which the author was counsel.]

UNITED STATES OF AMERICA, DISTRICT COURT OF THE UNITED STATES, FOR THE SOUTHERN DISTRICT OF NEW YORK.

[In Equity.]

THE PRESIDENT OF THE UNITED STATES OF AMERICA, To Fred. W. Ewald, Charles W. Ackerman, Adolf Weiser, John Doe and Richard Roe, late doing business as F. W. Ewald & Co., The United Correspondence Schools Co., Louis Stettiner, Martin Stettiner and Julius M. Stettiner, doing business as Stettiner Bros., their and each of their servants, agents, attorneys, employees, workmen, and confederates, and each and every of them, GREETING:

WHEREAS, it hath lately been represented to us in our said Circuit Court of the United States, sitting as a Court of Equity, on the part of The Colliery Engineer Company, renamed International Text Book Company, the complainant, that it, the said complainant, has lately exhibited its bill of complaint against you, the said Fred W. Ewald, Charles W. Ackerman, Adolf Weiser, John Doe and Richard Roe, late doing business as F. W. Ewald & Co., The United Correspondence Schools Co., Louis Stettiner, Martin Stettiner and Julius M. Stettiner, doing business as Stettiner Bros., defendants, to be relieved touching the matters therein contained, in which bill it is, among other things, set forth, that copyrights were granted and

issued by the United States to said complainant, for each and all of the following publications, to wit:—

A book entitled "Circular of Information of the International Correspondence Schools. A System of Home Study in Mechanics and Mechanical Drawing." Here were inserted the titles of the books and drawing plates.

And that said complainant is now the proprietor of each and all of said copyrights and of the sole liberty of printing, reprinting, publishing, completing, copying, executing, finishing and vending said publications and each of them.

And it being also set forth in said bill, that you, the said defendants, have printed, published and sold, and caused to be printed, published, distributed and sold within the United States, books and drawing plates, infringing said copyrights and each of them; being particularly the books and drawing plates entitled as follows, to wit:

Books entitled "A College Education by Mail. The United Correspondence Schools, New York. Home School of Mechanical Engineering. A Thorough System of Home Study in Mathematics, Mechanical Drawing, Mechanics, Electricity."

Books entitled "The United Correspondence Schools."

[Here were inserted the title of other books and drawing plates.]

And also that you, the said defendants, have unfairly competed with the said complainant in business by imitating and causing the imitation of the said publications of the complainant, and particularly in the construction, arrangement and printing of said infringing publications and each of them.

And that your aforesaid acts and doings are contrary to equity and good conscience.

We, Therefore, in consideration of the premises, and the same appearing to us to be true, Do Strictly And Fully Command And Enjoin You, the said Fred W. Ewald, Charles W. Ackerman, Adolf Weiser, John Doe and Richard Roe, late doing business as F. W. Ewald & Co., The United Correspondence Schools Co., Louis Stettiner, Martin Stettiner and Julius M. Stettiner, doing business as Stettiner Bros., the defendants, and your and each of your servants, agents, attorneys, workmen, employees, and confederates, and each and every of you, under the pains and penalties that may fall on you in case of disobedience, that you and each and every of you do henceforth altogether, absolutely and entirely, desist and refrain from, directly and indirectly, publishing, printing, selling or exposing for sale, or otherwise disposing of or giving away or causing or being in any way concerned in publishing, selling or exposing for sale or otherwise disposing of or giving away the books, sheets, papers or documents hereinbefore referred to, or any books, sheets or other papers or documents infringing or containing said copyrights or either of them, or any part thereof, or like or similar to those hereinbefore set forth, and from in any way infringing said copyrights or the rights of the complainant under the same.

Witness the Honorable [Learned Hand, United States District Judge]

at the City of New York in said district, this 8th day of January in the year one thousand nine hundred and two.

[SEAL] [ALEX. GILCHRIST, JR.],
Clerk of the [District] Court of the United States for the Southern District of New York.

GIFFORD & BULL,
Solicitors for the complainant.

FORM XLIII.—WRIT OF INJUNCTION AGAINST STRIKERS.

[From Loewe v. California State Federation of Labor, 139 Fed. 71, 85, 86.]

United States of America, Northern District of California—ss.

The President of the United States of America, to California State Federation of Labor, San Francisco Labor Council, Harry Knox, T. F. Gallagher, Nicholas Blum, Daniel D. Sullivan, J. R. Hillis, C. W. Holmquist, J. C. Templeton, John Guinne, Frank J. Bonnington, G. K. Smith, Will J. French, A. C. Rose, Russel I. Wisler, P. H. Coyle, J. A. Johnson, Richard Cornelius, Sarah Hogan, Charles T. Shuppert, J. L. Franklin, Theodore Johnson, G. M. Lipman, Wm. P. McCabe, George Metzger, A. Burton, J. E. Hooper, A. S. Howe, Joseph Moran, Annie Mullen, O. E. Pierce, T. E. Zant, J. R. Roland, their and each of their, attorneys, agents, employees and all persons acting in aid of, or in conjunction with them, or any of them, greeting:

Whereas, Dietrich E. Loewe and Martin Fuchs, complainants in the above-entitled cause, and citizens of the state of Connecticut, have filed on the chancery side of the [District] Court of the United States for the northern district of California a bill against the above-named defendants and others, and have obtained an allowance for an injunction as prayed for in said bill:

Now, therefore, we, having regard to the matters in said bill contained, do hereby command and strictly enjoin you, the said California State Federation of Labor, San Francisco Labor Council, Harry Knox, T. F. Gallagher, Nicholas Blum, Daniel D. Sullivan, J. R. Hillis, C. W. Holmquist, J. C. Templeton, John Guinne, Frank J. Bonnington, G. K. Smith, Will J. French, A. C. Rose, Russel I. Wisler, P. H. Coyle, J. A. Johnson, Richard Cornelius, Sarah Hogan, Charles T. Shuppert, J. L. Franklin, Theodore Johnson, G. M. Lipman, Wm. P. McCabe, George Metzger, A. Burton, J. E. Hooper, A. S. Howe, Joseph Moran, Annie Mullen, O. E. Pierce, T. E. Zant, J. R. Roland, your and each of your, attorneys, agents, employees and all persons acting in aid of or in conjunction with you, or any of you, from in any manner agreeing or combining or conspiring together to injure or destroy the trade or business of complainants herein, or to interfere with the manufacture, transportation or sale by complainants or by any other person, firm or corporation, of hats manufactured by complainants; from boycotting or agreeing or attempting to boycott and from declaring or continuing a boycott against complainants or complainants' trade or business or the product of complainants' said factory, or against any

person, firm or corporation, for the purpose of preventing or injuring, and from thereby preventing or injuring, the regular operation and conduct of complainants' trade or business or the transportation or sale of or trade in hats manufactured or sold by said complainants, and from abetting, aiding or assisting in such boycott; from publishing or circulating, in combination, or in pursuance of any conspiracy or agreement to injure or destroy the trade or business of complainants, in writing or orally, any statements or representations advertising or calling the attention of complainants' customers or merchants or tradesmen or the public to any boycott or strike against complainants, or against the product of complainants' said factory, or that, or to the effect that, complainants, complainants' factory, or complainants' goods, or the hats or products made or sold by complainants, or sold by complainants' customers, are or were "unfair," or should not be purchased or dealt in or handled by the public or merchants or tradesmen; from publishing or circulating, in combination, or in pursuance of any conspiracy or agreement to injure or destroy the trade or business of complainants, or for the purpose of injuring or destroying the trade or business of complainants, in writing or orally, statements or representations to customers of complainants, or to dealers in hats, or tradesmen or the public, that complainants' factory, complainants' business, or complainants' hats, or the product of complainants' factory, or either or any of them, are unfair or have been boycotted or are boycotted, or should not be dealt with in or with or sold, and from coercing or inducing or attempting to coerce or induce any such dealer, person, firm or corporation, or the public, not to wear, buy, trade in, deal in, or have in possession, hats or any hat made by complainants, or the product of complainants' factory, for the purposes last aforesaid, and, for like purposes, from threatening any person, firm or corporation with injury or loss to the business or trade of such person, firm or corporation in case such person, firm or corporation should purchase or deal in hats manufactured by complainants, or the product of complainants' said factory; from giving any orders or directions to committees, associations, or others for the performance of any acts or threats hereinbefore enjoined —which commands and injunctions you are respectively required to observe and obey until our said circuit court shall make further order in the premises.

Hereof fail not, under penalty of the law thence ensuing.

Witness the Honorable [John J. De Haven, District Judge of the United States for the Northern District of California.] this 1st day of July, 1905, and in the 129th year of the Independence of the United States of America.

FORM XLIV.—ORDER DENYING INJUNCTION UPON BOND FILED BY DEFENDANT.

[TITLE AND RECITALS.]

It is hereby Ordered that the said motion for a preliminary injunction be and the same hereby is denied; upon condition that the defendant give

to the plaintiff a bond with sufficient surety to be approved by the Court for the sum of five thousand ($5,000) dollars conditioned for the payment of all profits and damages that may be decreed against the defendant in this cause for the infringement of the patent described in the bill herein between the date of this order and the final decree in this cause; and it is further Ordered that if the defendant fails to execute and file with the clerk of this court such a bond within thirty (30) days from the date of the entry of this order that the plaintiff may renew said motion.

FORM XLV.—BOND IN PLACE OF INJUNCTION.

[TITLE.]

THE UNITED STATES OF AMERICA,
The Southern District of New York. } ss.:

Know all men by these presents that John Aber as principal and the Fidelity and Deposit Company of Maryland as surety, are held and firmly bound unto James Piper in the sum of five thousand ($5,000) dollars, to the payment of which they bind themselves and each of them, their heirs, executors, administrators and successors, and the heirs, executors, administrators and successors of each of them, firmly by the presents. Sealed with our seals and dated this 4th day of March, 1922.

The condition of the above bond is such, that whereas an order of the District Court of the United States for the Southern District of New York, made and dated on the 3rd day of February, 1922, in a suit in equity therein pending in which suit said James Piper is complainant and said John Aber is defendant has denied a motion for a preliminary injunction upon condition that the said defendant give to the said complainant a bond with sufficient surety to be approved by the court for the payment of all profits and damages that may be decreed against the defendant in said cause. Now, if the said John Aber shall pay to said James Piper all profits and damages that are decreed against said John Aber in this cause favor the infringement of the patent described in the bill of complaint in said cause. [Here insert number and title of patent], between February 3, 1922, the date of said order, and the final decree in said cause, then these presents and this obligation shall be void; otherwise they shall remain in full force and effect. [Add signatures and seals, acknowledgments and justifications of surety company.]

The foregoing bond and surety are hereby approved as to sufficiency and form. New York, March 4th, 1922.

LEARNED HAND,
U. S. District Judge.

FORM XLVI.—ORDER TO SHOW CAUSE AGAINST APPOINTMENT OF RECEIVER AT FOOT OF DECREE.

DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

CHRISTIAN DANCEL and MARY DANCEL as Administrators of the Goods, Chattels and Credits of CHRISTIAN DANCEL, deceased,

against

GOODYEAR SHOE MACHINERY COMPANY of Portland, Maine, otherwise known as the United Shoe Machinery Company of Maine.

} In Equity.

On the petition of Christian Dancel and Mary Dancel, Administrator and Administratrix of the Goods, Chattels and Credits of Christian Dancel, deceased, sworn to March 28th, 1905, and the two affidavits of Christian Dancel thereto annexed sworn to on said date, upon the pleadings, testimony, petition and bond upon removal, decree, executions and return thereof and the other proceedings in the suit in equity above entitled; on motion of J. Philip Berg, Attorney and Solicitor for the above named complainants and petitioners; I hereby Order, that the United Shoe Machinery Company of Portland, Maine, show cause before me at a stated term of this Court to be held in the Post Office Building in the City, County and State of New York on the 4th day of April, 1905 at 3:30 P. M. or as soon thereafter as counsel can be heard, why an order should not be made and entered appointing a Receiver of the assets of the said corporation; and why a writ of injunction, and all the relief prayed in said petition should not be granted; and why the above named complainants and petitioners should not have such other and further relief in the premises as may be just. And I hereby further ORDER, that until the further order of this Court, the said United Shoe Machinery Company of Maine, otherwise known as the Goodyear Shoe Machinery Company of Portland, Maine, and its officers, agents, assigns, employees and attorneys be and the same hereby are enjoined, restrained, stayed from transferring and from interfering with and forbidden to transfer and interfere with any of the property and any of the assets which it now owns and which it owned at any time during the year 1900. Service of this order on Edwards H. Childs, Esq., Solicitor for said defendant, or at his office No. 59 Wall St. New York City and County, in case of his absence from said office on or before March 29th, 1905; and service of this order by depositing a copy of the same in the Post Office of the City and County of New York, registered addressed to The Goodyear Shoe Machinery Company of Portland, Maine, otherwise known as the United Shoe Machinery Company of Maine, at Portland,

Maine, and another copy addressed to the same corporation at Boston, Massachusetts, shall be sufficient; said papers to be mailed on this day.

Dated New York, March 29th, 1905.

"E. HENRY LACOMBE,"
U. S. Circuit Judge.

FORM XLVII.—ORDER APPOINTING RECEIVER AT FOOT OF DECREE.

At a stated term of the [District] Court of the United States for the Southern District of New York, held in the Post Office Building, in the City, County and State of New York on the 7th day of April, 1905.

Present: Honorable E. HENRY LACOMBE,
United States Circuit Judge.

CHRISTIAN DANCEL and MARY DANCEL as Administrators of the Goods, Chattels and Credits of CHRISTIAN DANCEL, deceased,
against
GOODYEAR SHOE MACHINERY COMPANY of Portland, Maine.
} In equity.

On the petition of Christian Dancel and Mary Dancel, Administrators of the goods, chattels and credits of Christian Dancel, deceased, sworn to March 18th, 1905, filed in this Court on the 29th day of March, 1905; and the two affidavits of Christian Dancel thereto annexed sworn to March 28th, 1905; and filed with said petition; and upon the decree, judgment roll, testimony, evidence, pleadings, petition and bond upon removal, executions and returns of the same by the Marshals of the United States thereupon indorsed and made; and all the proceedings in the above entitled suit; and upon the Order to show cause why a Receiver of the defendant above named should not be appointed; and by an injunction should not be issued against said defendant as prayed for in said petition; and upon reading and filing the affidavit of Edward T. Bruner, sworn to April 6, 1905; and the receipts for registered letters containing copies of said petition and Order to show cause thereto annexed; after hearing Roger Foster, Esq. of counsel for the above named complainants and petitioners; it appearing that the said Order to show cause and said petition have been duly served on March 29, 1905, on Edwards H. Childs, Esq. Solicitor for said defendant at his office number 59 Wall Street, New York; and also by mail upon the above named defendant at its office in Portland, Maine and at its office in Boston, Massachusetts; on motion of J. Philip Berg, Attorney and Solicitor for the above named complainants and petitioners; IT IS HEREBY ORDERED AND I HEREBY ORDER: that Robert C. Beatty, Esq., be and he hereby is appointed Receiver of all the property and assets of the

United Shoe Machinery Company of Maine, otherwise known as the Goodyear Shoe Machinery Company of Portland, Maine, with all the authority usually granted to Receivers, to retain counsel, to sue, to collect all such assets; and to take possession of all such property; and hold the same subject to the further Order of this Court. That said Receiver qualify by filing in the Clerk's office of this Court a bond in the penal sum of $1,000.00 conditioned for the faithful performance of his duties as such Receiver; and shall report specially to this Court whenever any property or assets may come to his hands in order that, if necessary, the amount of such bond may be increased; that until the further Order of this Court the said United Shoe Machinery Company of Maine otherwise known as the Goodyear Shoe Machinery Company of Portland, and its officers, agents, assigns, employees and attorneys be and the same hereby are enjoined, restrained and stayed from transferring and from interfering with, and forbidden to transfer and interfere with any of the property and any of the assets which it now owns and which it owned at any time during the year 1900; and the same is and are enjoined, stayed and restrained from collecting and forbidden to collect any moneys which are due to said corporation and which are due to any one because of the use of any of such property.

April 8, 1905.

E. HENRY LACOMBE,
U. S. C. J.

U. S. Circuit Court,
filed
April 8th, 1905,
Southern District of New York
John A. Shields, Clerk.

FORM XLVIII.—ORDER APPOINTING RECEIVERS OF STREET RAILWAY COMPANY.

[*Re* Metropolitan Railway Receivership, 208 U. S. 90.]

In the [District] Court of the United States, for the Southern District of New York.

THE PENNSYLVANIA STEEL COMPANY AND THE DEGNON CONTRACTING COMPANY, Complainants,

against

NEW YORK CITY RAILWAY COMPANY, Defendant.

} In Equity.

And now on this 24th day of September, 1907, this cause came on to be heard upon the bill of complaint and on the answer of the defendant thereto this day filed, upon motion for the appointment of a Receiver,

and after hearing James Byrne for complainants and James L. Quackenbush for the defendant, and after due deliberation.

It was ordered, adjudged and decreed, that Adrian H. Joline, Esq., and Douglas Robinson, Esq., both of the City of New York, be and they hereby are appointed temporary Receivers of the defendant, New York Railway Company, and of all the property of the said defendant, real, personal and mixed of whatsoever kind and description and wheresoever situated, including all railroads, owned, leased or operated by said defendant, all tracks, terminal facilities, offices, shops, and all buildings and appurtenances of every kind, all cars and other rolling stock and equipment, tools, machinery, furniture, fixtures, materials and supplies, books of account, records and other books, papers and accounts, cash in bank, on deposit and in hand, money, debts, things in action, credits, stocks, bonds, securities, deeds, leases, contracts, muniments of title, bills receivable, rents, issues, profits and income accruing and to accrue as well as all interest, easements, privileges and franchises and all assets of every kind; that the said receivers be, and they hereby are, authorized immediately to take possession of the same and to run, manage and operate the said railroads and properties in such manner as will in their judgment produce most satisfactory results so that the operation of the railroad system of the defendant shall be continued in the same manner as at present and the public duties obligatory upon the defendant be in all respects discharged, and to exercise the authority and franchises of defendant and discharge its public duties and to preserve and protect its said system in proper condition and repair and protect the title and possession and secure and develop the business of the same, and in their discretion to employ and discharge and fix the compensation of all officers, attorneys, managers, superintendents, agents and employees, and to make such payments and disbursements as may be needful and proper in so doing; that the said Receivers be and they hereby are, authorized to collect the rents, income, tolls and profits of the said railroads and property, and to make appropriate payments therefrom on account of accruing rents and other necessary charges, and they shall have power to redeem any and all securities of the defendant now pledged as security on loans of money, and shall have power to borrow money if needful in their judgment in order to comply with this direction, and also, so far as may be needful to pay off current necessities for labor and supplies, but for no other purpose without the further order of this Court; and the said Receivers are hereby fully authorized and empowered to institute and prosecute all such suits as may be necessary in their judgment for the proper protection of the property and trust hereby imposed in them and likewise to defend all actions instituted against them as Receivers, and also to appear in and conduct the prosecution or defense of any suits now pending in any court against the defendant, the prosecution and defense of which will in the judgment of said receivers be necessary for the proper protection of the property placed in their charge, or the interests and rights of creditors connected

therewith; and the said Receivers are hereby authorized in their discretion from time to time, out of the funds coming into their hands, to pay the expenses of operating the said properties and executing their trusts, and all taxes and assessments upon the said properties or any part thereof, and all such rentals and instalments as may fall or become due for the use of any portion of said railroads and other property; and also to pay and discharge all claims arising from the previous operation of said properties as in their judgment on examination are proper to be paid as expenses of operation and the current and unpaid payrolls and vouchers and supply accounts incurred in the operation of said railroad system at any time within four months prior hereto. The said Receivers are hereby required to open proper books of account wherein shall be stated the earnings, expenses, receipts and disbursements of their said trust, and preserve proper vouchers for all payments by them made on account thereof.

And it is further ordered, that the bond of each of the said Receivers in the sum of Two hundred and fifty thousand dollars, conditioned that he will well and truly perform the duties of his office and duly account for all moneys or property which may come into his hands and abide by and perform all things which he shall be directed to do, with sufficient sureties, to be approved of by a judge of this court, be forthwith filed in the office of the Clerk of this Court;

And it is further ordered that each and every of the officers, directors, agents and employees of the defendant, said New York City Railway Company, and all other persons whomsoever, be and they are hereby required and commanded forthwith, upon demand of the said Receivers or their duly authorized agent, to turn over and deliver to said Receiver or their duly constituted representative, any and all books of account, vouchers, papers, deeds, leases, contracts, bills, notes, accounts, moneys or other property in his or in their hands or under his or their control, and each of said directors, officers, agents and employees is hereby commanded and required to obey and perform such orders as may be given to them from time to time by the said Receivers or their duly constituted representative, in conducting the operation of the said system and in discharging their duties as Receivers.

And the defendant, said New York City Railway Company and its officers,* directors, agents and employees, and all other persons claiming to act by, through or under the defendant and all other persons whomsoever are hereby enjoined from interfering in any way whatever with the possession or management of any part of the property over which the Receivers are hereby appointed or interfering in any way to prevent the discharge of their duties or their operating the same, and any party in interest may apply for further direction.

And it is further ordered that the parties herete show cause before this Court at the United States Post Office Building in the City of New York on the 7th day of October, 1907, at two o'clock in the afternoon why the said receivership should not be continued during the pendency of this

suit and upon the hearing thereon any other creditor of the defendant or other party in interest may be heard.

Dated New York, September 24, 1907.

E. HENRY LACOMBE,
United States Circuit Judge.

* The word, officers, was subsequently stricken from the order. This appointment was approved in *Re* Metropolitan Railway Receivership, 208 U. S. 90.

FORM XLIX.—ORDER APPOINTING ANCILLARY RECEIVER.

At a stated term of the [District] Court of the United States for the Southern District of New York, held at the General Post Office, in the City, County and State of New York, on the 9th day of May, 1905. Present: Hon. E. HENRY LACOMBE, United States Circuit Judge.

RIDGEWAY BOWKER,
vs.
HAIGHT AND FREESE COMPANY and others. } In Equity.

On reading and filing the bill in equity herein, sworn to May 9th, 1905, and the affidavits of Ridgeway Bowker and John M. Warwick, sworn to May 9th, 1905, and the affidavit of Arthur M. Johnson, sworn to May 8th, 1905, and on reading and filing a certified copy of the decree of the [District] Court of the United States for the District of Massachusetts, appointing James D. Colt receiver of the above named defendant, Haight and Freese Company, and it appearing that the said receiver has duly qualified in said [District] Court of the United States for the District of Massachusetts.

Now, on motion of William P. Maloney, Esq., solicitor for complainant, Roger Foster, Esq., of counsel for James D. Colt, said receiver, appointed as aforesaid by the [District] Court of the United States, District of Massachusetts as aforesaid, of the defendant, Haight and Freese Company, appearing on behalf of the said receiver, and admitting and confessing the allegations in said bill, and consenting to this order and decree on behalf of said defendant, Haight & Freese Company, it is

Ordered, adjudged and decreed, and I hereby order that James D. Colt, of Boston, Massachusetts, and Walter D. Edmonds, Esq., of New York City, be and they hereby are appointed receivers both original and as ancillary to said decree of the [District] Court of the United States for the District of Massachusetts, to receive, collect, and take possession of all the property of said defendant, Haight & Freese Company, including all the assets, choses in action, accounts, books of account, correspondence, papers and memoranda, whether in possession of the said defendant, Haight and Freese Company, or of any other person acting in behalf of said defendant, and hold the same awaiting the further order of this Court, provided that said receivers shall take no action until they shall file a bond

in the sum of Ten Thousand Dollars ($10,000) in this Court, conditions for the faithful performance of their duties as such receivers, with good and sufficient surety, and that as soon as they shall collect funds or assets of said defendant, Haight and Freese Company, they shall report the amount thereof from time to time to this Court, in order that the amount of such may be increased if necessary, and it is hereby

Ordered, adjudged and decreed, and I hereby order that the said defendant, Haight and Freese Company, its officers, agents, servants, and assigns, and the Seaboard National Bank, the Consolidated National Bank, the Produce Exchange, Safe Deposit and Storage Company, John Doe and Richard Roe, and all other persons and corporations that may have in their possession and control any property effects or credit belonging to the said Haight and Freese Company, or standing in its name or in the name of William H. Lillis, George G. Turner, Harvey Watson, Charles B. Poor, Junior, William G. Conkling, ———— Beardsley, either as officers of said defendant or individually, be and they hereby are enjoined and restrained and stayed until the further order of this Court from paying over or transferring any of said money, property, effects, or assets to any person other than said Receivers, and from permitting any person other than said Receivers to remove the contents of any safe deposit company box or vault, or bank standing in the name of said defendant, Haight and Freese Company, or in the name of either of the officers or employees of the said above mentioned Haight and Freese Company or either of the above named persons, and they and each of them are hereby directed to deliver up the same to the said Receivers forthwith, and it is

Further ordered that either of said Receivers may take possession upon his qualification without waiting for the qualification of the other; and that no funds be removed from the jurisdiction of this Court, and I hereby,

Further order that the said defendants and each of them show cause before me or such Judge of this Court as may be holding the motion calendar, on the 12th day of May, 1905, at 11 o'clock A. M., or at such other hour as said motion calendar may be called on said day, at the Court House of the [District] Court of the United States for the Southern District of New York, in the General Post Office, County of New York, Borough of Manhattan, City and State of New York, why a writ of permanent injunction should not issue in accordance with the terms of this order, and why the said receivership should not be made permanent, and why the complainant should not have such other and further relief as to the Court may seem just.

And sufficient cause appearing, service of this order and such other affidavits as may be served twenty-four hours before said return day shall be sufficient service thereof.

May 9th, 1905.

E. HENRY LACOMBE,
U. S. C. J.

Clerk. (SEAL.)
JOHN A. SHIELDS,

FORM L.—ORDER EXTENDING RECEIVERSHIP.

In the [District] Court of the United States for the Southern District of New York.

THE PENNSYLVANIA STEEL COMPANY and DEGNON CONTRACTING COMPANY, Complainants,
against
NEW YORK CITY RAILWAY COMPANY, Defendant.
IN THE MATTER OF
The Petition of METROPOLITAN STREET RAILWAY COMPANY.
} in Equity.

On this 1st day of October, 1907, this cause came on to be heard upon the petition of Metropolitan Street Railway Company, to be made a party defendant in this suit and for other relief, on consideration whereof, and after hearing J. Parker Kirlin, for said petitioner; James Byrne, for the complainants; and James L. Quackenbush for the defendant.

IT IS ORDERED that the petitioner, Metropolitan Street Railway Company, be and it hereby is made a party defendant in this cause.

IT IS FURTHER ORDERED that the receivership in this cause be and the same hereby is extended to the properties of said petitioner Metropolitan Street Railway Company as prayed in said petition, and that Adrian H. Joline and Douglas Robinson, heretofore appointed receivers in this cause be and they hereby are appointed receivers of the properties of said petitioner with the powers and duties prescribed by order entered in this cause September 24th, 1907, appointing them receivers in this cause.

AND IT IS FURTHER ORDERED that each and every of the officers, directors, agents and employes of said petitioner Metropolitan Street Railway Company, and all other persons whomsoever be, and they are hereby required and commanded forthwith, upon demand of the said recievers or their duly authorized agent, to turn over and deliver to said receivers or their duly constituted representative, any and all books of account, vouchers, papers, deeds, leases, contracts, bills, notes, accounts, moneys or other property in his or their hands or under his or their control, and each of such directors, officers, agents and employees is hereby commanded and required to obey and perform such orders as may be given to them from time to time by the said receivers or their duly constituted representatives, in conducting the operation of the said system and in discharging their duties as receivers.

And said petitioner, said Metropolitan Street Railway Company and its officers, directors, agents and employees and all other persons claiming to act by, through or under said petitioner, and all other persons whomsoever are hereby enjoined from interfering in any way whatsoever with

the possession or management of any part of said property over which the receivers have been appointed or interfering in any way to prevent the discharge of their duties or their operating the same; and any party in interest may apply for direction.

Dated New York, October 1st, 1907.

E. HENRY LACOMBE,
U. S. [Circuit] Judge.

FORM LI.—ORDER FOR EXAMINATION OF THIRD PARTY BY RECEIVERS.

At a Special Term of the [District] Court of the United States for the Southern District of New York, held in the Post Office building, in the Borough of Manhattan, City and County of New York, on the 12th day of July, 1905.

Present: Hon. E. HENRY LACOMBE, United States [District] Judge.

RIDGWAY BOWKER, Complainant,
against
HAIGHT & FREESE COMPANY, SEABOARD NATIONAL BANK, CONSOLIDATED NATIONAL BANK, PRODUCE EXCHANGE SAFE DEPOSIT & TRUST COMPANY, JOHN DOE AND RICHARD ROE, Respondents. } In Equity.

On reading and filing the petition of Ridgway Bowker, the complainant above named, and of James D. Colt and Beverly Randolph Robinson, who were previously duly appointed receivers of the property of the Haight & Freese Company, and the affidavits of the said three petitioners thereto annexed, respectively sworn to on the 3d and 9th days of June, 1905, and the affidavit of William J. Budd, sworn to June 8th, 1905, the affidavit of Harvey Watson, sworn to June 23, 1905, the affidavit of Luman S. Handley, sworn to June 23, 1905, and the affidavit of Franklin Bien, sworn to June 23, 1905, and the affidavit of Maurice S. Decker, sworn to June 24th, 1905, and the affidavit of Harvey Watson, sworn to June 27, 1905; upon all the papers and proceedings in the above entitled suit in equity, after hearing Roger Foster, William P. Maloney and Frederick J. Moses, Esquires, in support of a motion for the relief prayed for in the said petition, and Franklin Bien, Esquire, opposed; on motion of Roger Foster, attorney for the Receiver Colt, William P. Maloney, attorney for the complainant above named, and Frederick J. Moses, attorney for Receiver Robinson, it is hereby

Ordered, that Harvey Watson attend before John J. Townsend, Esq., who is hereby appointed Special Master for said purpose, on Tuesday, July 11th, 1905, at his office, No. ——, —— ——, Borough of Manhattan, City, County and State of New York, at eleven o'clock in the morning of that day, and at such subsequent days and hours and places as said

Master may appoint; and that he then and there submit to an examination by the counsel for the complainant above named and by the counsel for the receivers above named concerning all the property and assets of the Haight & Freese Company which he has in his possession, and all such which he has in his control, and all such which he has had in his possession since May 8th, 1905, and all such which he has had in his control since May 8th, 1905, and concerning such property and assets of the said Haight & Freese Company as he has knowledge or information concerning.

E. HENRY LACOMBE,
U. S. C. J.

July 1st, 1905.

FORM LII.—PETITION BY LESSOR CORPORATION FOR EXTENSION OF RECEIVERSHIP FOR ITS PROTECTION.

In the [District] Court of the United States for the Southern District of New York.

THE PENNSYLVANIA STEEL COMPANY and DEGNON CONTRACTING COMPANY, Complainants,
against
NEW YORK CITY RAILWAY COMPANY, Defendant.
IN THE MATTER OF THE PETITION OF METROPOLITAN RAILWAY COMPANY.
} In Equity.

To the Judges of the [District] Court of the United States for the Southern District of New York:

The petition of Metropolitan Street Railway Company, by J. Parker Kirlin, its solicitor, respectfully shows as follows:

FIRST.—The cause is a general creditors' suit and is instituted by the complainants as creditors of the defendant for the administration of the assets and property of the defendant. For the contents of the bill of complaint and of the answer of the defendant to said bill, reference is made to said bill and answer of record in this Court in this cause.

By an order of this Court duly entered in this cause on September 24, 1907, made on the bill of complaint and on the answer of the defendant thereto, Adrian H. Joline and Douglas Robinson were duly appointed temporary receivers of the defendant New York City Railways Company and of its property, with the powers and duties prescribed in said order. For the precise terms of said order reference is made to the original order of record in this cause. Said Joline and Robinson have duly qualified as receivers as aforesaid and have entered into possession of the property of

said defendant and are now operating the same and collecting the rents, issues and profits thereof.

SECOND.—Your petitioner is a consolidated corporation under the laws of the State of New York and by virtue of various consolidations is lawfully vested with the lines of street railway in the City of New York and the appurtenant franchises and property formerly of Lexington Avenue and Pavonia Ferry Railway Company, Columbus and Ninth Avenue Railroad Company, South Ferry Railroad Company, Broadway Railroad Company and Metropolitan Crosstown Railway Company.

Your petitioner is also the lessee of the lines of street railway in the City of New York of the following companies which by various indentures of lease, demised their respective lines of railway and the appurtenant franchises and property to the petitioner or its predecessors, or to lessors of the petitioner or its predecessors, for terms now unexpired, to wit:

Broadway and Seventh Avenue Railroad Company,
Sixth Avenue Railroad Company,
Ninth Avenue Railroad Company,
Twenty-third Street Railway Company,
Bleecker Street & Fulton Ferry Railroad Company,
Central Park, North and East River Ferry Railroad Company,
Forty-second Street and Grand Street Ferry Railroad Company,
Eighth Avenue Railroad Company,
New York and Harlem Railroad Company (City Line),
Second Avenue Railroad Company,
Third Avenue Railroad Company,
Central Crosstown Railroad Company,
Christopher and Tenth Street Railroad Company,

By each of said indentures of lease, a right of re-entry is reserved to the lessor in the event of default in the payment of the rent of the demised premises.

THIRD.—By indenture of lease bearing date the 21st day of March, 1902, between your petitioner of the one part and the defendant New York City Railway Company, which then bore the name of Interurban Street Railway Company, of the other part, your petitioner leased to said defendant the entire system of street railways of your petitioner, including as well all lines owned by your petitioner as all lines leased to your petitioner, for the term of nine hundred and ninety-nine years from the date of said lease, said lessee agreeing to pay by way of rental therefor, in addition to all taxes and assessments on the demised properties, all rentals payable under the leases of said lines leased to your petitioner and interest on the funded debt of your petitioner and other fixed charges of your petitioner, and an amount equal to seven per cent. per annum upon the existing capital stock of your petitioner and upon such additional capital stock of your petitioner as might thereafter be issued with the written consent of said lessee.

Said indenture of lease provides, among other things, that in case said

lessee shall fail at any time to pay the rent provided for in said indenture of lease, or shall fail at any time to keep and perform any of the agreements or covenants contained in said lease, and any such default in the payment of rent or in the performance of the covenants of said lease shall continue for the period of twelve months after written demand and notice from your petitioner to said lessee, then, at the option of your petitioner, the estate by said indenture of lease demised shall cease and determine, and your petitioner shall thereupon become and be entitled to re-enter into and upon the demised railroads and properties. Your petitioner files with this petition as Schedule A hereto, a copy of said indenture of lease, and for a precise statement of the terms and conditions of said indenture of lease prays leave to refer thereto.

FOURTH.—The various lines of railway embraced in said lease, as well the lines owned by your petitioner as the lines leased to your petitioner are subject to funded indebtedness secured by mortgage which is now outstanding and which so far as not outstanding at the date of the execution and delivery of said lease has since been created with the consent of said lessee, and your petitioner is informed and believes that failure to meet the interest on such underlying funded indebtedness as such interest matures will operate also a default under the mortgage securing the indebtedness the interest on which shall so become in default, and will render said mortgage enforceable. Said mortgage indebtedness is as follows:

[Then followed a description of same.]

FIFTH.—By said refunding mortgage of your petitioner which is expressed to be subject to said indenture of lease, made by your petitioner to said defendant, your petitioner covenanted from time to time punctually to observe and perform all of the obligations and pay and discharge all amounts payable under or by virtue of any lease thereby mortgaged so that the interest of your petitioner in any such leasehold estate might be at all times preserved unimpaired as security for the bonds issued under said refunding mortgage; and said refunding mortgage secured or in the payment of the principal of any such bond or in case default shall be made in the due observance or performance of any of the covenants or conditions in said refunding mortgage required to be kept or performed by your petitioner, and any such last mentioned default shall continue for a period of sixty days after written notice thereof to your petitioner from the trustee under said refunding mortgage or from the holders of five per cent. or more in amount of the outstanding bonds by said refunding mortgage secured, then the trustee thereunder may forthwith proceed to protect and enforce its rights and the rights of bondholders under said refunding mortgage by a suit or suits in equity or at law for the specific performance of any covenant or agreements contained in said refunding mortgage or in aid of any power therein granted or for the foreclosure of said refunding mortgage for any default or for the collection of interest or principal or both or for the enforcement of any other appropriate legal or equitable remedy as the trustee shall deem most effectual in support of any of its rights and duties under said mortgage. Your petitioner files a copy of said refunding mortgage as Schedule B hereto.

SIXTH.—It is alleged among other things in the bill of complaint in this cause and admitted by the answer of the defendant thereto and your petitioner so charges, that the defendant said New York City Railway Company, since entering into possession of the premises demised by said lease made to it by your petitioner, has operated all the lines owned and leased by said defendant as a single system constituting routes over different lines or parts of lines, connecting separated lines over parts of intermediate leased or controlled lines, interchanging equipment among the various lines and furnishing equipment as might be required to meet from time to time the varying requirements of particular lines, supplying power and using power houses, car barns and stations as deemed best for the effective and economical operation of the system as a whole and also establishing a system of transfers between various lines and routes; that the equipment owned by said defendant has been used over the system as varying requirements of operation made necessary without assignment to any particular line or lines and that many of the lines leased by your petitioner to said defendant are without adequate equipment of their own; and that in many cases the motive power employed on leased or controlled lines has been changed to electricity without supplying said lines with independent power houses or other independent sources of supply of power, leaving such lines dependent for power on other lines of the system.

Your petitioner further shows that it is alleged in said bill of complaint in this cause and is admitted by the answer of the defendant that the defendant is insolvent; that the fixed charges of your petitioner's system hereinabove set forth are accruing and installments thereof will become due on October 1, 1907, and each month thereafter; that failure to meet such fixed charges as they become due will operate a default under the mortgage securing the indebtedness the interest on which shall so become in default and render such mortgage enforceable; that the rentals under the leases made to your petitioner are accruing and that instalments of rental under some or all thereof will shortly become payable; that under said lease made to said defendant by your petitioner, no right of re-entry by reason of a default in the payment of the rent by said lease reserved or in the performance of any of the agreements or covenants therein contained will accrue thereunder to your petitioner until the expiration of a year after default and written demand and notice from your petitioner, and that in the meantime your petitioner's said system may be hopelessly disrupted and your petitioner suffer irremediable loss.

SEVENTH.—Your petitioner alleges that its railroad system embraced in said lease is very extensive; that it is of vital importance to your petitioner and to the creditors of your petitioner that said railroad system should be continued to be operated as a whole, and that said system should be preserved; that by said lease to the defendant the defendant is bound to finance the requirements of your petitioner for capital expenditures; that your petitioner has already issued to the defendant its obligations in large amounts on account of advances by the defendant for that purpose, and your petitioner is informed and believes that the defendant

has disposed of said obligations, and that said obligations are now outstanding in the hands of other holders; that claims for personal injuries to a large amount in connection with the operation by your petitioner of its system prior to said lease are now outstanding and are the subject of actions now pending; that by said lease to the defendant the defendant agreed to pay any judgments recovered in respect of said claims; that by said lease made by your petitioner to said defendant your petitioner parted with the possession of its entire railroad system; that your petitioner has no other resources wherewith to meet the fixed charges on the mortgage indebtedness of its said system so leased or to meet the accruing rentals of said lines so leased to your petitioner or its predecessors, and by your petitioner so leased to said defendant or to meet judgments for said claims for personal injuries, or to meet its said outstanding obligations for capital expenditures as they mature, or to meet other indebtedness or liabilities of your petitioner than the rentals reserved under said lease made by your petitioner to the defendant, as part of which said defendant agreed to pay such fixed charges and such rentals and to perform the other covenants therein contained; that said system is in the possession of this court through its said receivers appointed in this cause for administration in accordance with equitable principles; that no substantial remedial action can be taken in this case at the instance of said defendant or at the instance of defendant's creditors which will not affect the rights of your petitioner; and that the rights of your petitioner are inextricably interwoven with the rights which the Court has undertaken to administer in this cause.

Your petitioner therefore prays,

I.—That your petitioner may become party defendant to said suit for the protection of its interests and those of its creditors.

II.—That the receivership under the bill of complaint in this cause be extended so as expressly to embrace the interests of your petitioner in said property, your petitioner submitting itself and its property to the jurisdiction of this court.

III.—That said receivers be further directed to keep separate accounts not only of the lines owned by said defendant but also of such of the leased lines embraced in your petitioner's system and in your petitioner's said lease as may be deemed practicable, and that the rents, issues, profits and income be applied under the orders or decrees of this court to the end that said system of your petitioner may be protected and preserved.

IV.—That your petitioner may have such other and further relief as may be just.

METROPOLITAN STREET RAILWAY COMPANY,
By D. C. MOOREHEAD,
Secretary.
J. PARKER KIRLIN,
Solicitor and Counsel for Petitioner,
27 William Street,
New York.

FORM LIII.—WRIT OF NE EXEAT.

[Printed in full, *supra*, § 328.]

FORM LIV.—PETITION FOR SUBPOENA DUCES TECUM IN AID OF DEPOSITION DE BENE ESSE.

To the Honorable the Judges of the [District] Court of the United States for the Southern District of New York:

The petition of —— respectfully shows:

I. Your petitioner resides in the Borough of Brooklyn, City, County and State of New York. On or about May 12th, 1905, your petitioner duly filed in the [District] Court of the United States for the District of Massachusetts, a bill in equity against —— —— and John Doe, which latter name is fictitious, who were transacting business as stock brokers in the city of Boston under the firm name of ——, —— & Company. Subsequently your petitioner duly amended said bill by an amendment duly filed in said court on or about May 15, 1905. Subsequently our petitioner further amended said bill by a subsequent amendment duly filed in said court on or about June 5, 1905. Issue in said suit was duly joined on or about October 2, 1905, by the filing by your petitioner of a replication to an answer filed to said bill on or about September 10, 1905, by said defendant John A. Caldwell in the place of John Doe, joining in said answer.

II. Amongst the issues raised by said pleadings are the facts concerning the purchase and sale of certain shares of stock made, and some that are claimed to have been made by said defendants and by certain firms of stock brokers, who were the predecessors of said defendants; namely, the firm of —— & Company and the firm of —— & Company; both of which said firms transacted business for this petitioner in the City, County and State of New York.

III. The shares of stock and other corporate securities which were the property of your petitioner, and which were held by said preceding firms, are now in possession of the defendants herein, who claim a lien upon the same because of an alleged indebtedness by your petioner to said preceding firms.

IV. Amongst other claims made by said defendants in said suit, they insist that they are entitled to a lien upon said corporate securities and shares of stock, because they aver that your petitioner was indebted to the said firm of —— & Company in the sum of $4,000, for a purchase alleged to have been made on her account by said —— & Company of 400 shares of stock, in an alleged mining company known between the parties as Avino, the exact name of which is to your petitioner unknown, at the price of ten ($10.00) dollars a share.

V. Your petitioner is informed, believes and alleges: That no shares of said stock were ever purchased on account of your petitioner by said firm of —— & Company; and that the books of account, contracts, letter

books, stock orders and other papers of said firm of —— & Company will show that the shares of said Avino stock, the alleged purchase price of which is charged against your petitioner as aforesaid, were at the date of said alleged purchase, the property of said firm or else of one of the members thereof; namely, ——; and that the original entries concerning the same show that the purchase price of said stock was charged against said Clark in the said books of account; and that the purchase price of the same was no more than eight ($8.00) dollars a share.

VI. If the books of account and other papers of said firm were kept in accordance with the usual practice of stock brokers in the City of New York, they will show the names of all the persons from whom said —— & Company purchased shares of said Avino stock; the date of the purchase, and the purchase price, of the same. Your petitioner has been informed by ——, a former member of said firm of —— & Company, who is now somewhere on the Continent of Europe, to your petitioner unknown; that said stock was charged on the books of said firm against the personal account of one of the members of said firm.

VII. The said defendants further claim a lien upon said stock because of the alleged purchase price of 2,000 shares of preferred and 2,000 shares of common stock of the Federal Graphite Company, which purchase defendants claim was made by said firm of George E. Armstrong & Company on behalf of your petitioner. Your petitioner is informed and believes and alleged: That the said shares of stock in said Graphite Company were never purchased by said George E. Armstrong & Company, on behalf of your petitioner. At the time when the first charge for said alleged purchase was made, the certificates for the same, which were subsequently offered to your petitioner and refused by her were in the name of the said firm of —— & Company; and were as your petitioner is informed and believes, the property of the said firm or else the property of one or more members of the same.

VIII. Your petitioner is informed and believes: That the books of account of said firm of —— & Company and the contracts, letter books, stock orders and other papers of the same, will show that no such purchase of stock was made by such firm, nor by any member of the same on behalf of your petitioner at any time. If the books of account and other papers of said firm were kept in accordance with the usual practice of stock brokers in the City of New York, they will show the names of all the persons from whom said firm ever purchased shares of stock in the Federal Graphite Company; the date of said purchase and the purchase price of the same.

IX. The said defendants further in the account, which they have presented to your petitioner and upon which, they claim the alleged balance exists, for which the said lien upon said shares of stock is claimed by them in their said answer, credit your petitioner with the sum of four thousand nine hundred sixty-eight ($4,968.00) dollars only as the proceeds of 1,000 shares of stock in the Boston Consolidated Gold Mining Company which stock was in the possession of said George E. Armstrong & Company; and

was the property of your petitioner prior to the month of April, 1900; and which they claim to have sold in the month of April on said terms; but the said firm and the defendants have refused to disclose to your petitioner the names of the purchasers of said shares; although the usual practice of the stock exchanges, and of stockbrokers in the City of New York and elsewhere, requires such a disclosure. And your petitioner alleges and charges upon information and belief: That said alleged sale was fictitious and was never made. The said shares of the Boston Consolidated Gold Mining Company are now worth much more than the said alleged purchase price of the same.

X. Your petitioner has written several letters to said firm of —— & Company; and to said firm of —— & Company concerning their transactions with your petitioner; all of which are material as evidence in support of the case of your petitioner above described but of some of which no copies were kept by your petitioner. Amongst other such letters is a letter by your petitioner addressed to ——, a member of said firm of —— — Company dated August 26th, 1889. A letter by your petitioner to A. M. Hallenberg, a member of said firm of George E. Armstrong & Company, dated on or about August 8th, 1902; certain statements of account. A letter by your petitioner to said —— of said firm of —— & Company written on or about May 24th, 1904.

The letter books of said firms contain copies of letters written to your petitioner by different members and by different agents of said firms of —— & Company and —— & Company, at different times while said firms transacted business.

XI. Your petitioner is informed and believes: That all of the books of account, papers, letter books, contracts and correspondence of the said firms of —— & Company, and of —— & Company are now in the possession of —— & Company, stockbrokers in the City of New York, the members of which are —— ——, —— —— and said —— ——.

XII. After the dissolution of the firm of —— —— & Company, on or about January 14th, 1903, your petitioner saw some of the books of account of said firm in the possession of the firm of —— —— & Company at Number 44 Broadway, in the City and County of New York. Mr. —— —— of said firm was manager of —— —— & Company at the time of its dissolution. James —— of said firm was formerly a member of the firm of —— —— & Company. The petitioner was told by the defendant Schirmer on or about January 14th, 1904; that the said firm of —— —— & Company had taken over the accounts of the former firms of —— —— & Company and of —— —— & Company. Your petitioner has received at different times, what purported to be statements of her account with —— —— & Company, which were restatements of the accounts previously furnished to me by —— & Company, with some of the items charged against her by ——, —— & Company, the correctness of which, she has disputed as above set forth. It is admitted in the answer of defendants herein that on or about September 30th, 1899, the said firm of ——, —— Company was dissolved; and that the business of said firm was continued under the name

of —— —— & Company. Your petitioner never received any notice of the dissolution of the firm of —— —— & Company; but since some time in April, 1901, she received notices, which contained the printed name of —— —— & Company with a red line marked there-through; and with the name of —— —— & Company written above the same, which notices referred to her account with said firm of —— —— & Company. On or about September 2nd, 1902, your petitioner received a notice to the following effect:

"44 Broadway.

"The firm of —— —— & Company having been dissolved by the death of Mr. George E. ——, the business will be continued at the above address by the undersigned under the firm of —— —— & Company.

(Signed)

—— ——,
—— ——,
Member N. Y. Stock Exchange.
—— ——, Special.

"New York, September 2, 1902."

XIII. Upon information and belief: That the said firm of —— —— & Company and the defendants to this suit in equity have had considerable correspondence and exchanged letters concerning the account of your petitioner with said firm of —— —— & Company and —— —— & Company, and concerning the claim made against the securities of your petitioner, which were formerly in the possession of said firms and which are now in the possession of the defendants to said bill in equity; that all letters upon said subject received by said —— —— & Company are in their possession; and that all letters written by said —— —— & Company, and by any member thereof to said defendants; and all such written to any one of said defendants, were copied, and copies of the same preserved by said —— —— & Company in their letter books, and on the correspondence files of the said firm. All such letters, and copies are material to the issues raised by said bill, answer and replication. Your petitioner has also written one or more letters to said —— —— & Company concerning said securities; which letters are material evidence in support of the plaintiff upon the issues in the above described suit in equity, one of which letters was dated on or about September 2nd, 1902.

XIV. The said firm of —— —— & Company is composed of Charles ——, Gardiner — —and James ——; all of whom transact business under said firm name at number 44 Broadway, in the Borough of Manhattan, City, County and State of New York; and all of whom, as your petitioner believes, live in said City, County and State of New York; and all of them reside more than 100 miles from the City of Boston, in the State of Massachusetts, which is the place of trial of the said suit in equity.

XV. The said books of account, papers, letter books, contracts and correspondence of the said firms of —— —— & Company and of —— —— & Company are material to the issues raised by the said bill, answer and replication in said suit in equity. Your petitioner believes that the testi-

mony of the said ——, —— and —— is material to the said issues; and she wishes to take the testimony of said ——, —— and —— *de bene esse*, in accordance with the Revised Statutes of the United States.

XVI. On October 7th, 1905, a notice of which a copy is hereto annexed marked A was deposited, postage prepaid by registered mail, the registration fee being paid, in the General Post Office, in the Borough of Manhattan, City, County and State of New York, by James A. Timony, a Clerk in the office of my attorney, Roger Foster, in a sealed envelope, addressed to John Stiles, Esq., attorney at law, 15 Milk Street, Boston, Massachusetts. Said Stiles has appeared as solicitor for the defendants in the above entitled suit in equity; and said notice has been duly served upon said solicitor, and has been duly received by him.

WHEREFORE, your petitioner prays that a *subpœna duces tecum* issue directly to the said —— ——, —— —— and —— ——, directing them and each of them to produce before John A. Stiles, Notary Public, at the Postoffice, on November 10, 1905, at —— o'clock in the afternoon of that day.

(1) All books of account, letter books, letters and papers, including orders for the purchase, and orders for the sale, of stock, which were formerly the property of the firm of —— —— & Company, and all such which were formerly in the possession of said —— —— & Company, and all such which were formerly in the possession of any member of said firm; which contain any entry in relation to any transaction between Alice —— and said firm and all such which contain any entry in relation to any transaction between Alice —— and any member of said firm; and all such which contain any writing in relation to any such transaction.

(2) All books, letter books, letters and papers including orders for the purchase, and orders for the sale, of stock, formerly in the possession of ——, —— & Company, which contain any entry in relation to any sale to Alice —— of any shares of stock in any corporation having a name containing the word Avino or any similar word as a part thereof; and all such which contain any entry concerning an alleged purchase on her account of any such shares of stock.

(3) All letters by Alice —— to the said firm of ——, —— & Company; and all letters by Alice —— to any member of said firm of ——, —— & Company, including amongst others, the letters by said Alice —— respectively addressed to —— ——, dated on or about August 30th, 1898; to ——, —— & Company, dated on or about August 26th, 1899, and to —— ——, dated some time shortly before June 21st, 1904.

(4) All letter books formerly in the possession of said ——, —— & Company, which contain copies of any letters written by any member of said firm, and of all such which contain letters written by any agent of said firm to said Alice ——.

(5) All books of account, letter books, letters and papers; including orders for the purchase, and orders for the sale, of stock, formerly in the possession of ——, —— & Company; and all such formerly in the possession of any member of said firm, which contain entries; and all such

which contain writings in relation to any purchase by said ——, —— & Company, and by any member thereof of any shares of stock of any such mining company; all such which contain any charge against any member of said firm of ——, —— & Company, in connection with any purchase of any shares of such stock.

(6) All books of account, letter books, letters and papers, including orders for the purchase, and orders for the sale of stock, which were formerly the property of the firm of —— —— & Company; and all such which were formerly in the possession of said —— —— & Company; and all such which were formerly in the possession of any member of said firm, which contain any entry in relation to any transaction between Alice —— and said firm; and all such which contain any entry in relation to any transaction between Alice ——, and any member of said firm; and all such which contain any writing in relation to any such transaction.

(7) All books, letter books, letters and papers, including orders for the purchase, and orders for the sale, of stock, formerly in the possession of —— —— & Company, which contain any entry in relation to any sale to Alice —— of any shares of stock in the Federal Graphite Company; and of any shares of stock in any corporation having a name containing the word Graphite or any similar word as a part of such name; and all such which contain any entry concerning an alleged purchase on her account of any such shares of stock.

(8) All letters by Alice —— to said firm of —— —— & Company; and all letters by Alice —— to any member of said firm, including amongst others, a letter by Alice —— to —— —— & Company, dated on or about March 7th, 1900; a letter by Alice —— to ——, dated on or about August 8th, 1902.

(9) All letter books formerly in the possession of said —— —— & Company, which contain copies of any letters written by any member of said firm; and all such which contain letters written by any agent of said firm to said Alice ——.

(10) All books of account, letters, letter books and papers, formerly in the possession of —— —— & Company, which contain any entry in relation to any sale on account of Alice ——, of any shares of stock in any corporation known by the name of the Boston Consolidated Mining Company; and all such, which contain any entry in relation to any sale on account of said Alice —— of any shares of stock in any corporation with any similar name, including all such, which contain any entry of the name of the purchaser of the same.

(11) All letters written to —— —— & Company, and all letters written to any member of said firm by Alice ——, including that dated on or about September 2nd, 1902, written to —— —— & Company, ——, —— & Company; and all letters written to —— —— & Company by —— ——; and all letters to —— —— & Company by —— ——; and all letters written to any member of said firm of —— —— & Company by any of said persons, and by any of their agents, and by any of the agents of any of them, which mention, and all such which refer to Alice ——;

and all such which refer to the said Federal Graphite Company; and all such which refer to the said Boston Consolidated Mining Company; and all such which refer to the said Avino Mining Company; and all such which refer to any company with any name similar to such names.

(12) All letters written to —— —— & Company by —— ——, which in any manner refer to Alice ——; and all such, which in any manner refer to said Avino Mining Company; and all such which in any manner refer to the Federal Graphite Company; and all such which in any manner refer to the Boston Consolidated Mining Company; and all such, which refer to any company with any name similar to the names of any of said three companies.

(13) All letters written to —— —— & Company, and all letters written to any member of said firm by Alice ——.

(14) All books of account, letter books, letters and papers, including orders for the purchase, and orders for the sale, of stock, formerly in the possession of said ——; and all such formerly in the possession of any member of said firm, which contain entries; and all such which contain writings in relation to any purchase by said ——, and by any member of said firm of any shares of stock of any such mining company; all such which contain any charge against any member of said firm by said —— in connection with any purchase of any shares of such stock.

And your petitioner will pray, etc.

"Alice ——."
ROGER FOSTER,
Petitioner's Attorney,
35 Wall Street,
New York.

STATE OF NEW YORK,
County of New York, } ss.
Southern District of New York.

Alice ——, being duly sworn, deposes and says: The foregoing petition is true to my own knowledge, except as to the matters therein stated to be alleged upon information and belief; and as to those matters, I believe the same to be true.

"Alice ——."

Sworn to before me this 31st day of October, 1905.

"B. B. HIGGINS,"
Notary Public,
N. Y. Co.

FORM LV.—MASTER'S WARRANT OR SUMMONS.

[*District*] *Court of the United States for the Southern District of New York.*

JOHN DOE, Plaintiff,
against
RICHARD ROE, Defendant. } In Equity.

In pursuance of the authority contained in a decretal order made in this cause by the Honorable William J. Wallace, Circuit Judge, and the Hon-

orable Nathaniel Shiuman, District Judge, at a stated term of this court held at the United States Court House in the City of New York on the 5th day of July, A. D. 1888, I, Benjamin Smith, one of the masters of said court, do hereby summon you, John Doe, complainant, and Richard Roe, defendant, to appear before me, the said Benjamin Smith, at my office at No. 206 Broadway, in the City and County of New York in the Southern District of New York, on the fourth day of January, A. D. 1889, at two o'clock in the afternoon, to attend a hearing before me, the said master, of the matters in reference in the said cause to be had by virtue of the decretal order aforesaid. And hereof fail not at your peril.

BENJAMIN SMITH, Master.

Dated the 28th day of December, 1888.

Underwriting: To take the account in the suit.

BENJAMIN SMITH, Master.

To JOHN DOE and RICHARD ROE.

FORM LVI.—MASTER'S WARRANT OR SUMMONS IN PATENT CASE.

[From record in 101 Fed. 126, 41 C. C. A. 250. This is the usual form in the Second Circuit. In Beckwith v. Malleable Iron Range Co., 195 Fed. 291, D. C. E. D. Wisc., Judge Sanborn quashed such a summons because he held that Eq. Rule 79 of 1842, now Eq. Rule 63, did not apply to such an accounting. The Circuit Court of Appeals for the Seventh Circuit subsequently granted a mandamus directing the court below to require the defendant to account under Eq. Rule 79, without passing upon the question whether the summons was too broad. Re Beckwith, C. C. A., 203 Fed. 45, S. C., C. C. A., 201 Fed. 518. See S. C., 207 Fed. 848, *supra*, § 389a.]

United States [District] Court, District of Connecticut.

HARRIOT H. WALES
vs.
THE WATERBURY MFG. CO. } No. 365, in Equity.

To the Waterbury Manufacturing Company, defendant, and to Augustus S. Chase, Henry S. Chase and Richard J. Ashworth, being officers and agents of said defendant:

The undersigned having been appointed master *pro hac vice* for stating the account authorized by the interlocutory decree herein, you are required and directed to be and appear before me at the office of C. W. Gillette, Esq., in Waterbury, on the first day of July, A. D. 1894, at 10 o'clock in the forenoon, then and there to render to me upon the oath or oaths of such one or more of you, or of the confidential agents of said defendant as shall have the most certain and full knowledge of the same, a statement in writing of the lever buckles and pencil holders with lever buckles attached, which contain or embody in any manner the device described

and claimed in claims 1, 2 and 3, of the letters patent of the United States, numbered 172,527, granted and issued January 18, 1876, to Sigourney Wales and Nathaniel H. Furness, which has been made, sold or used by you, or any of you, since June 4, 1881, with the names of all the parties to whom you have sold the same, the dates of the sales and the price received therefor, and the gains and profits made by you or any of you thereon.

And you will have there with you in court all the books and vouchers in your possession, on which all the said data were originally entered, together with all books and vouchers in your possession which show the cost of labor and materials used in making such lever buckles, especially all day books, journals, ledgers, order books, blotters and cash books used by defendant since January 18, 1881.

Dated at Hartford, July 27, 1894.

Service accepted

E. E. MARVIN,
Master pro hac vice.
Waterbury, July 28, 1894.
GEO. E. TERRY,
Defendant's Attorney.
Waterbury, July 31, 1894.

It is ordered that the defendant's statement presented to-day be extended so as to show the lever buckles of each variety in each and every year of the period covered by the accounting.

E. E. MARVIN,
Master *pro hac vice.*

FORM LVII.—NOTICE ACCOMPANYING DRAFT OF MASTER'S REPORT.

[*District*] *Court of the United States for the Southern District of New York.*

JOHN DOE, Complainant,
against
RICHARD ROE, Defendant. } In Equity.

SIRS: You are hereby notified that I have prepared the draft of my report upon the matters referred to me as master, by the interlocutory decree herein dated the 30th day of November, 1887, and that a copy of such draft report accompanies and is annexed to this notice and is herewith served upon you; you are also hereby notified that I shall sign and file said draft report as my report herein, unless alterations are made by me therein, upon suggestions of counsel for either party hereto, and that I appoint the 26th day of February, 1889, at my office, Room 3, No. 10 Wall Street, in the City and County of New York, at 11 o'clock in the forenoon of said day, for counsel for either party hereto to present to me

any suggestions of amendments to or alterations of said draft report, and to file with me written objections of exceptions thereto, if any they have to the same.

Yours, &c., BENJAMIN SMITH, Master.

Dated New York, February 21, 1889.

To MESSRS. BROWN & BLACK, Complainant's Solicitors,
1 Broadway; and
ROBERT JONES, Defendant's Solicitor,
111 Broadway, New York City.

FORM LVIII.—ACCOUNT OF INFRINGEMENTS OF PATENT.

[From record in 41 C. C. A. 250, 101 Fed. 126, in which the author was counsel for complainant.]

United States [District] Court, of Connecticut.

HARRIOT H. WALES
vs.
THE WATERBURY MFG. CO. } No. 365. In Equity.

Pursuant to the interlocutory decree herein, and the order of the master requiring a statement in writing of the lever buckles and pencil holders with lever buckles attached, containing or embodying in any manner the device described and claimed in claims 1, 2 and 3 of letters patent of the United States, numbered 172,527, dated January 13, 1876.

Schedule "A," hereto annexed and made a part of this return, contains all sales made or buckles specified in claims 1, 2 and 3 of said patent, from June 14, 1881, to January 18, 1893, together with the names of the persons to whom they were sold, the date when sold and the prices obtained therefor.

Schedule "B" contains a statement of the cost of each of the several kinds of buckles embraced in schedule "A."

Schedule "C" contains a statement of the cost of the buckle and pencil holder combined.

Schedule "D" contains a statement of the cost of the buckle and button combined.

Schedule "E" contains a statement of the number of each of the several buckles sold, the price received therefor, the cost thereof deducted, showing the net profit or gain derived from the sales of such lever buckles.

Schedule "F" contains a statement of the number of buckles combined with the pencil holder that were sold, the price received therefor, the cost thereof deducted, showing the net gain or profit thereof derived from the sale of the combined buckle and pencil holder which last schedule is filed under protest, under the assumption that said pencil holder was not a patented article, and not within claims 1, 2 and 3 of said patent, and that the buckle, and the buckle alone, should only be accounted for.

It will be borne in mind that the sales made to E. Faber, as shown in

schedule "A," are the same buckles that were used in connection with the pencil holder, and are included in the statements shown in schedule "F."

All of which is respectfully submitted.

Waterbury, Nov. 17, 1894.

FORM LIX.—ORDER OF SUPREME COURT CONSOLIDATING CAUSES FOR THE PURPOSE OF TAKING TESTIMONY AND APPOINTING COMMISSIONER.

[State of Ohio v. State of West Virginia, 252 U. S. 563.]

[TITLE.]

ON CONSIDERATION of the respective motions of the complainants for the appointment of a Special Master and of the defendant for the appointment of a Commissioner to take the testimony and report the same to the Court and of the motions to consolidate the cases for the purpose of taking such testimony,

IT IS NOW HERE ORDERED that the motions to consolidate the cases for the purpose of taking the proofs be, and the same are hereby, granted.

IT IS FURTHER ORDERED that Mr. Levi Cooke, of the District of Columbia, be, and he is hereby, appointed a Commissioner to take and return the testimony in these causes, with the powers of a Master in Chancery, as provided in the rules of this Court; but said Commissioner shall not make any findings of fact or state any conclusions of law.

IT IS FURTHER ORDERED that the complainants shall take their evidence, at such place or places as they may indicate, between the first day of May, 1920, and the first day of October, 1920, upon giving ten days' notice of the time and place of taking such evidence to the counsel for the defendant; that the defendant may take evidence, at such place or places as it may indicate, between the first day of October, 1920, and the first day of March, 1921, upon giving ten days' notice of the time and place of taking such evidence to the counsel for the complainants; that the complainants shall take their evidence in rebuttal between the first day of March, 1921, and the first day of April, 1921, at such place or places as they may indicate, upon giving ten days' notice to counsel for defendant, and the defendant shall then conclude the taking of its evidence in surrebuttal on or before the first day of May, 1921, upon giving ten days' notice of the time and place of taking such evidence to the counsel for complainants. *Provided, however,* that if complainants shall conclude the taking of their evidence in chief before the first day of October, 1920, and shall give notice thereof, that time for the taking of evidence in chief on the part of defendant shall begin to run fifteen days after giving of said notice by the complainants; and if the defendant shall conclude the taking of its evidence before the first day of March, 1921, and shall give notice thereof, the thirty-one days' time for the taking of evidence in rebuttal on behalf of the complainants shall begin to run fifteen days after the giving of said notice by the defendant; and the thirty days' time for the

taking of evidence on behalf of defendant in surrebuttal shall begin to run from the termination of said thirty days' allowed for the taking of the evidence in rebuttal by the complainants; but nothing in this proviso contained shall operate or be construed to postpone the ultimate dates for the commencement of the time for the taking of the defendant's evidence in chief, the complainants' evidence in rebuttal and the defendant's evidence in surrebuttal, respectively, first above specified.

IT IS FURTHER ORDERED that the said complainants and the defendant, respectively, shall make such deposits with the Clerk of this Court for fees, costs and expenses of the said Clerk and of the said Commissioner as they may from time to time be requested by said Clerk.

FORM LX.—ORDER APPOINTING MASTER TO SUPERVISE STOCKHOLDERS' MEETING.

[Bartlett v. Yates, 118 Fed. 68.]

[TITLE.]

Now on this 2d day of October, A. D. 1902, the motion for a modification of the injunction heretofore granted in the original cause above entitled filed herein by the cross-complainants, John W. Gates, James A. Blair, John Lambert, John J. Mitchell, and Arthur J. Singer having come on regularly for hearing, the plaintiff and respondent to the cross-bill, George F. Bartlett, appearing by his solicitor, A. M. Stevenson, Esq., the cross-complainants appearing by their solicitors, William B. Hornblower, Esq., Joel F. Vaile, Esq., and Charles W. Waterman, Esq., and the defendants and respondents to the cross-bill, to wit, the Colorado Fuel & Iron Company, David C. Beaman, Julian A. Kebler, John C. Osgood, Alfred C. Cass, John T. Kebler, Cass E. Herrington, John L. Jerome, William H. James, and Dennis Sullivan, appearing by David C. Beaman, Esq., Cass E. Herrington, Esq., and Charles J. Hughes, Jr., Esq., their counsel, and the court having heard read the original bill, cross-bill, and the affidavits, pleadings, and records offered in support of the said motion and in opposition thereto, and also including the original petition for removal of said cause and the affidavits in support thereof and in opposition thereto, and also the pleadings and affidavits filed in that certain cause pending in this court wherein John J. Mitchell and others were complainants and the Colorado Fuel & Iron Company and others were defendants, and having heard the arguments of counsel, and the court being fully advised in the premises, it is by the court ordered and adjudged as follows:

First. That the original injunction heretofore issued in said original cause above entitled by the district court of the Second judicial district of the State of Colorado sitting within and for the County of Aprapahoe, in said state, by order of said court dated the 20th day of August, 1902, be, and the same is hereby, modified as follows: So much of said injunction as undertakes to enjoin and restrain the stockholders of the Colorado Fuel & Iron Company, or any of them from holding or voting at any meet-

ing of said stockholders to be held as a substitute for the regular annual meeting called for the 20th day of August, 1902, be, and the same is hereby, vacated, and set aside, and a substitute meeting of the stockholders of said company is hereby ordered and directed to be called and held as follows. Such meeting shall be called by the board of directors of said company for the 10th day of December, 1902, at 10 o'clock in the forenoon, and the defendants herein composing said board of directors, namely, David C. Beaman, Julian A. Kebler, John C. Osgood, Alfred C. Cass, Dennis Sullivan, William H. James, John T. Kebler, Cass E. Herrington, and John L. Jerome and all other persons who are directors of said company, and any persons who may be hereafter elected members of said board before such action shall have been taken, are hereby ordered and directed to call such meeting for the 10th day of December, 1902, for the purpose of electing directors of said the Colorado Fuel & Iron Company for the year ending on the third Wednesday of August, 1903, and for the transaction of such other business as may come before the meeting. And it is further ordered and directed that the defendant David C. Beaman, the secretary of said company, or any one who may be elected or appointed in his place prior to the carrying out of this order, shall send, or cause to be sent, to the stockholders of said company, the notice of said meeting required by the statutes of the State of Colorado, and the by-laws of said company, at least thirty (30) days before the date herein fixed for the holding of said meeting, and shall also publish, in accordance with the statutes of the State of Colorado, a notice of said meeting in one or more newspapers as provided by law, at least ten (10) days before the date herein fixed for the holding of said meeting. And said the Colorado Fuel & Iron Company, its officers, agents, servants, attorneys, employes, and the directors of said company, are further ordered and directed in accordance with the by-laws of said company to cause the transfer books of said company in the City of New York, kept by the Knickerbocker Trust Company, transfer agent of said The Colorado Fuel & Iron Company to be closed twenty (20) days before said tenth (10) day of December, 1902, and to remain closed until after the meeting shall have finally adjourned.

Second. It is further ordered that Hon. Seymour D. Thompson be, and he is hereby appointed special master to be present at and supervise the meeting of the stockholders of said The Colorado Fuel & Iron Company herein before directed to be held, and the said master so appointed shall ascertain and report to the said meeting of stockholders so to be held on said tenth (10) day of December, a list of all stockholders of said company having on said day the right to vote as such stockholders; and to enable the said master to make said report to the board of directors of the defendant The Colorado Fuel & Iron Company shall cause, at the demand or request of the said master, that the books in the possession of the said transfer agent of said company shall be open to the inspection and examination of the said master, and the secretary of said company shall submit to the said master the stock books of said company kept or to be kept in the City of Denver, and from the evidence obtained from

said books, or from such other evidence as the said master shall deem competent, the said master shall make up the list of stockholders aforesaid. The master is authorized to take testimony upon his own motion or upon the request of either party, and may hear and examine witnesses, and examine books, documents, and papers in the City of New York and in the City of Chicago, State of Illinois, and in the State of Colorado, and in such other places as in his discretion he may order and direct; provided, however, that the taking of testimony on the request of parties shall not be so extended or so used as to delay the convening of the said meeting for the election of directors on the day in this order designated, or to unreasonably delay the election of directors herein provided for. The said master hereby appointed shall have full, absolute, and complete authority to determine who are entitled to vote at said election of directors, either in person or by proxy, and shall determine all questions of dispute that may arise at said meeting as to the right of any person to vote by himself or by proxy, and as to the validity of any proxy presented at the meeting, and as to the right of any such person as such proxy, and his decision shall be conclusive for the time being upon the said meeting, its presiding officer, the tellers of election, and all persons participating in the said meeting of stockholders. After the conclusion of said election said master shall declare the result of said election, and the persons by him declared to be elected directors shall at once be inducted into office for the time being, and the master shall report to this court the result of such meeting, and the names of the directors who may be elected thereat, the number of votes cast by the stockholders for each person voted for at said meeting for the office of director, and also any ruling made by said master during the progress of said meeting to which any exception shall be taken by any stockholder or person claiming to be a stockholder or to represent any stockholder as proxy; but no exception to any decision or ruling by the said master shall delay or postpone the election of directors at said meeting, or be cause of adjournment thereof, but any question of difference shall be summarily disposed of by the said master at the time of said meeting.

Third. It is further ordered and adjudged that the board of directors of the defendant company shall, on or before the 20th day of October, 1902, cause to be made of record its resolution providing for the calling of the said meeting hereinabove directed to be called, and on or before the said 20th day of October, 1902, the secretary of the said The Colorado Fuel & Iron Company shall prepare the form of notice thereafter to be issued to stockholders, and the form of notice to be published in a newspaper as hereinabove provided, and on or before the said 20th day of October, 1902, the defendant The Colorado Fuel & Iron Company shall cause a copy of said resolution so by it to be adopted, and a copy of said notice or notices, to be transmitted and delivered to the said master hereby appointed for his consideration and approval, and the said master shall immediately consider the same. If he approves such resolution and notices, he shall indorse his approval thereon, and return them to the said The

Colorado Fuel & Iron Company. If he does not approve the said form of resolution or said notice, then he shall direct the proper change or modification that, in his opinion, should be made in such resolution or notices, or both, and immediately upon receiving such instructions from the said master the board of directors of the said The Colorado Fuel & Iron Company shall cause the said resolution to be adopted, and the said notices to be prepared in accordance with the directions so made by said master, and have the same completed prior to the tenth (10th) day of November, 1902, so that the said notices to individual stockholders can be issued and delivered or mailed on or before said date, as required by the statute of the State of Colorado and by the by-laws of said company.

Fourth. It is further ordered that any party hereto may apply to the court or the judge granting this order for any further order in the premises, upon reasonable written notice to the solicitors of record in this cause.

By the Court. (HENRY C. CALDWELL,
Judge of the United States Circuit Court, Eighth Judicial Circuit.

FORM LXI.—FINAL RECORD IN EQUITY.

[*District*] *Court of the United States, Southern District of New York.*

JOHN STILES
against } In Equity.
ROBERT ROE.

The complainant in the above entitled cause filed his bill of complaint, which is hereunto annexed, on 2d day of January, one thousand eight hundred and eighty-seven, and the writ of subpœna was thereupon issued, and returned personally served.

An appearance was duly entered for the defendant by Henry Smith, his solicitor, and on the first Monday of March thereafter an answer to said bill of complaint was filed, the same being hereto annexed.

On the first Monday of April thereafter, the complainant filed a replication, the same being hereto annexed.

On the 19th day of March, one thousand eight hundred and eighty-seven, an order of the Court granting to the complainant a preliminary injunction as prayed for in the bill of complaint was filed and entered, which said order is hereunto annexed.

Testimony was thereafter taken by the respective parties, and filed in the clerk's office of the said [District] Court.

Afterwards, and at the October term of 1888 of said Court, present the Honorable Nathaniel D. Shipman, District Judge, the said cause came on to be heard on the pleadings and proofs, and was argued by counsel. On the 3d day of November, one thousand eight hundred and eighty-eight, a decree of said Court was filed and entered in favor of the complainant, by which it was adjudged that a perpetual injunction should issue against the defendant, and that an accounting be had before John A. Shields, Master of said Court; the said order being hereto annexed.

On the 9th day of June, one thousand eight hundred and eighty-nine, the said Master filed his report, upon which, and on the 11th day of October, one thousand eight hundred and eighty-nine, the said court caused its final decree to be entered herein, the same being hereto annexed.

And the costs having been taxed by the clerk at seven hundred and fifty dollars, the process, pleadings, and decrees, together with other papers filed in said cause, are duly annexed hereunto.

Wherefore let the said John Stiles recover of said Robert Roe the sum of two thousand dollars as adjudged in said final decree, together with the further sum of seven hundred and fifty dollars, the cost and charges as taxed, making in the aggregate the sum of two thousand seven hundred and fifty dollars.

Signed and enrolled this 15th day of November, A. D. 1889.

JOHN A. SHIELDS, Clerk.

FORM LXII.—DECREE.

[Drafted by the author. Affirmed by C. C. A., 144 Fed. 679. Certiorari denied in 202 U. S. 619.]

United States District Court, Southern District of New York.

CHRISTIAN DANCEL and MARY DANCEL, as Administrators of the Goods, Chattels, and Credits of Christian Dancel, Deceased, Plaintiffs,

against

GOODYEAR SHOE MACHINERY COMPANY OF PORTLAND, MAINE, Defendant.

This cause duly came on to be heard at this term on the bill, answer, replication and proofs; and was argued by counsel. And it appearing to the Court, that on January 2nd, 1892, the Goodyear Shoe Machinery Company of Hartford, Connecticut, duly entered into a contract with Christian Dancel, wherein in consideration of the assignment to said company by said Dancel of letters patent of the United States, dated September 8th, 1891, and numbered 459,036, and of his interest in certain other letters patent and other valuable considerations said company agree to pay to said Dancel in each year while the said letters patent number 459,036 remained in force as a valid patent the sum of Five thousand dollars in equal monthly installments of four hundred and sixteen and two-thirds dollars ($416.66⅔); and that said letters patent number 459,036 remains in force as a valid patent and its term expires September 8th, 1908; and that on March 9th, 1898, the said Goodyear Shoe Machinery Company of Hartford, Connecticut, duly assigned, transferred and set over unto the defendant, the Goodyear Shoe Machinery Company of Portland, Maine, which has since changed its name to the United Shoe Machinery Company of Maine, the said letters patent number 459,036, the other patents mentioned in said contract with said Dancel and all other property and assets of said Connecticut Company, all of which patents, property and assets said defendant took into its possession on said day; and that on March 9th,

1893, the said defendant then assumed and promised to pay all the obligations and contracts of said Connecticut Company, including all the obligations of said Connecticut Company under said contract with the said Dancel; and that said defendant duly paid the said yearly sum in the said monthly installments to said Dancel during his life and until his death and after his death paid the installment due under said contract for October 31st, 1898, and since then has refused to pay any further installments under said contract; and that said Dancel departed this life in the County of Kings, State of New York, where he then resided on the 12th day of October, 1898, and on October 26th, 1898, letters of administration upon his estate were duly issued to the above named complainants Christian Dancel and Mary Dancel by the Surrogate of the County of Kings in the State of New York, a Court of competent jurisdiction; and they have duly qualified as such administrators and are now acting as such; and that the said defendant is a foreign corporation organized under the laws of the State of Maine and has transferred all its property in the State to another foreign corporation, the United Shoe Machinery Company of New Jersey, which was organized under the laws of the State of New Jersey. Thereupon, on motion of J. Philip Berg, solicitor for complainants, it is ordered, adjudged and decreed, that the Court has jurisdiction of this cause in equity, and that the assumption of the same is not in violation of Article 3, Section 2 of the Constitution of the United States, and it is further

Ordered, adjudged and decreed, that the said contract so entered into between the said Christian Dancel and the said Goodyear Shoe Machinery Company of Hartford, Connecticut in January 2nd, 1892, and assumed by the defendant aforesaid, be specifically performed by said defendant, formerly named the Goodyear Shoe Machinery Company of Portland, Maine, and now named The United Shoe Machinery Company of Maine, by the payment by said defendant to the complainants herein, Christian Dancel and Mary Dancel, as administrators of Christian Dancel, deceased, of the amount of $416.66⅔ on the last day of each month from and including November 30th, 1898, to and including August 31st, 1908, with interest at the rate of six per cent. a year from the end of each such month until the date of payment; and also on September 8th, 1908, the additional sum of $111.04, provided however, that should said letters patent of the United States, numbered 459,036, hereafter cease to remain in force as a valid patent, then the liability of said defendants to pay the installments under said contract subsequently maturing shall cease and that said defendant further pay to complainants the costs of this suit, as taxed by the Clerk; and the costs of said complainants having been duly taxed at the sum of $423.72, now, therefore, it is further

Ordered, adjudged and decreed, that the complainants, Christian Dancel and Mary Dancel, administrators of the estate of Christian Dancel, deceased, recover of the defendant the United Shoe Machinery Company of Maine, formerly named the Goodyear Shoe Machinery Company of Portland, Maine, the sum of $416.66⅔, with interest from November 30th, 1898, which interest amounts to $156.25; and the further sum of $416.66⅔ with

interest from December 31st, 1898, which interest amounts to $154.17; and the further sum of $416.66 with interest from January 31st, 1899; which interest amounts to $150.09; and the further sum of $416.66⅔ with interest from February 28th, 1899, which interest amounts to $150; and the further sum of $416.66⅔ with interest from March 31st, 1899, which interest amounts to $147.92; and the further sum of $416.66⅔ with interest from April 30th, 1899, which interest amounts to $145.84; and the further sum of $416.66⅔ with interest from May 31st, 1899, which interest amounts to $143.75; and the further sum of $416.66⅔ with interest from June 30th, 1899, which interest amounts to $141.67; and the further sum of $416.66⅔ with interest from July 31st, 1899, which interest amounts to $139.59; and the further sum of $416.66⅔ with interest from August 31st, 1899, which interest amounts to $137.50; and the further sum of $416.66⅔ with interest from September 30th, 1899, which interest amounts to $135.42; and the further sum of $416.66⅔ with interest from October 31st, 1899, which interest amounts to $137.50; and the further sum of $416.66⅔ with interest from November 30th, 1899, which interest amounts to $131.25; and the further sum of $416.66⅔ with interest from December 31st, 1899, which interest amounts to $129.17; and the further sum of $416.66⅔, with interest from January 31st, 1900, which interest amounts to $127.09; and the further sum of $416.66⅔, with interest from February 28th, 1900, which interest amounts to $125.00, and the further sum of $416.66⅔, with interest from March 31st, 1900, which interest amounts to $122.92; and the further sum of $416.66⅔, with interest from April 30th, 1900, which interest amounts to $120.84; and the further sum of $416.66⅔, with interest from May 31st, 1900, which interest amounts to $118.75; and the further sum of $416.66⅔, with interest from June 30th, 1900, which interest amounts to $116.67; and the further sum of $416.66⅔, with interest from July 31st, 1900, which interest amounts to $114.59; and the further sum of $416.66⅔, with interest from August 1900, which interest amounts to $112.50; and the further sum of $416.66⅔, with interest from September 30th, 1900, which interest amounts to $110.42; and the further sum of $416.66⅔, with interest from October 31st, 1900, which interest amounts to $112.50; and the further sum of $416.66⅔, with interest from November 30th, 1900, which interest amounts to $106.25; and the further sum of $416.66⅔, with interest from December 31st, 1900, which interest amounts to $104.17; and the further sum of $416.66⅔, with interest from January 31st, 1901, which interest amounts to $102.09; and the further sum of $416.66⅔, with interest from February 28th, 1901, which interest amounts to $100.00; and the further sum of $416.66⅔ with interest from March 31st, 1901, which interest amounts to $97.92; and the further sum of $416.66⅔ with interest from April 30th, 1901, which interest amounts to $95.84; and the further sum of $416.66⅔ with interest from May 31st, 1901, which interest amounts to $93.75; and the further sum of $416.66⅔ with interest from June 30, 1901, which interest amounts to $91.67; and the further sum of $416.66⅔ with interest from July 31st, 1901, which interest amounts to $89.59; and the further

sum of $416.66⅔ with interest from December 31st, 1901, which interest amounts to $87.50; and the further sum of $416.66⅔ with interest from September 30th, 1901, which interest amounts to $85.42; and the further sum of $416.66⅔ with interest from October 31st, 1901, which interest amounts to $83.34; and the further sum of $416.66⅔ with interest from November 30th, 1901, which interest amounts to $81.25; and the further sum of $416.66⅔ with interest from December 31st, 1901, which interest amounts to $79.17; and the further sum of $416.66⅔ with interest from January 31st, 1902, which interest amounts to $77.09; and the further sum of $416.66⅔ with interest from February 28th, 1902, which interest amounts to $75.00; and the further sum of $416.66⅔ with interest from March 31st, 1902, which interest amounts to $72.92; and the further sum of $416.66⅔ with interest from April 30, 1902, which interest amounts to $70.84; and the further sum of $416.66⅔ with interest from May 31st, 1902, which interest amounts to $68.75; and the further sum of $416.66⅔ with interest from June 30th, 1902, which interest amounts to $66.67; and the further sum of $416.66⅔ with interest from July 31st, 1902, which interest amounts to $64.59; and the further sum of $416.66⅔ with interest from August 31st, 1902, which interest amounts to $62.50; and the further sum of $416.66⅔ with interest from January 31st, 1903, which interest amounts to $60.42; and the further sum of $416.66⅔ with interest from October 31st, 1902, which interest amounts to $58.34; and the further sum of $416.66⅔ with interest from November 30th, 1902, which interest amounts to $65.25; and the further sum of $416.66⅔ with interest from December 31st, 1902, which interest amounts to $54.17; and the further sum of $416.66⅔ with interest from January 31st, 1903, which interest amounts to $52.09; and the further sum of $416.66⅔ with interest from February 28th, 1903, which interest amounts to $50.00; and the further sum of $416.66⅔ with interest from March 31st, 1903, which interest amounts to $47.92; and the further sum of $416.66⅔ with interest from April 30th, 1903, which interest amounts to $45.94; and the further sum of $416.66⅔ with interest from May 31st, 1903, which interest amounts to $43.75; and the further sum of $416.66⅔ with interest from June 30th, 1903, which interest amounts to $41.67; and the further sum of $416.66⅔ with interest from July 31st, 1903, which interest amounts to $39.50; and the further sum of $416.66⅔ with interest from August 31st, 1903, which interest amounts to $37.50; and the further sum of $416.66⅔ with interest from September 30th, 1903, which interest amounts to $35.42; and the further sum of $416.66⅔ with interest from October 31st, 1903, which interest amounts to $33.34; and the further sum of $416.66⅔ with interest from November 30th, 1903, which interest amounts to $31.25; and the further sum of $416.66⅔ with interest from December 31st, 1903, which interest amounts to $29.17; and the further sum of $416.66⅔ with interest from January 31st, 1904, which interest amounts to $27.09; and the further sum of $416.66⅔ with interest from February 29th, 1904, which interest amounts to $25.00; and the further sum of $416.66⅔ with interest from March 31st, 1904, which interest amounts to $22.92; and the further sum of $416.66⅔

with interest from April 30th, 1904, which interest amounts to $20.84; and the further sum of $416.66⅔ with interest from May 31st, 1904, which interest amounts to $18.75; and the further sum of $416.66⅔ with interest from June 30th, 1904, which interest amounts to $16.67; and the further sum of $416.66⅔ with interest from July 31st, 1904, which interest amounts to $14.59; and the further sum of $416.66⅔ with interest from August 31st, 1904, which interest amounts to $12.50; and the further sum of $416.66⅔ with interest from September 30th, 1904, which interest amounts to $10.42; and the further sum of $416.66⅔ with interest from October 31st, 1904, which interest amounts to $8.34; and the further sum of $416.66⅔ with interest from November 30th, 1904, which interest amounts to $6.25; and the further sum of $416.66⅔ with interest from December 31st, 1904, which interest amounts to $4.17; and the further sum of $416.66⅔ with interest from January —, 1905, which interest amounts to $2.09; and the further sum of $416.66⅔ due February 28th, 1905. In the aggregate $37,604 39/100 *Dollars*, together with the said costs of $423 72/100 *dollars*, making a total of $38,028 11/100.

And that the complainants above named may have an execution to collect the said sum of $38,028 11/100 from the said defendant, the Goodyear Shoe Machinery Company of Portland, Maine, otherwise known as the United Shoe Machinery Company of Maine; and it is further

Ordered, adjudged and decreed, that thereafter, in case upon or before the last day of any succeeding month prior to August 31st, 1908, provided that the said letters patent of the United States number 459,036, then still remain in force as a valid patent, said defendant shall omit to pay the said complainants or to the successors of the said complainants said sum of $416.66⅔; and also in case on September 8th, 1908, said defendant fail to pay the said complainants or their successors the further sum of $111.04, then immediately upon and after each such default and failure to pay any said sum as aforesaid, said complainants or their successors may apply to this Court at the foot of this decree upon four days' notice to Edward H. Childs, Esq., the solicitor who appeared for said defendants in this suit at his office, number 59 Wall Street, in the Borough of Manhattan, City and County of New York, or at such office or address as the said defendant may subsequently by notice in writing to the complainants select in this State, for judgment for all and for any of the installments under said contract which are then unpaid with interest to the date of payment and the cost of each such application, and it is further

Ordered, adjudged and decreed, that either party may apply at the foot of this decree for further relief not inconsistent with that previously awarded upon notice in writing addressed to the solicitor who has appeared for the opposite party at his present office, or at such other address as either party may hereafter notify the other party in writing that he, she, it or they select for that purpose.

Dated New York, February 28th, 1905.

Enter on Febr'y 28, 1905.

JOHN R. HAZEL, U. S. D. J.

FORM LXIII.—DECREE FOR INJUNCTION AND ACCOUNTING IN PATENT CASE.

[Affirmed by Circuit Court of Appeals, 101 Fed. 126. *Certiorari* denied, 177 U. S. 693. The author was counsel for complainant.]

[*District*] *Court of the United States for the District of New Jersey.*

HARRIOT H. WALES
vs.
THE WATERBURY MFG. CO. } No. 365.

At the April term of the [District] Court of the United States, for the district of Connecticut, in the second circuit, held at the United States court room in the city of New Haven, on the 12th day of May, in the year of our Lord one thousand eight hundred and ninety-four.

Present: The Hon. WILLIAM K. TOWNSEND,
District Judge.

This cause came on to be heard at the April term of the said court, in the year of our Lord one thousand eight hundred and ninety-three, and was argued by counsel, and was continued for advisement until this present term; and thereupon upon consideration thereof, it was ordered, adjudged and decreed as follows, that said letters patent number 172,527, granted and issued on the eighteenth day of January, 1876, to Sigourney Wales and Nataniel H. Furness, being the letters patent referred to in the bill of complaint herein, are good and valid as respects the first, second and third claims therein specified.

That the said Sigourney Wales was the first and original inventor and discoverer of the improvement in lever buckles, as described and claimed in claims 1, 2 and 3 in the said letters patent and the specification annexed thereto.

That Harriot H. Wales, complainant in said bill, became on or about the twenty-fifth day of November, 1879, the sole owner of said patent as alleged in said bill by an assignment duly recorded in the patent office of the United States.

That the said Waterbury Manufacturing Company, defendant herein, infringed upon claim 1, 2 and 3 of said letters patent, and upon the exclusive rights of the complainant under the same; that is to say by making, using and selling lever buckles, embodying said invention and improvement, patented as aforesaid, as charged in said bill of complaint.

And it is further ordered, adjudged and decreed, that the complainant do recover of the defendant the profits, gains and advantages which the said defendant has received or made, or which have arisen or accrued to it by the manufacture, use or sale of sundry lever buckles and pencil-holders with lever buckles attached thereto, in violation of claims 1, 2 and 3, of said letters patent, since the fourth day of June, 1881, and that the complainant do recover the damages resulting from said infringement

And it is further ordered, adjudged and decreed, that the said com

plainant do recover of the defendant her costs and charges and disbursements in this suit to be taxed.

And it is further ordered, adjudged and decreed, that it be referred to E. E. Marvin, a commissioner of this court, residing in the city of Hartford, as master *pro hac vice*, his experience in such matters being found by the court a sufficient reason for such appointment, to ascertain and take, and state, and report to the court an account of the number of lever buckles, embodying said invention and improvement as described and secured in claims 1, 2 and 3 of said letters patent made, used or sold by said defendant, and also the gains, profits and advantages which the said defendant has received, or which have arisen or accrued to it, since the fourth day of June, 1881, from infringing the said exclusive rights of the said complainant, by the manufacture, use or sale of the said improvement in lever buckles described and secured by claims 1, 2 and 3, in said letters patent, and the damages which the complainant has suffered by said infringement.

And it is further ordered, adjudged and decreed, that the complainant on such accounting have the right to cause the examination of the officers of said defendant corporation, *ore tenus* or otherwise, and also the production of the books, vouchers and documents of said defendant, and that the officers of said defendant corporation attend for such purpose, before said master, from time to time as said master shall direct.

And it is further ordered, adjudged and decreed, that a perpetual injunction be issued in this suit against the said defendant, restraining it, its agents, clerks, servants, and all claiming or holding under or through it, from making or selling, or in any way disposing of lever buckles, embracing the invention or improvement described in claims 1, 2 and 3 of said letters patent, pursuant to the prayer of the said bill of complaint.

W. K. TOWNSEND, U. S. District Judge.

FORM LXIV.—DECREE FOR INJUNCTION AND ACCOUNTING IN COPYRIGHT CASE.

[The Colliery Engineer Co. v. Ewald, 126 Fed. 843, in which the author was counsel.]

[TITLE.]

This cause having come on to be heard on the pleadings and proofs at the October 1901 Term of said Court, it is hereby ordered, adjudged and decreed as follows:

1. That the complainant is the sole and exclusive owner and proprietor of good and valid copyrights duly obtained under the laws of the United States on each and all of the following publications, to wit:

A book entitled "Circular of Information of the International Correspondence Schools. A System of Home Study in Mechanics and Mechanical Drawing." [Here were inserted the titles of the other books and drawing plates.]

2. That the complainant being the proprietor of each and all of said publications duly and fully complied with all the provisions of the law of the United States for copyrighting them and each of them and thereby acquired and now owns the sole liberty of printing, reprinting, publishing, completing, copying, executing, finishing and vending the same and each of them; and that the complainant printed on its publication of said copyrighted books and drawing plates and each of them the notice of the granting of such copyrights and each of them required by statute.

3. That the said defendants and each of them have infringed upon the said copyrights and each of them and upon the exclusive rights of the complainant under the same by printing, publishing and selling and causing to be printed, published, distributed and sold within the United States, books, and drawing plates and particularly those entitled as follows, to wit:

Books entitled "A College Education by mail. The United Correspondence Schools, New York. Home School of Mechanical Engineering. A Thorough System of Home Study in Mathematics, Mechanical Drawing, Mechanics, Electricity." [Here were inserted the titles of other books and drawing plates.]

4. That in addition to the said infringement of the said copyrights of the complainant, the said defendants and each of them have also unfairly competed with the complainant in business by imitating and causing the imitation of the said publications of the complainant, and particularly in the construction, arrangement and printing of said infringing publications and each of them.

5. That the complainant do recover from the defendants, the profits, gains and advantages which they, the said defendants and each of them, have received or made or which have arisen or accrued to them by reason of infringement of said copyrights and each of them, as well as by said unfair competition; and also the damages which the complainant has sustained by reason of said infringements of said copyrights and each of them, as well as by reason of said unfair competition; and that said defendants and each of them do surrender and deliver up to the Clerk of this Court to be cancelled and destroyed, all copies on hand of said infringing books and drawing plates and each of them.

6. That said complainant do recover from said defendants its costs and charges in this suit to be taxed.

7. That it be referred to John A. Shields, Esq., whose long experience in such matters is determined by the Court to be a sufficient reason for such appointment, as Master, to ascertain, state and report to the Court an account of the extent of said infringement of said copyrights and said unfair competition and of the profits, gains and advantages which the defendants and each of them have received or which have arisen or accrued to them or either of them by reason of infringements of said copyrights, as well as by said unfair competition; and also to assess the damage suffered by the complainant by reason of said infringements and unfair competition; leaving all questions as to increase of damages until the coming in of the report of said Master.

8. That the complainant on said accounting have the right to cause an examination of the said defendants and each of them, and their employees, *ore tenus* or otherwise, and also the production of the books, vouchers, and documents of the said defendants and each of them; and that said defendants and each of them and their employees, attend for such purpose before said Master from time to time as said Master shall direct; and that the parties and the Master may apply upon due notice to the Court upon the foot of this decree, for such other and further order of instruction as may be necessary; and that when he shall have taken an account of said profits and assessed said damages, he shall return the same to this Court for further action.

9. That a perpetual injunction be issued in this suit strictly commanding and enjoining said defendants and each of them and their and each of their servants, agents, attorneys, employees, workmen and confederates, from directly or indirectly publishing, printing, selling or exposing for sale, or otherwise disposing of or giving away, or causing or being in any way concerned in publishing, selling or exposing for sale or otherwise disposing of or giving away the books, sheets, papers or documents hereinbefore referred to, or any books, sheets or other papers or documents infringing or containing said copyrights or either of them, or any part thereof or like or similar to those hereinbefore set forth.

HOYT W. WHEELER,
Judge.

FORM LXV.—DECREE FOR INJUNCTION AND ACCOUNTING IN TRADEMARK CASE.

[Baglin v. Cusenier Co., 221 U. S. 580; in which the author was counsel.]

[TITLE.]

This cause coming on to be heard on November 11, 1907, upon Bill, Answer and Replication, and full Proofs of the respective parties (comprising the Testimony of numerous witnesses who were subjected to cross-examination, as well as Exhibits), and Philip Mauro, Esq., for Complainants, and Charles Howson, Esq., for Defendant, having been heard both orally and by printed briefs and the Court being fully advised in the premises; now, therefore, upon consideration thereof and on motion of Complainants' Solicitor, it is this day:

1. ADJUDGED, ORDERED and DECREED that the word-symbol "CHARTREUSE," as applied to liqueur or cordial, is a good and valid trade-mark, and in this country has been and now is the sole and exclusive property of the Carthusian Monks or Fathers ("PERES CHARTREUX") complainants herein; and that the said word-symbol "Chartreuse" accompanied by the fac-simile signature of L. Garnier, as set forth in U. S. Trade-Mark Certificate No. 3,377, registered in the U. S. Patent Office January 25, 1876 (re-registered January 29, 1884, as No. 10,897), and in U. S. Certificate No. 3,989, registered September 12, 1876 (re-registered January 29, 1884, as

No. 10,898), and as appearing upon "Complainant's Exhibit Bottle of Chartreuse sold by Batjer & Co.," constitute good and valid trade-marks, and in this country have been and now are the sole and exclusive property of said complainants the Carthusian Monks and Fathers ("PERES CHARTREUX"); and that in this country the said complainants still have the right, and the exclusive right, to use the said marks, or any of them, upon liqueurs or cordials manufactured by the complainants.

2. It is further ADJUDGED, ORDERED and DECREED that the defendant herein the Cusenier Company has infringed the said trade-marks and each of them, and has violated complainants' rights in the premises, by importing and causing to be imported, selling and causing to be sold, and offering for sale and causing to be offered for sale, in the United States, liqueur or cordial not manufactured by the complainants herein, but purporting to be "Chartreuse" and put up in packages having affixed thereto the trade-marks above referred to.

3. It is further ADJUDGED, ORDERED and DECREED that defendant herein the Cusenier Company has been guilty of unfair competition with complainants by importing and causing to be imported, by selling and causing to be sold, and by offering for sale and causing to be offered for sale, in the United States liqueur or cordial not manufactured by complainants, but put in bottles, dress, etc., resembling in all substantial respects the bottles, dress, etc., hitherto employed by complainants in marketing their genuine Chartreuse; and particularly by selling or offering for sale the bottle of liqueur now on file in this Court as "Complainants' Exhibit, Defendant's Liqueur."

4. It is further ADJUDGED, ORDERED, and DECREED that defendant, its associates, successors, assigns, officers, servants, clerks, agents and workmen, and each of them be and they hereby are, perpetually enjoined from using in this country or in any possession thereof, in connection with any liqueur or cordial not manufactured by complainants, the Trade-Mark "Chartreuse" or of any colorable imitation thereof, or the fac-simile signature of L. Garnier, or any colorable imitation thereof, or any of the trade-marks above referred to, or any colorable imitation thereof; and they and each of them are likewise perpetually enjoined from importing or putting out or selling or offering for sale, directly or indirectly, within this country, any liqueur or cordial not manufactured by complainants, in any dress or package like or simulating in any material respects the dress or package heretofore used by complainants, and in particular from making use of any bottle or label or package like or substantially similar to "Complainants' Exhibit, Defendant's Liqueur," being the bottle now on file as an exhibit in this Court, and from in any wise attempting to make use of the good-will and reputation of complainants in putting out in this country any liqueur or cordial not made by complainants.

5. It is further ADJUDGED, ORDERED, and DECREED that the matter be referred to John A. Shields, Esq., as Master, to take the usual accounting and report to this Court with all convenient speed the amount of defendant's profits by reason of the infringements and wrongs above referred to,

together with the quantity of the infringing article now in possession or control of defendant or of any of its officers, servants, or privies.

6. And it is further ADJUDGED, ORDERED, and DECREED that complainants do recover from defendant their taxable costs herein; and that execution issue for the same and for the amounts found due on the accounting.

(Signed) C. M. HOUGH,
U. S. J.

FORM LXVI.—DECREE OF INJUNCTIONS AGAINST MONOPOLY.

[230 Fed. 524.]

"This cause came on to be heard at this term and was argued by counsel: and thereupon, upon consideration thereof, it was ordered, adjudged, and decreed as follows, viz.:

"(1) The defendants, George Eastman, Henry A. Strong, Walter S. Hubbell, and Frank S. Noble (hereinafter called the individual defendants), and Eastman Kodak Company of New York and Eastman Kodak Company of New Jersey (hereinafter called the corporate defendants), have combined, conspired, and participated in various transactions directly affecting the trade and commerce among the several states in photographic supplies, consisting of cameras, films, plates, and photographic paper, with the purpose and intent of unduly and unreasonably suppressing competition and restraining and monopolizing such trade in violation of the act of July 2, 1890, entitled "An act to protect trade and commerce against unlawful restraints and monopolies." Thereby the corporate defendants have engrossed and monopolized, and will engross and monopolize, between 75 and 80 per cent, of such trade, and accordingly attained, and now hold, an illegal monopoly thereof, which in and of itself, as well as each and all of the elements composing it, whether corporate or individual, whether considered separately or collectively, violates sections 1 and 2 of said act of July 2, 1890. Said monopoly was induced by wrongful contracts with regard to raw paper stock, by preventing the trade from obtaining such stock, by acquiring competing plants, businesses, and stock houses, dismantling acquired plants, and restraining the vendors from re-entering the business, by imposing on photographic dealers arbitrary and oppressive terms of sale, and other regulations inconsistent with fair and free dealing, and arbitrarily enforcing the same through the establishment of a system of espionage and the keeping of records of violations, with a view of penalizing dealers, by limiting the number of dealers, and in general by suppressing competition by the foregoing and other means.

"(2) The individual defendants, and the corporate defendants, their subsidiaries, and their successors, together with their respective officers, directors, agents, servants, and employes, are hereby severally enjoined from continuing or carrying into further effect the monopoly herein adjudged illegal, or any of the contracts, conspiracies, restraints on trade, terms of sale, regulations, or practices, or any similar acts, which induced said monopoly, or which might in the future restrain commerce in photo-

graphic supplies among the states, or induce or prolong an unlawful monopoly of such commerce.

"(3) The monopoly herein adjudged illegal shall be abrogated, and to that end the business and assets of the defendants, Eastman Kodak Company, a corporation of New Jersey, and Eastman Kodak Company, a corporation of New York, be divided in such manner and into such number of parts of separate and distinct ownership as may be necessary to establish competitive conditions and bring about a new condition in harmony with law; and the defendants shall file with the clerk within 90 days from the entry of this decree a plan for such separation and division for the consideration of this court. In the event this case is appealed and the decree superseded within 60 days from the entry thereof, the time within which the defendants shall file said plan is hereby extended to 60 days from the filing of the mandate of the Supreme Court with the clerk of this court. Jurisdiction is retained by the court to make such additional orders or decrees as may be necessary to carry this decree into effect.

"(4) Inasmuch as trade in cinematograph film and foreign trade in photographic supplies are not covered by the petition herein of the United States of America, no decree in regard to such subjects is made herein, but without renouncing the power and duty of this court to deal with all the property and business of every character of the corporate defendants in effecting the abrogation of the monopoly herein adjudged illegal.

"(5) Nothing in this decree contained shall prevent the defendants, or any of them, from the institution, prosecution, or defense of any suit, action, or proceeding involving any of their property or rights.

"(6) The petitioner shall recover from the defendants the costs of this suit to be duly taxed herein.

"(7) The injunction granted by the second subdivision of this decree shall take effect 60 days after the entry of this decree, in case no appeal is taken from it. If an appeal be taken, and the decree be superseded, its operations shall be suspended until such time as shall be fixed in the final decree of this court entered on the mandate of the Supreme Court."

For another form, see U. S. v. Southern Grocers' Ass'n, 207 Fed. 434.

FORM LXVII.—PETITION FOR REHEARING.

[Denied. Colliery Engineer Co. v. Ewald, 126 Fed. 843. The author was counsel in opposition.]

[TITLE.]

To the Honorable the Judges of the Circuit Court of the United States in and for the Southern District of New York:

Your petitioner, the complainant, respectfully shows as follows:

1. The bill of complaint in the above cause was filed on the 19th day of August, 1898, alleging infringement by the defendants of various copyrights owned by the complainant; answer was filed putting in issue the validity and ownership of said copyrights and the infringement thereof;

general replication was filed; complainant took its *prima facie* evidence proving said copyrights, its ownership thereof and the defendants' infringement thereof; said testimony when printed aggregating, inclusive of depositions and exhibits, 794 pages. Defendants, though starting to take testimony, failed to take any refuting the complainant's evidence. The case came to final hearing before this Court at the Fall Term of 1901, and was argued by the complainant before Judge WHEELER on the pleadings and proofs; no appearance being made by the defendants at said argument. On January 4, 1902, the decree of this Court was entered in favor of complainant whereby it was adjudged that the complainant "is the sole and "exclusive owner and proprietor of good and valid copyrights duly ob- "tained under the laws of the United States on each and all of the fol- "lowing publications" (specifying 21 publications) and that the said defendants and each of them "have infringed upon the said copyrights "and each of them and upon the exclusive rights of the complainant "under the same by printing, publishing and selling and causing to be "printed, published, distributed and sold within the United States Books "and drawing plates and particularly those entitled as follows" (specifying 20 publications all of which are exhibits on file in this Court) and have "also unfairly competed with the complainant in business by imitat- "ing and causing the imitation of the said publications of the complain- "ant, and particularly in the construction, arrangement and printing of "said infringing publications and each of them" and that the defendants and each of them and their servants, agents, attorneys, employees, workmen and confederates be enjoined from directly or indirectly "publishing, "printing, selling, or exposing for sale or otherwise disposing of or giving "away or causing or being in any way concerned in publishing, selling "or exposing for sale or otherwise disposing of or giving away the books, "sheets, papers or documents hereinbefore referred to or any books, sheets "or other papers or documents infringing or containing said copyrights "or either of them or any part thereof, or like or similar to those herein- "before set forth"; the injunction of this Court was issued in accordance with said decree and the defendants received service or notice thereof; said decree and injunction are still in full force and effect and never have been appealed from.

2. On information and belief that under the authority of the West Publishing case, 79 Fed., 756, the defendant's publications enumerated in said decree and all parts thereof, were and are thereby adjudicated infringements and outlaws; the unlawful use of the complainant's copyrights was adjudicated to have been made by the defendants in preparing all parts of the defendants' specified publications without excepting any part thereof; the defendants having failed prior to the entry of said decree, to show that there was any part of their publications in the preparation of which the complainant's copyrights were not unlawfully used, as under the West Publishing decision the burden was upon them to do if the decree was to exempt any part; and that said adjudication is still in full force and effect and not subject to review.

3. On information and belief thereafter, the defendants and their confederates continued to directly and indirectly publish and dispose of publications which were substantially the same as and, in fact, in large part manifestly copied from the publications enjoined by said decree and injunction and thereby repeated the same offense against which said decree was entered in defiance of said decree and injunction.

4. Thereafter, the complainant duly moved that the defendants, F. W. Ewald, United Correspondence Schools Co. and their confederates, Leonard L. Poates, Leonard W. Seeligsburg and Consolidated Schools Co. be adjudged in contempt of said decree and injunction and that an attachment be issued against them, and each of them; said motion being supported by affidavits and exhibits duly served and filed in this Court, whereby as your petitioner is informed and believes it appeared by a comparison of the contempt exhibits with the decree exhibits, as well as by the admission of the defendants in their testimony on the accounting under the decree, that the text of said contempt exhibits was copied in whole or in part from the defendants' publications which were and are adjudicated outlaws, infringements and copies of the complainant's copyrights by said decree; the defendants filed affidavits in opposition to said motion for contempt in which it was not denied that the said contempt exhibits were, in fact, in large part copied from the previous editions thereof enjoined under the decree without excepting any portion.

WHEREFORE, upon the facts proved and not denied it appeared as your petitioner is informed and believes that the defendants' publications (which were by force of the decree *res adjudicata* copies of the complainant's publications) had been copied from in the defendants' publications against which the motion for contempt was directed, so that there remained no question of infringement on the contempt motion which was not already conclusively adjudicated by the decree. Said contempt motion came on to be heard and was fully argued by counsel for both parties on April 24 and May 1, 1903, and was held by the Court under advisement.

5. On information and belief that on July 1, 1903, the Circuit Court of Appeals for the Second Circuit handed down an opinion in the case of Thompson Co. v. American Co., 122 Fed. 922, in which there had been no decree and no adjudication of infringement but in which the question of infringement arose on motion for preliminary injunction and in which it was held that the defendants had not infringed by having referred to a list of cases in the complainant's digest to assist it in finding the authorities which it examined for preparing its digest; no text having been copied which was in the complainant's digest, either directly from that digest or from the publications from which it was taken. Said opinion, however, decided that to copy or simulate text either from the complainant's publication or from the source whence it was complied would constitute an infringement in the following terms (italics are ours):

> "Counsel for Complainant in order to illustrate their position put the following question:

'Suppose the author of a dictionary of quotations inserts after each quotation, as is customary, the book and page of the original author, will it be contended that the compiler of a subsequent book of quotations could have his clerk copy a list of all the references contained in the first author's book without copying the quotations and could then go to the original authors and copy the quotations found at the pages indicated by the references? Yet he would have an undoubted right to do this if the contention in the applicant's brief is sound.'

''Assuming that the question is answered in the negative we do not think the conclusion follows. It may very well be that *the second compiler would not be permitted to copy the quotations* and for the reasons suggested by Lord COLLINS in Moffat v. Gill, *supra*. He says: 'That (the defendant's contention) leaves out the whole merit; the felicity of the quotation; its adaptability to a particular end; its illustration of a particular characteristic. All these things enter into the choice of one quotation as apart from another. That is a process which may involve gifts both of knowledge and intelligence.'

''The difficulty with the counsel's hypothesis is that the case stated is not the case made by the proofs. The defendant *has not copied a sentence or a word from the complainant's book* and, of course, has not appropriated the skill and taste of the complainant in selecting or arranging quotations or any other matter. If, in the case put, the subsequent compiler had simply made, in connection with other lists, a naked list of the authors quoted, it cannot be doubted that he would have the right to select from their works such quotations as he desired.''

If it were assumed in this case (though not proved) that your petitioner's text was a compilation of quotations which could only be infringed by copying those quotations, the decree would constitute an adjudication that such quotations were copied by defendants, and, therefore, establish the very fact which the Thompson case held would constitute an infringement.

6. The advance number of the Federal Reporter containing the report of said Thompson decision was not received by complainant's counsel till after August 5, 1903, and complainant's counsel was unaware of the said decision and had no opportunity to consider or to argue before this Court, its bearing, if any, upon the questions presented by said contempt motion in this case.

7. On August 5, 1903, a decision was handed down of said contempt motion as follows: ''In view of the recent decision of the Court of Appeals ''in Edward Thompson Co. vs. Cyclopædia of Law and Procedure, this ''motion to punish for contempt must be denied.''

8. Your petitioner most respectfully desires an opportunity to be heard upon the question as to the effect of said Thompson decision upon the questions involved in this motion for contempt, being advised that it is an error to assume that said Thompson decision is an authority against the granting of said contempt motion but that, on the contrary, the ques-

tion of infringement which was decided by said Thompson case is a question which, in this case, is not open, being *res adjudicata* by the decree in so far as the contempt editions were manifestly copied from the decree editions. Moreover that, even if said question were open in this case, the said Thompson decision would be an authority in the affirmative instead of in the negative on the facts of this case.

9. Your petitioner submits that the Thompson Co. decision did not involve the question upon which this contempt motion depends, namely: whether a defendant under a decree can continue without contempt of the injunction, to publish subsequent editions of the decree publications in the preparation of which the decree editions were copied from.

It is respectfully submitted that it was impossible for such a question to be involved in that decision since, in that case, there was no decree; neither the defendants' books nor any part thereof had been adjudicated as infringements, nor were they later editions in the preparation of which it was admitted that earlier editions had been used which were adjudicated infringements.

We respectfully submit that the question in this case is not whether a decree shall be entered or an injunction issue, but whether a decree and injunction already issued shall be enforced against the defendants; said decree and injunction being against defendants' publications without exempting any portion thereof, as it had a right to be under the West Publishing case decision. If defendants considered that they were entitled to have certain portions of their publications exempted by said decree from the operation of the injunction, they should have, under the West Publishing decision, at the proper time, furnished the evidence entitling them to such exemption and secured some exemption in the wording of the decree and injunction, and are not entitled to set up any alleged right to such exemption as an excuse for violating the decree and injunction as they stand. Your petitioner submits that there is nothing in the Thompson case decision which supports them in this course.

10. Your petitioner further submits that even if the propriety of the injunction could be questioned on this contempt motion, the Thompson decision would be an authority in its favor instead of against, even if the text of the complainant's copyrights be assumed for the sake of the argument to be a mere compilation of quotations from various text books. The Thompson decision draws a distinction between "a naked list of authors" and a compilation of quotations from such authors, holding that in the case of a naked list the subsequent compiler "would have the right to "select from their works such quotations as he desired" but that in the case of a compilation of quotations "it may very well be that the second "compiler would not be permitted to copy the quotations and for the "reasons suggested by Lord COLLINS in Moffat v. Gill, *supra*. He says "'That (the defendant's contention) leaves out the whole merit; the "felicity of the quotation; its adaptability to a particular end; its illustra-"tion of a particular characteristic.'"

In other words, if the complainant's copyrights consisted of simply an

instruction to the student that the knowledge of arithmetic could be acquired by reading a given list of authors, the Thompson case would protect a subsequent compiler in referring to that list of authors for compiling a later book of instruction. But if the complainant's copyright consists of a compilation of quotations from those authors the Thompson case holds that the subsequent compiler would have no right to copy such quotations directly from the complainant's copyright, nor to use complainant's copyright as a guide for the selection of the quotations to be copied from the original authors. Your petitioner respectfully submits that on the evidence in this case upon which the decree was founded, the most favorable view to the defendants that could even be contended for would be the latter, under which the Thompson decision itself is an authority in favor of the propriety of the decree and the injunction; and it is also a distinct authority against defendants' position in this case that they could show non-infringement by showing that "there has been eliminated "from such new editions everything complained of that cannot be found "in such prior publications" (Master's Rec., p. 187, and Poates' afft., p. 16). This process of elimination which defendants ask to prove that they have adopted will leave the very compilation of selected quotations from the prior publications which the Thompson decision condemns as an infringement.

WHEREFORE your petitioner prays for a hearing herein upon the question of effect of said Thompson decision upon the issues of said motion for contempt and for such other and further relief as may seem proper.

And your petitioner will ever pray, etc.

THE COLLIERY ENGINEER COMPANY
(renamed International Textbook Co.),
Petitioner.

By
GIFFORD & BULL,
Complainant's Solrs.

I hereby certify that the foregoing petition is filed in good faith; and that in my opinion the relief therein prayed should be granted.

LIVINGSTON GIFFORD,
Of Counsel.

COMMON LAW FORMS

COMMON LAW FORM I.—SUMMONS UNDER CODE PRACTICE.

United States District Court, For the Southern District of New York.

[262 Fed. 680.]

ANNIE S. SIMONS,
against
THOMAS NELSON CROMWELL and LOUIS H. CRAMER, as executors under the Last Will and Testament of Frank Leslie, deceased.

To the above named Defendant:

You are hereby summoned to answer the complaint in this action, and to serve a copy of your answer on the plaintiff's attorney within twenty days after the service of this summons, exclusive of the day of service; and in case of your failure to appear, or answer, judgment will be taken against you by default for the relief demanded in the complaint.

WITNESS, the Hon. LEARNED HAND, Judge of the District Court of the United States for the Southern District of New York, at the City of New York, this 3rd day of May in the year one thousand nine hundred and seventeen.

[SEAL.]

ALEX GILCHRIST, JR., Clerk.
ROGER FOSTER,
Plaintiff's Attorney,

[COURT SEAL.]

Office and Post Office Address,
55 Liberty Street,
Borough of Manhattan,
New York City.

COMMON LAW FORM II.—RETURN OF SERVICE OF SUMMONS.

[262 Fed. 680.]

UNITED STATES OF AMERICA,
Nor. District of New York, } ss.:

I hereby certify and return that I have served the annexed Summons on the therein named Louis H. Cramer by handing to and leaving a true and correct copy thereof with him personally at Saratoga Springs, N. Y., in said District on the 16th day of May, A. D., 1917.

CLAYTON L. WHEELER,
U. S. Marshal.
By JOHN J. O'CONNOR,
Deputy.

Marshal fees:
Service $2.00
Expenses 3.34

$5.34

COMMON LAW FORM III.—PRAECIPE FOR SUMMONS IN DISTRICTS OF PENNSYLVANIA.

[215 U. S. 609, in which the author was counsel.]

In the [District] Court of the United States, For the Eastern District of Pennsylvania.

APRIL SESSIONS, 1908. NO. 314.

FRIES-BRESLIN COMPANY, a corporation organized and existing under and by virtue of the State of New Jersey,
vs.
WILLIAM BERGAN and JOHN A. SNYDER, citizens of the State of Pennsylvania and residents of the Eastern District thereof.

Issue summons trespass as above. Returnable the first Monday of August, 1908.

GRAHAM C. WOODWARD,
Attorney for the Plaintiff.
July 23rd, 1908.

To the Clerk of the U. S. C. C.

(Endorsed: No. 314. April Sessions, 1908. U. S. C. C. Fries-Breslin Company, etc., *vs.* William Bergan and John A. Snyder, citizens of the State of Pennsylvania, etc. Praecipe Summons Trespass. Graham C. Woodward. Filed July 23, 1908. Henry B. Robb, Clerk. By L., Deputy Clerk.)

COMMON LAW FORM IV.—SUMMONS IN DISTRICTS OF PENNSYLVANIA AND RETURN OF MARSHAL.

[215 U. S. 609.]

UNITED STATES OF AMERICA,
Eastern District of Pennsylvania, } ss.

THE PRESIDENT OF THE UNITED STATES

To the Marshal of the Eastern District of Pennsylvania, Greeting:

We command you, That you summon William Bergan and John A. Snyder, citizens of the State of Pennsylvania and residents of the Eastern District thereof, late of your District, if they may be found therein, so that they be and appear before the Judges of the [District] Court of the United States, in and for the Eastern District of Pennsylvania, at a session of the same Court to be holden at Philadelphia, on the first Monday of August next, to answer to Fries-Breslin Company, a corporation organized and existing under and by virtue of the laws of the State of New Jersey in a plea of trespass. And have you then there this writ.

[SEAL.]

Witness the Honorable [William H. Taft], Chief Justice of the Supreme Court of the United States, at Philadelphia, this 23rd day of July, A. D. 1908, and in the 133rd year of the Independence of the United States.

LEO A. LILLY,
Deputy Clerk of Circuit Court, U. S.

COMMON LAW FORM V.—RETURN BY MARSHAL OF SERVICE THEREOF.

July 24th, 1908.

At Philadelphia, in my district served the within writ on William Bergan by handing a true and attested copy thereof to an adult member of his family to wit, his daughter, Miss M. Bergan, at No. 1315 Erie Avenue. On John A. Snyder by handing him a true and attested copy thereof at 500 Walnut street, and making known the contents of the same to both mentioned parties.

So answers

JOHN B. ROBINSON,
U. S. Marshal.

Per

R. NEWTON THOMAS,
Deputy.

(Endorsed: No. 314. April Session, 1908. Circuit Court United States, Eastern District of Pennsylvania. Fries-Breslin Company *vs.* William Bergan and John A. Snyder. Summons. Trespass. Returnable on the first Monday of August next. Graham C. Woodward, Attorney for Plaintiff. Filed Aug. 3, 1908. Henry B. Robb, Clerk. By L., Deputy Clerk.)

COMMON LAW FORM VI.—APPEARANCE UNDER CODE PRACTICE.

[262 Fed. 680.]

United States District Court, For the Southern District of New York.

ANNIE S. SIMONS,
vs.
THOMAS NELSON CROMWELL and LOUIS H. CRAMER, as executors under the Last Will and Testament of Frank Leslie, deceased. } L. 17-20

To the Clerk of said Court:

Please enter our appearance as attorneys for the defendant, William Nelson Cromwell (erroneously designated in the title herein as "Thomas" Nelson Cromwell), as one of the executors under the last Will and Testament of Frank Leslie, deceased, in the above entitled cause.

Dated, June 5, 1917.

SULLIVAN & CROMWELL,
Attorneys for Defendant
William Nelson Cromwell,
49 Wall Street,
New York, N. Y.

COMMON LAW FORM VII.—DECLARATION UPON CONTRACT WHERE PLEADINGS FOLLOW PRACTICE AT COMMON LAW.

[76 Fed. 427.]

District of New Jersey, ss.

The Newark City Ice Company, the defendant in this suit, which is, and at the time of the commencement of this action was, a body corporate created by the laws of the State of New Jersey, and has its proper place of business and residence and principal office in the city of Newark, in the county of Essex, in said State, was summoned to answer Fred S. Fisher, the plaintiff therein, who at the time of the commencement of this action was, and is now and always has been an alien, and a subject of the Kingdom of Great Britain, and a citizen of the Dominion of Canada, and a resident of the city of Saint John, in the Province of New Brunswick, in the said Dominion of Canada, in an action upon contract, and thereupon, the plaintiff, by Roger Foster, Esq., his attorney, complains:

(1) For that whereas, heretofore, to wit, on or about the thirteenth day of February, eighteen hundred and ninety, at Saint John, in the Province of New Brunswick aforesaid, to wit, at the city of Newark, in the county of Essex, State aforesaid, the said defendant made and entered into a certain instrument in writing under seal with the said plaintiff, a true copy of which said instrument is hereto attached and marked "Exhibit One," and which it is prayed may be deemed and taken as if the same were set out in full in this count, the initials F. O. B. in said instrument in writing under

seal, signifying free on board; by which said instrument in writing under seal, the said defendant bargained for and bought of the said plaintiff, and the said plaintiff at the special instance and request of the said defendant, and by the said instrument under seal, covenanted to sell, and then and there did sell to the said defendant a large quantity of goods, to wit, fifteen thousand tons, of two thousand pounds to the ton, of good mercantile ice, of not less than twelve inches in thickness, at the rate of price of one dollar and sixty cents for each and every ton thereof, to be delivered by the said plaintiff to the said defendant during the months of June, July, August and September, eighteen hundred and ninety, in the parish of Rothesay, county of Kings, in the Dominion of Canada aforesaid, and to be paid for by the said defendant to the said plaintiff as follows: Three thousand seven hundred and fifty dollars upon the signing of said instrument under seal, three thousand seven hundred and fifty dollars in March, eighteen hundred and ninety, if three-quarters of the said fifteen thousand tons of ice be then stored in certain buildings, then in course of erection, or in a building to be erected on land owned by the said plaintiff, situate on the shore of the Kennebecasis river, in the parish of Rothesay and county of Kings, the said land having been bought from one Susannah Hicks; and seventy-five cents a ton as ice is shipped, said seventy-five cents to be paid by said drafts drawn by the said Fisher on the said Newark City Ice Company, with bills of lading attached, and weight to be verified by sworn weighers, and their certificate to be attached to the bill of lading, on the payment in full of the said advance, sight drafts as aforesaid to be drawn for one dollar and sixty cents a ton on ice as shipped; the said plaintiff further covenanting that the said ice shall be packed and delivered free on board, on board of a vessel suitably and properly dunnaged for a voyage to Newark aforesaid; and it being also further agreed and covenanted by and between the said plaintiff and the said defendant in the said instrument under seal, that the ice as soon as cut shall be the absolute property of the said Newark City Ice Company but in case the said Newark City Ice Company shall refuse to accept or pay said sight drafts, the property in the said ice to revest in the said plaintiff; and further, that the said plaintiff shall put at least eleven thousand two hundred and fifty tons of ice, properly stored, in said building or buildings during the month of March, eighteen hundred and ninety, or in a building to be erected by the said Fred S. Fisher, leased from Wetmore estate, situate in Clifton, in said county of Kings, or in any other building to be approved of by the said Newark City Ice Company; and further, that the said Fred S. Fisher, the plaintiff herein, shall have the right to make up the quantity to be delivered as aforesaid by purchase or otherwise, indemnifying the said Newark City Ice Company for any additional expense they may be put to; in pursuance of which said agreement in writing under seal, the said plaintiff cut and stored, in the month of March, eighteen hundred and ninety, in the building or buildings in said instrument under seal designated, eleven thousand two hundred and fifty tons, of two thousand pounds

to the ton, of good mercantile ice, of not less than twelve inches in thickness, being three-quarters of the said fifteen thousand tons of ice, which, under the said contract, he covenanted to cut and store in the said building or buildings, in the said month of March; and the said defendant, in pursuance of his covenant in the said agreement under seal contained, did pay unto the said plaintiff upon the execution of the said agreement, the said sum of three thousand seven hundred and fifty dollars, and did further pay in or about the month of March, eighteen hundred and ninety, the sum of three thousand seven hundred and fifty dollars; and afterwards, to wit, on or about the seventh day of April, eighteen hundred and ninety, the said plaintiff and the said defendant made and executed another instrument in writing, a true copy of which is hereto attached and marked "Exhibit Two," and which it is prayed may be deemed and taken as part of this count, as fully as if the agreement were at length set forth; by which said instrument in writing, and in part fulfillment of the aforesaid instrument in writing under seal, bearing date the thirteenth day of February, eighteen hundred and ninety, the said plaintiff conveyed to the said defendant eleven thousand two hundred and fifty tons of ice, of two thousand pounds to the ton, then and there situate, and being in certain ice houses in the parish of Rothesay, in the county of Kings aforesaid; it being further agreed upon between the said plaintiff and the said defendant that instead of the said Newark City Ice Company having to pay seventy-five cents a ton for ice as delivered as provided in said contract, they shall only have to pay sixty cents a ton for ice as delivered, until the advance made by them shall have been repaid or made good to them by the difference between such sixty cents and the contract price of such ice delivered, namely, one dollar and sixty cents a ton; in consideration thereof, and that the said plaintiff at the like special instance and request of the said defendant had then and there undertaken, covenanted and faithfully promised to said defendant at the time and at the place aforesaid, it, the said defendant, undertook, covenanted and then and there faithfully promised the said plaintiff to accept the said ice of and from him, the said plaintiff, and to pay him for the same on the delivery thereof, to it, the said defendant, as aforesaid in manner aforesaid; and the said plaintiff afterwards, to wit, on or about the seventh day of April, eighteen hundred and ninety, did then and there deliver to the said defendant eleven thousand two hundred and fifty tons, of two thousand pounds to the ton, of good mercantile ice of not less twelve inches in thickness, which the said defendant then and there accepted in part performance of the said instrument under seal, bearing date the thirteenth day of February, eighteen hundred and ninety; and the said plaintiff afterwards, to wit, in the months of June, July, August and September, A. D. eighteen hundred and ninety, packed and delivered free on board, on board of a vessel suitably and properly dunnaged for a voyage to Newark, in the State of New Jersey, six thousand one hundred and fifty-four and fourteen hundred and eighty two-thousandths tons, of two thousand pounds to the ton, of good mercantile ice of not less than twelve inches in thickness, in

accordance with his said promise, covenant and undertaking to the said defendant; and the said defendant to pay to the said plaintiff in the manner provided for by said agreement in writing under seal, three thousand five hundred and four dollars and forty-five cents, over and above the said sum of seven thousand five hundred dollars, which the said defendant had theretofore paid to the said plaintiff under the terms of said agreement in writing under seal, bearing date February thirteenth, eighteen hundred and ninety; and although the said plaintiff, afterwards, and during the month of September, eighteen hundred and ninety, was ready and willing and then and there tendered and offered to deliver, at the places in said agreement designated, free on board, on board of a vessel suitably and properly dunnaged for a voyage to Newark, the balance of the eleven thousand two hundred and fifty tons of ice conveyed to the said defendant by the said instrument in writing of April seventh, eighteen hundred and ninety, to wit, five thousand and ninety-five and five hundred and twenty-two thousandths tons of ice; and was further ready and willing, and then and there tendered and offered to deliver three thousand seven hundred and fifty tons, of two thousand pounds to the ton, of good mercantile ice of not less than twelve inches in thickness, which the said plaintiff had agreed to purchase, and had, in fact, purchased under the right reserved to him by said agreement in writing under seal, at the place designated in said writing under seal; and had further tendered and offered to indemnify the said defendant for any additional expense it may be put to by reason of the said purchase of the said three thousand seven hundred and fifty tons of ice, and then and there requested the said defendant to accept the same and to pay him, the said plaintiff, for the same, in the manner provided for by the said agreement hereinbefore contained; yet the said defendant, not regarding its said promise and undertaking, but contriving and craftily and subtly intending to deceive and defraud the said plaintiff in this behalf, did not or would not at the said time when it was so requested as aforesaid, or at any time before or afterwards, accept the said goods or any part thereof, of and from the said plaintiff, or pay him for the same as aforesaid, but then and there wholly neglected and refused so to do, and specifically on or about the sixteenth day of September, eighteen hundred and ninety, notified the said plaintiff that it would not on its part perform the covenants and agreements by it to be performed under the said agreement in writing under seal, of the thirteenth day of February, eighteen hundred and ninety, and of the said agreement in writing bearing date the seventh day of April, eighteen hundred and ninety.

(2.) And for that whereas, heretofore, to wit, on or about the thirteenth day of February, eighteen hundred and ninety, at Saint John, in the Province of New Brunswick aforesaid, to wit, at the city of Newark, in the county of Essex, State aforesaid, in consideration of the said plaintiff, at the special instance and request of the said defendant, would cut for it, the said defendant, certain chattels, to wit, fifteen thousand tons, of two thousand pounds to the ton, of good mercantile ice of not

less than twelve inches in thickness, at and for a certain price, to wit, one dollar and sixty cents for each and every ton thereof, and would deliver the said chattels to the said defendant during the months of June, July, August and September, eighteen hundred and ninety, in the parish of Rothesay, county of Kings, in the Dominion of Canada aforesaid, according to the terms of a certain other instrument in writing under seal, a true copy of which said instrument is hereto attached and marked "Exhibit One," and which it is prayed may be deemed and taken as if the same were set out in full in this count, the initials F. O. B. in said instrument signifying free on board, it, the said defendant, undertook and covenanted and then and there faithfully promised the said plaintiff to accept the said chattels of the said plaintiff when so cut and delivered, and to pay him for the same the price aforesaid, in manner following, that is to say, three thousand seven hundred and fifty dollars upon the signing of the said instrument under seal, three thousand seven hundred and fifty dollars in March, eighteen hundred and ninety, if three-quarters of the said fifteen thousand tons of ice be then stored in a building to be erected on land owned by the said plaintiff, situate on the shore of the Kennebecasis river, in the parish of Rothesay and county of Kings, the said land having been bought from one Susannah Hicks; and seventy-five cents a ton as ice is shipped, said seventy-five cents to be paid by sight drafts drawn by the said Fisher on the said Newark City Ice Company, with bills of lading attached, and weight to be verified by sworn weighers, and their certificate to be attached to the bill of lading, on the payment in full of the said advance, sight drafts as aforesaid to be drawn for one dollar and sixty cents a ton on ice as shipped; the said plaintiff further covenanting that the said ice shall be packed and delivered free on board, on board of a vessel suitably and properly dunnaged for a voyage to Newark aforesaid; and it being also further agreed and covenanted by and between the said plaintiff and the said defendant in said instrument under seal, that the ice as soon as cut shall be the absolute property of the said Newark City Ice Company, but in case the said Newark City Ice Company shall refuse to accept or pay said sight drafts, the property in the said ice to revest in the said plaintiff; and further that the said plaintiff shall put at least eleven thousand two hundred and fifty tons of ice properly stored in said building or buildings during the month of March, eighteen hundred and ninety, or in a building to be erected by the said Fred S. Fisher leased from Wetmore estate, situate in Clifton, in said county of Kings, or in any other building to be approved of by the said Newark City Ice Company; and further that said Fred S. Fisher, the plaintiff herein, shall have the right to make up the quantity to be delivered as aforesaid, by purchase or otherwise, indemnifying the Newark City Ice Company for any additional expense they may be put to; in pursuance of which said agreement in writing under seal, the said plaintiff cut and stored in the month of March, eighteen hundred and ninety, in the building or buildings in said instrument under seal designated, eleven thousand two hundred and fifty tons, of two thousand pounds to the ton, of good mercantile ice of not less than twelve inches

in thickness, being three-quarters of the said fifteen thousand tons of ice which, under the said contract, he covenanted to cut and store in said building or buildings in the said month of March; and the said defendant, in pursuance of its covenant in the said agreement under seal contained, did pay unto the said plaintiff upon the execution of the said agreement the sum of three thousand seven hundred and fifty dollars, and did further pay in or about the month of March, eighteen hundred and ninety, the sum of three thousand seven hundred and fifty dollars; and afterwards, to wit, on or about the seventh day of April, eighteen hundred and ninety, the said plaintiff and the said defendant made and executed another instrument in writing, a true copy of which is hereto attached and marked "Exhibit Two," and which it is prayed may be deemed and taken as part of this count as fully as if the agreement was here at length set forth; by which said instrument in writing and in part fulfillment of the aforesaid instrument in writing under seal, bearing date the thirteenth day of February, eighteen hundred and ninety, the said plaintiff conveyed to the said defendant eleven thousand two hundred and fifty tons of ice, of two thousand pounds to the ton, then and there situate and being in certain ice houses in the parish of Rothesay, in the county of Kings aforesaid; it being further agreed upon between the said defendant and the said plaintiff that instead of the Newark City Ice Company having to pay seventy-five cents a ton for ice as delivered, as provided in said contract, they shall only have to pay sixty cents a ton for ice as delivered until the advance made by them shall have been repaid or made good to them by the difference between such sixty cents and the contract price of such ice delivered, namely, one dollar and sixty cents a ton; and the said plaintiff avers that he, confiding in the said promise, covenant and undertaking of the said defendant, did afterwards, to wit, at or about the time in said agreement under seal named, in the parish of Rothesay, county of Kings, in the Dominion of Canada aforesaid, to wit, at Newark aforesaid, the said chattels at and for the said price, to wit, at and for the sum of one dollar and sixty cents per ton, and afterwards, to wit, on the days and year aforesaid, in the parish of Rothesay aforesaid, to wit, at Newark aforesaid, was ready and willing and then and there offered to deliver the same to the defendant and requested it to accept the same, and of all which said premises the said defendant then and there had notice; and the said plaintiff afterwards, to wit, on or about the seventh day of April, eighteen hundred and ninety, did then and there deliver to the said defendant eleven thousand two hundred and fifty tons of ice, of two thousand pounds to the ton, of good mercantile ice of not less than twelve inches in thickness, which the said defendant then and there accepted in part performance of the said instrument under seal, bearing date the thirteenth day of February, eighteen hundred and ninety, and the said plaintiff afterwards, to wit, in the months of June, July, August and September, eighteen hundred and ninety, packed and delivered free on board, on board of vessels suitably and properly dunnaged for a voyage to Newark, in the State of New Jersey, six thousand one hundred and fifty-four and fourteen hundred and

eighty-two thousandths tons, of two thousand pounds to the ton, of good mercantile ice of not less than twelve inches thickness, in accordance with his said promise, covenant and undertaking to the said defendant; and the said defendant did pay to the said plaintiff in the manner provided for by said agreement in writing under seal, three thousand five hundred and four dollars and forty-five cents over and above the said sum of seven thousand five hundred dollars which the said defendant had theretofore paid to the said plaintiff, under the terms of said agreement in writing under seal, bearing date February thirteenth, eighteen hundred and ninety; and although the said plaintiff afterwards during the month of September, eighteen hundred and ninety, was ready and willing and then and there tendered and offered to deliver at the place in said agreement designated free on board, on board of vessels suitably and properly dunnaged for a voyage to Newark, the balance of the eleven thousand two hundred and fifty tons of ice conveyed to the said defendant by the said instrument in writing of April seventh, eighteen hundred and ninety, to wit, five thousand and ninety-five and five hundred and twenty-two thousandths tons of ice, and was further ready and willing and then and there tendered and offered to deliver three thousand seven hundred and fifty tons, of two thousand pounds to the ton, of good mercantile ice of not less than twelve inches in thickness, which the said plaintiff had agreed to purchase and had in fact purchased under the right reversed to him by said agreement in writing under seal, at the place designated in said writing under seal, and had further tendered and offered to indemnify the said defendant for any additional expense it may be put to by reason of the said purchase of the said three thousand seven hundred and fifty tons of ice, and then and there requested the said defendant to accept the same and to pay him, the said plaintiff, for the same in the manner provided for by the said agreement hereinbefore contained; yet the said defendant, not regarding its said promise, covenant and undertaking, but contriving and intending to injure the said plaintiff in this behalf, did not nor would then, or at any other time, accept the said chattels of the said plaintiff or pay him the said price thereof, or any part thereof, but it to do so hath hitherto wholly neglected and refused and still neglects and refuses.

(3.) And for that whereas, heretofore, to wit, on or about the thirteenth day of February, eighteen hundred and ninety, at Saint John, in the Province of New Brunswick aforesaid, to wit, at the city of Newark, in the county of Essex, State aforesaid, in consideration that the said plaintiff, at the special instance and request of the said defendant, would cut and deliver to the said defendant fifteen thousand tons, of two thousand pounds to the ton, of good mercantile ice of not less than twelve inches in thickness, said ice to be packed and delivered free on board, on board of vessels suitably and properly dunnaged for a voyage to Newark aforesaid, during the months of June, July, August and September, eighteen hundred and ninety, at and for a certain price, to wit, one dollar and sixty cents per ton, the said defendant agreed to pay therefor the said sum of one dollar and sixty cents per ton in manner following, to wit, three thousand seven hundred

and fifty dollars upon the signing of a certain instrument in writing under seal, a true copy of which is hereto attached and marked "Exhibit One," and which it is prayed may be deemed and taken as if the same was set out in full in this count, the initials F. O. B. in said instrument signifying free on board; a further sum of three thousand seven hundred and fifty dollars in the month of March next, if three-quarters of said fifteen thousand tons of ice is stored in certain buildings in said agreement in writing under seal specified, and seventy-five cents a ton as ice is shipped, said seventy-five cents to be paid by sight drafts drawn by the said Fisher on the said Newark City Ice Company, with bills of lading attached and weight to be verified by sworn weighers, and their certificate to be attached to the bills of lading, on the payment in full of the said advance, sight drafts as aforesaid to be drawn for one dollar and sixty cents a ton on ice as shipped; and it was further agreed and covenanted by and between the said plaintiff and the said defendant in the said instrument under seal, that ice as soon as cut shall be the absolute property of the said Newark City Ice Company, but in case the Newark City Ice Company shall refuse to accept or pay said sight drafts, the property in the said ice to revest in the said plaintiff; and further, that the said plaintiff shall put at least eleven thousand two hundred and fifty tons of ice properly stored in said building or buildings during the month of March, eighteen hundred and ninety, or in a building to be erected by said Fred S. Fisher, leased from Wetmore estate, situate in Clifton, in said county of Kings, or in any other building to be approved of by the said Newark City Ice Company; and further, that the said Fred S. Fisher, the plaintiff herein, shall have the right to make up the quantity to be delivered as aforesaid by purchase or otherwise, indemnifying the Newark City Ice Company for any additional expense they may be put to; in pursuance of which said agreement in writing under seal, the said plaintiff cut and stored in the month of March, eighteen hundred and ninety, in the building or buildings in said instrument under seal designated, eleven thousand two hundred and fifty tons, of two thousand pounds to the ton, of good mercantile ice of not less than twelve inches thickness, being three quarters of the said fifteen thousand tons of ice which under said contract he covenanted to cut and store in the said building or buildings in the said month of March; and the said defendant, in pursuance of its covenant in the said agreement under seal contained, did pay unto the said plaintiff upon the execution of the said agreement, the sum of three thousand seven hundred and fifty dollars, and did further pay in or about the month of March, eighteen hundred and ninety, the sum of three thousand seven hundred and fifty dollars; and after, to wit, on or about the seventh day of April, eighteen hundred and ninety, the said plaintiff and the said defendant made and executed another instrument in writing, a true copy of which is hereto attached and marked "Exhibit Two," of which it is prayed may be deemed and taken as part of this count, as fully as if the agreement were here at length set forth; by which said instrument in writing the said plaintiff conveyed to the said defendant eleven thousand two hundred and fifty tons of ice, of two thousand pounds to the ton, then

and there situate and being in certain ice-houses in the parish of Rothesay, in the county of Kings, aforesaid; it being further agreed upon between the said plaintiff and the said defendant that instead of the Newark City Ice Company having to pay seventy-five cents a ton for ice as delivered as provided in said instrument in writing under seal, of the thirteenth day of February, eighteen hundred and ninety, they shall only have to pay sixty cents a ton for ice as delivered until the advance made by them shall have been repaid or made good to them by the difference between such sixty cents and the contract price of such ice delivered, namely, one dollar and sixty cents a ton; and the said plaintiff says that afterwards, to wit, in the months of June, July, August and September, eighteen hundred and ninety, he packed and delivered in the parish of Rothesay aforesaid, to wit, at Newark aforesaid, free on board, on board of vessels suitably and properly dunnaged for a voyage to Newark, six thousand one hundred and fifty-four and fourteen hundred and eighty two-thousandths tons, of two thousand pounds to the ton, of good mercantile ice of not less than twelve inches thickness, in accordance with his said promise, covenant and undertaking; and the said defendant did pay to the said plaintiff, upon the delivery of said goods and chattels on board of said vessel, the further sum of three thousand five hundred and four dollars and forty-five cents; and the said plaintiff says that he was ready and willing, and did offer during the said months of June, July, August and September, eighteen hundred and ninety, to pack and deliver free on board, on board of vessels suitably and properly dunnaged for a voyage to Newark aforesaid, and at the places designated in said agreements, the balance of the said eleven thousand two hundred and fifty tons of ice cut and stored as aforesaid, to wit, three thousand and ninety-five and five hundred and twenty two-thousandths tons of ice, and was further ready and willing and then and there offered to make up the quantity of fifteen thousand tons to be delivered under said agreement in writing under seal, of the thirteenth day of February, eighteen hundred and ninety, by purchase or otherwise, indemnifying the said defendant for any additional expense it may be put to, and then and there requested the said defendant to accept the same and to pay him, the said plaintiff, for the same in the manner provided for in the said agreement hereinbefore contained; yet the said defendant, not regarding its said promise, covenant and undertaking, but contriving and intending to injure the said plaintiff in this behalf, did not nor would then or at any other time accept the said chattels of the said plaintiff, but on the contrary, on or about the sixteenth day of September, eighteen hundred and ninety, notified the said plaintiff that it would not accept any more ice under the said instruments in writing made by and between the said plaintiff and the said defendant, nor pay the said plaintiff the price thereof or any part thereof, but it to do so hath hitherto wholly neglected and refused and still neglects and refuses.

(4.) And for that, whereas, the said defendant heretofore, on or about the twenty-fourth day of February, in the year of our Lord one thousand eight hundred and ninety one, at Newark, in the county of Essex, was

indebted to the plaintiff in the sum of twenty-six thousand dollars for goods, wares and merchandise, before that time sold and delivered by the plaintiff to the defendant at its request, and twenty-six thousand dollars for work and labor before that time done and performed, and materials furnished by the plaintiff for the defendant at its request; and being so indebted, the defendant, in consideration thereof, then and there promised the plaintiff to pay him the said several sums of money on request; yet the defendant disregarded its said several promises, and hath not paid the said several sums of money nor any of them, nor any part thereof, although often requested so to do, but to do so hath hitherto refused and still refuses.

To the damage of the said plaintiff twenty-six thousand dollars, and therefore he brings his suit.

ROGER FOSTER,
Plaintiff's Attorney,
35 Wall Street, New York City, N. Y.

[Annexed were the exhibits.]

COMMON LAW FORM VIII.—COMPLAINT UPON CONTRACT UNDER CODE PRACTICE.

[262 Fed. 680.]

District Court of the United States for the Southern District of New York.

ANNIE S. SIMONS,
Plaintiff,
against
WILLIAM NELSON CROMWELL, described in the Summons as Thomas Nelson Cromwell, and LOUIS H. CRAMER, as Executors under the Last Will and Testament of Frank Leslie, deceased,
Defendants.

The plaintiff, above named, by Roger Foster, her attorney, respectfully shows to this Court, upon information and belief:

I. The plaintiff is and at all the times hereinafter mentioned and at the time of the commencement of this action was a citizen and resident of the City of Charleston, in the State of South Carolina.

II. The defendant Cromwell above named, is and at all the times hereinafter mentioned, and at the time of the commencement of this action was a citizen and resident of the Borough of Manhattan, City, County and State of New York. The defendant Cramer is and at all the times hereinafter mentioned and at the time of the commencement of this action was a citizen and resident of Saratoga Springs, in the County of Saratoga, State of New York.

III. On or about the 17th day of September, 1914, the above named Frank Leslie, who was a woman, a widow and childless, died in the City

and County of New York, of which she was a resident. She is hereinafter described as Mrs. Leslie. On or about December 7th, 1914, the will of said Mrs. Leslie was admitted to probate by one of the Surrogates of the County of New York. The said last Will and Testament appointed as executors of the said Mrs. Leslie, the above named defendants. On or about said last named date letters testamentary under said Will and Testament were duly issued to the said defendants out of the Surrogates' Court of the County of New York, and the said defendants duly accepted the same and qualified as such.

IV. The above named plaintiff is the cousin german of the said Mrs. Leslie. The father of the plaintiff was the brother of the father of said Mrs. Leslie.

V. For thirty years or more prior to her death, the said Mrs. Leslie knew only one other relative, a niece, as long as and as intimately as this plaintiff.

VI. At different times between the year 1899 and the year 1913, both inclusive, at the request of said Mrs. Leslie, this plaintiff acted as nurse and companion for the said Mrs. Leslie in the Estates of New York, New Jersey and South Carolina and on different journeys. The said services were laborious, painful and humiliating. The said services were performed at the following places and during approximately the following times, as well as at other times and places:

VII. During the months of November and December, 1899, at Sherry's Hotel, New York City. At that time and place this plaintiff nursed the said Mrs. Leslie, at the latter's request, through a severe illness of the said Mrs. Leslie. During said time this plaintiff, at the request of Mrs. Leslie, occupied the same bed with Mrs. Leslie, frequently bathed Mrs. Leslie and changed Mrs. Leslie's garments and suffered greatly through the loss of sleep because of the attention that she thus paid Mrs. Leslie. During said time she took her meals in the bedroom of Mrs. Leslie and she never left Mrs. Leslie's room except occasionally for a short drive when the weather permitted. Plaintiff consequently was unable to return to her home in Charleston, South Carolina, in time for Christmas and plaintiff was thus prevented from spending Christmas with plaintiff's aunt who had had charge of plaintiff during plaintiff's childhood and during said period of time from taking care of plaintiff's aunt who was then eighty years of age and blind, and with whom plaintiff had been accustomed to spend Christmas each year and to whom plaintiff had been for many years accustomed to give great care and attention. This neglect of plaintiff's aunt, who died a few months later, was necessitated by the said services performed by plaintiff to the said Mrs. Leslie at Mrs. Leslie's request and was a cause of great grief to plaintiff.

VIII. Immediately after a stroke of paralysis from which the said Mrs. Leslie had suffered, during the months of February, March and April and May, 1902, at the Chelsea Hotel, in the City of New York, and in the City of Charleston, South Carolina, and on a journey from New York City to South Carolina, the plaintiff at Mrs. Leslie's request,

nursed Mrs. Leslie and took the place of a trained nurse who was discharged upon the arrival of the plaintiff in New York. During this period of time Mrs. Leslie could not without assistance walk nor could she dress nor undress herself without aid, which aid and assistance was given Mrs. Leslie by plaintiff, at Mrs. Leslie's request. Mrs. Leslie requested and insisted that this plaintiff should remain within her call by day and by night since Mrs. Leslie was in constant fear of another stroke of paralysis, and plaintiff so remained.

IX. During the year 1903 between the first day of February and the 30th day of June of said year, this plaintiff at the request of Mrs. Leslie acted as nurse and companion for Mrs. Leslie at Charleston, South Carolina. During the year 1904 between the first day of February and the 30th day of April of said year and subsequently between the first day of August and the 30th day of September of said year; during the year 1905 between the first day of February and the 30th day of April of said year and also between the first day of August and the 30th day of September of said year; during the years 1906, 1907, 1908, 1909, 1910, 1911 and 1912, between the first day of August and the 30th day of September in each of said years, this plaintiff, at the request of Mrs. Leslie, acted as companion and nurse for Mrs. Leslie at the Chelsea Hotel and subsequently at the Sherman Square Hotel, both of which hotels were in the Borough of Manhattan, City and County of New York, for a period of time, the exact amount of which is now unknown to plaintiff. Between the first day of August and the 30th day of September, 1913, this plaintiff acted as nurse and companion for Mrs. Leslie at Hampton Park Terrace, in Cranford, New Jersey, and in the Sherman Square Hotel in the City of New York.

During the two years which upon information and belief were the years 1905 and 1906 this plaintiff spent approximately two months in the winter of each of said years in the City of New York as companion and nurse for Mrs. Leslie at Mrs. Leslie's request. During all of these times that plaintiff was acting as nurse and companion for Mrs. Leslie she was, at Mrs. Leslie's request, acting as maid for a dog of Mrs. Leslie, whose disposition was spoiled and to whom Mrs. Leslie insisted and requested that great care and attention should be given by plaintiff as was done by plaintiff; who took said dog out of the hotels where Mrs. Leslie lived, for said dog's exercise in order that the dog might obey the calls of nature. On one occasion in the fall of 1913, plaintiff was subjected to abuse from Mrs. Leslie because plaintiff refused to take the said dog out for exercise on Broadway at night while dressed only in a kimona, as directed so to do by Mrs. Leslie, and finally to appease the anger of Mrs. Leslie, plaintiff was forced to put on a raincoat over her kimona and so dressed go out of the hotel onto Broadway with the said dog. All of this was done by plaintiff and all of this was extremely humiliating.

X. The said Mrs. Leslie at the time of her death was seventy-eight years of age. During all said times Mrs. Leslie was feeble in body and suffered from a complication of diseases and was in consequence thereof in a highly

irritable and nervous condition. She was then arbitrary and dominant in character, habit and practice; accustomed to exact strict compliance with her wishes by this plaintiff and by every one who came in contact with her, and she was a very difficult person to get along with. Her physical and mental condition was such that she had constant need of a nurse and companion of her own sex and her own class. She was unable to keep in her service as a companion or as a nurse people of ordinary circumstances upon ordinary terms for any length of time because of the lack of consideration with which she treated them and the duties which she insisted upon their performing. She was unwilling to treat and did not treat with courtesy or consideration those dependent upon her and those who served her and those who associated with her. She was then penurious in disposition and unwilling to pay during her life adequate compensation for services of that nature. Upon information and belief, she was accustomed to obtain the services of men and women (even of hotel bell boys and porters), without paying them any compensation, upon her promise to compensate them by legacies in her will. Her estate was large, approximating in value $1,800,000 then and at the time of her death.

Her nature and disposition were so irascible that she became frequently involved in quarrels and misunderstandings and antagonisms with many whom she had business and social and personal relations. This subjected plaintiff to many difficulties and humiliations. For example, on one occasion Mrs. Leslie was ordered out of a dining car because she insisted in feeding her dog at the table, thus violating the rules of the car. Plaintiff was obliged to leave the car with Mrs. Leslie in the presence of a number of people and afterwards to return to the car and obtain food which she carried thence to Mrs. Leslie and her dog in the car in which Mrs. Leslie had a seat.

The said Mrs. Leslie was at all of the times herein mentioned of a very penurious disposition. For example in September, 1913, she forbade this plaintiff to take cream with her coffee at breakfasts at the Sherman Square Hotel because there was an additional charge of ten cents for the service of cream. She often loudly complained at the hotel dining rooms that the plaintiff ate too much, which was not the case. Mrs. Leslie obliged this plaintiff to live at hotels in a manner not fit and at a scale much below that to which this plaintiff was accustomed. For example, the room furnished this plaintiff at the Chelsea Hotel was small, dark, improperly ventilated and not intended for the purposes of a bedroom, and injurious to health. The heat in said room was at times so intense as to cause plaintiff to have vertigo and bleeding of the nose. The room furnished at the Sherman Square Hotel, to plaintiff, was of like nature. Plaintiff was not permitted to have any light in her room at night. The bed furnished plaintiff was a cot, and plaintiff frequently had to supply her own bed linen and towels because of Mrs. Leslie's failure to provide a proper and sufficient supply and change of same. The room, bed, and bath used by plaintiff at the Sherman Square Hotel had been used by a companion of Mrs. Leslie who had suffered with, and died of a cancer

while acting as a companion for Mrs. Leslie. Mrs. Leslie interfered with the personal life of this plaintiff. She insisted that this plaintiff should dress so as to please the said Mrs. Leslie. This resulted in much discomfort and mortification to this plaintiff. For example, on one occasion in or about the month of September, 1913, plaintiff was obliged by Mrs. Leslie to attend a luncheon in a silk petticoat without any skirt over the same because said Mrs. Leslie objected to the plaintiff's wearing any of the dresses which were then in plaintiff's possession.

XI. Plaintiff performed other services for the said Mrs. Leslie at times and places which are now unknown to plaintiff. Plaintiff prays leave to offer evidence upon the trial concerning such services in case before that time she is able to refresh her recollction as to such dates and places by the discovery of correspondence or by conversations with witnesses of such services.

XII. In consideration of the performance of the said services by plaintiff as aforesaid and of plaintiff's continuance in the performance of the same said Mrs. Leslie promised to bequeath to this plaintiff by her last will and testament a legacy of the sum of $50,000. Said promise was made in or about the month of February, 1902, and was repeated on subsequent occasions. In consideration of said promise the services hereinbefore set forth were performed by plaintiff.

XIII. The said will of said Mrs. Leslie left this plaintiff no more than the sum of $10,000.

XIV. By the action of the said Mrs. Leslie as aforesaid this plaintiff has been damaged in the sum of $40,000 dollars with interest from September 17th, 1915.

AND THIS PLAINTIFF ALLEGES AS A SECOND, DISTINCT AND SEPARATE CAUSE OF ACTION:

XV. She repeats and refers to the previous allegations herein designated by the paragraph numbers I, II, III, IV, V, VI, VII, VIII, IX, X and XI, and she incorporates the same in this complaint with the same effect as if the same were repeated specifically and at length.

XVI. In consideration of the performance of the said services by plaintiff as aforesaid, and of plaintiff's continuance in the performance of the same, said Mrs. Leslie promised to pay to this plaintiff the reasonable value for said services.

XVII. The reasonable value of said services was the sum of fifty thousand ($50,000) dollars.

XVIII. Mrs. Leslie has not paid this plaintiff any part of the same except the sum of ten thousand ($10,000) dollars which said Mrs. Leslie bequeathed this plaintiff by her will.

XIX. By the action of Mrs. Leslie as aforesaid, this plaintiff has been damaged in the sum of forty thousand ($40,000) dollars with interest from September 17th, 1915.

AND THIS PLAINTIFF ALLEGES AS A THIRD, DISTINCT AND SEPARATE CAUSE OF ACTION:

XX. She repeats and refers to the previous allegations herein designated

by the paragraph numbers, I, II, III, IV, V, VI, VII, VIII, IX, X and XI, and she incorporates the same in this complaint with the same effect as if the same were repeated herein specifically and at length.

XXI. In consideration of the performance of the said services by plaintiff as aforesaid, and of plaintiff's continuance in the performance of the same, said Mrs. Leslie promised to pay to this plaintiff after her death and to bequeath to this plaintiff by the last will and testament of Mrs. Leslie, an amount equal to the reasonable value of said services.

XXII. The reasonable value of said services was the sum of fifty thousand ($50,000) dollars.

XXIII. Said Mrs. Leslie has failed to pay this plaintiff any part of the same except the sum of $10,000 which said Mrs. Leslie bequeathed this plaintiff by her will and the said Mrs. Leslie has failed to bequeath to this plaintiff more than the sum of $10,000.

WHEREFORE, plaintiff demands judgment against defendants for the sum of $40,000 with interest as aforesaid and for such other and further relief in the premises as may be just, together with the costs of this action.

ROGER FOSTER,
Attorney for Plaintiff,
55 Liberty Street,
Borough of Manhattan,
City of New York.

STATE OF NEW YORK,
County of New York,
Southern District of New York. } ss:

Roger Foster, being duly sworn, deposes and says the foregoing amended complaint is true to my own knowledge except as to the matters therein stated to be alleged upon information and belief, and as to those matters I believe the same to be true.

The reason why the said amended complaint is not sworn to by the plaintiff, is that the plaintiff is not within the County and State of New York, in which I reside. The sources of my information and the grounds of my belief as to all matters not therein stated to be alleged upon my own knowledge are conversations and correspondence with the plaintiff, and with members of the plaintiff's family, and with other witnesses and letters.

ROGER FOSTER.

Sworn to before me this
6th day of July, 1918.

LILLIAN ROHMER,
Notary Public No. 47,
Bronx County.
Certificate filed in N. Y. Co.
Commission expires, March 30, 1919.

COMMON LAW FORM IX.—COMPLAINT AT COMMON LAW UNDER ANTI-MONOPOLY LAW.

IN THE [DISTRICT] COURT OF THE UNITED STATES.

FOR THE SOUTHERN DISTRICT OF NEW YORK.

PETER SCHMIDT,
Plaintiff,
against
FREDERICK JOSEPH, MOSES JOSEPH, LEO JOSEPH, NATIONAL PACKING COMPANY, SWIFT & COMPANY AND ARMOUR & COMPANY,
Defendants.

The plaintiff above named, by Hays, Hershfield & Wolf, his attorneys, complaining of the defendants, shows to this Court and alleges, upon information and belief:

1. That the defendant, National Packing Company, at all of the times hereinafter mentioned, was and still is a foreign corporation, duly created by and existing under and by virtue of the laws of the State of New Jersey.

2. That the defendant, Swift & Company, at all of the times hereinafter mentioned, was and still is a domestic corporation, duly created by and existing under and by virtue of the laws of the State of New York.

3. That the defendant, Armour & Company, at all of the times hereinafter mentioned, was and still is a foreign corporation, duly created by and existing under and by virtue of the laws of the State of New Jersey.

4. That the plaintiff, at all of the times hereinafter mentioned, was and still is engaged in the business of purchasing in the State of New York, and other States of the United States, meats obtained from cattle and the products thereof, and selling the same at retail.

5. That heretofore and at all of the times hereinafter mentioned The New York Butchers' Dressed Meat Company was and still is a domestic corporation, duly created by and existing under and by virtue of the laws of the State of New York.

6. That said The New York Butchers' Dressed Meat Company was organized and incorporated, as aforesaid, in the year 1902, with a capital stock of $75,000, consisting of 7,500 shares, of the par value of $100 each, all of which stock has been issued and is now outstanding.

7. That the plaintiff, at all the times hereinafter mentioned, was and still is the actual owner and record holder, on the books of said The New York Butchers' Dressed Meat Company, of 30 shares of the capital stock of said The New York Butchers' Dressed Meat Company.

8. That William G. Wagner, Arthur Bloch, Samuel Bloch and Aaron Buchsbaum were, with others, the incorporators of said The New York Butchers' Dressed Meat Company and were, until April, 1907, the major-

ity stockholders thereof, and by reason and virtue of said majority stock control, through themselves, or their nominees, constituted or controlled a majority of the Board of Directors of said The New York Butchers' Dressed Meat Company.

9. That until said last named date, the said Arthur Bloch was the President of said The New York Butchers' Dressed Meat Company, and for a short time subsequent thereto was the Vice President thereof. The said Wagner was, until said last named date, the Secretary thereof, and the said Buchsbaum was the Treasurer thereof. That since said last named date the defendant, Frederick Joseph, has been and still is the President of said The New York Butchers' Dressed Meat Company, and that since the resignation of said Arthur Bloch, as Vice President, shortly after April, 1907, the said defendant Leo Joseph became and still is the Vice President of said Company. That the defendant, Moses Joseph, since April, 1907, has been and still is the Secretary and Treasurer of said The New York Butchers' Dressed Meat Company.

10. That said The New York Butchers' Dressed Meat Company has been from the time of its inception and still is engaged in the business of purchasing, in the various States of the United States, cattle and the products thereof, and particularly is engaged in the purchase thereof in the States of Kansas, Missouri, Illinois, New Jersey and New York, and transporting said cattle and the products thereof to New York City, to be killed and dressed at the abattoir or slaughter house of said The New York Butchers' Dressed Meat Company in New York City, where the said cattle and the products thereof are dressed and then transported to and sold by said The New York Butchers' Dressed Meat Company in various parts of the States of New York, New Jersey, Florida, Connecticut, Pennsylvania, and other States of the United States and in Europe.

11. That at all the times mentioned in this complaint the corporate defendants herein have been and still are likewise engaged in the business of purchasing, in the various States of the United States, cattle and the products thereof, and are particularly engaged in the purchase thereof in the States of Kansas, Missouri, Illinois, New Jersey and New York, and transporting said cattle and the products thereof, to be killed and dressed at their abattoirs, located, principally in the State of Illinois, Kansas and Missouri, where the said cattle and the products thereof are dressed, and then transported to and sold by the said corporate defendants in practically every State of the United States and Europe.

12. That at all of the times hereinafter mentioned the said defendants herein owned or controlled, and do now own or control, many other firms co-partnerships and corporations engaged in the same business as the said defendants herein, so that by reason of the said ownership or control the said defendants herein has been and still is intra and interstate and a very large and important part—in fact, substantially all—of the business aforesaid, of dealing in said cattle and selling the products thereof as aforesaid.

13. That at all the times mentioned in this complaint the business of

the said defendants herein has been and still is intra and interstate and foreign trade and commerce aforesaid, viz., the purchasing, in the States of Kansas, Missouri, Illinois, New Jersey and New York, of live cattle and the products thereof, the transportation of the same from the place of purchase to other States of the United States, where the said live cattle and the products thereof were and are thereupon slaughtered and dressed in the abattoirs of the said defendants, and the dressed cattle and the products thereof were and are thereupon transported to and sold in substantially each and all of the States of the United States, and also were and are exported to Europe. That the purchase, sale and transportation aforesaid of said cattle and the products thereof were and are inseparably connected with and comprised in the defendants' said business.

14. That said The New York Butchers' Dressed Meat Company was incorporated as aforesaid, in July, 1902, because and as a result of the combination of the corporate defendants herein with certain other corporations, firms and individuals, which had theretofore fixed the price of cattle and the products thereof, and curtailed the supply thereof, so that in said year 1902 the price thereof reached the highest point ever before known in the City of New York.

15. That in the said year 1902 said The New York Butchers' Dressed Meat Company was thereupon caused to be organized by various retail butchers in the City of New York, including plaintiff, as an independent purchaser and seller of said cattle and products thereof. The said retail butchers of the said City of New York subscribed to the stock thereof upon the representation and understanding that said The New York Butchers' Dressed Meat Company would be operated as an independent corporation, free from any combination or restriction of any kind with or of the defendants herein, and thereafter, as a result thereof, the abattoir of said The New York Butchers' Dressed Meat Company was erected and constructed in the City of New York, and said The New York Butchers' Dressed Meat Company proceeded to do the business hereinbefore mentioned.

16. That in or about the year 1907 the defendants, and each of them, unlawfully, and with unlawful intent and purpose, combined, conspired and confederated to and with each other, and to and with divers other persons, firms and corporations, to monopolize the said business mentioned and described in paragraph 13 of this complaint, and to prevent and restrain said The New York Butchers' Dressed Meat Company from engaging in business that would be competitive with the said business then and there conducted by the defendants herein, and to prevent and restrain said The New York Butchers' Dressed Meat Company from engaging in interstate trade and commerce with the sellers of live cattle and the products thereof at the markets aforesaid, in the States of the United States and particularly the States of Missouri, Kansas, Illinois, New Jersey and New York, and to prevent and restrain said The New York Butchers' Dressed Meat Company from purchasing in the said places the said cattle and the products thereof, and transporting the same to the State and City of New York, to be there slaughtered and dressed, and

to prevent and restrain said The New York Butchers' Dressed Meat Company from then transporting to and selling the said cattle and the products thereof in the States of New York, New Jersey, Florida, Connecticut, Pennsylvania, and other States of the United States and Europe.

17. That the defendants and each of them did and performed, among other things, the various acts set forth as follows:

In the year 1907, the defendants, acting by and through the agency and instrumentality of the defendants Joseph, purchased a majority of the shares of the capital stock of said The New York Butchers' Dressed Meat Company, and by and through the instrumentality of said majority stock, controlled and nominated, and have since controlled and nominated, and do now control and nominate, the officers of said The New York Butchers' Dressed Meat Company and the Board of Directors thereof.

18. That thereafter, and since said purchase by the defendants herein of said majority stock of said The New York Butchers' Dressed Meat Company, the said The New York Butchers' Dressed Meat Company has been conducted, operated and controlled, not in the interests of the stockholders thereof, but solely in the interest of the defendants herein. That said The New York Butchers' Dressed Meat Company has by reason and because of said control of the defendants herein, purchased, at the markets aforesaid, only a certain fixed and limited number and amount of cattle and the products thereof, has sold the said cattle and products thereof at a certain price, fixed, regulated and determined by the defendants herein, has refused to purchase said cattle or the products thereof in excess of such fixed amount and except at such fixed prices, and only from certain designated individuals, all of which has been determined and regulated by the defendants herein, who have dominated and still dominate the said The New York Butchers' Dressed Meat Company.

19. That by reason of the restraint aforesaid, exercised by the defendants herein, said The New York Butchers' Dressed Meat Company has purchased, at the markets aforesaid, only a fixed and limited number and amount of cattle and the products thereof, has sold the same at a fixed price, determined, as aforesaid, by the defendants herein, has refused and declined to purchase, at the markets aforesaid, such cattle, or the products thereof, except in the amount and for such prices aforesaid, and from the individuals aforesaid, designated by the defendants herein, all of which has restrained said The New York Butchers' Dressed Meat Company from engaging freely in said interstate trade and commerce, and from transporting said cattle and products, from the said respective points of purchase at the markets aforesaid outside as well as in the State of New York, to the City and State of New York, there to be slaughtered and dressed and then transported to and sold in the other States of the United States, as hereinbefore alleged.

20. That the purpose thereof of the defendants herein has been so to dominate, control and regulate the affairs of said The New York Butchers' Dressed Meat Company that the said business of said The New York Butchers' Dressed Meat Company should not compete, conflict or interfere

in any way with the business of the corporate defendants herein, but should be conducted in harmony therewith, and as a non-competitive concern.

21. That by reason of the aforesaid facts and of the said unlawful combination, agreement, confederation and conspiracy, the said The New York Butchers' Dressed Meat Company has failed and refused, in many instances, to purchase cattle at the markets aforesaid, outside of as well as in the State of New York, which could have been purchased at a most advantageous price to said The New York Butchers' Dressed Meat Company, and has failed and refused to transport the same to the City and State of New York, there to be slaughtered, and has failed and refused to transport the said cattle to and sell the said cattle in other States of the United States; has likewise failed and refused to purchase the products of said cattle at the markets aforesaid outside of as well as in the State of New York, except at such fixed prices, although in many instances the said products could have been purchased at an advantageous price, and has failed and refused to transport the said products, so offered for sale at the markets aforesaid, to the City and State of New York, there to be prepared and thereafter transported to and sold in the various other States of the United States and Europe, and has failed and refused to purchase the said products in certain instances from certain persons, at any price, because of the domination and control of the defendants herein, who have declined to permit said The New York Butchers' Dressed Meat Company to have dealings with such persons.

22. That by reason of the combination, agreement and conspiracy aforesaid, the prices of said cattle and the products thereof, paid by said The New York Butchers' Dressed Meat Company, and charged by said The New York Butchers' Dressed Meat Company to its customers, and the prices prevailing therefor in the City of New York, have been regulated, controlled, fixed and determined by the defendants herein, for the reason that the competition of said The New York Butchers' Dressed Meat Company has been entirely eliminated.

23. That by reason of the foregoing facts and of the said unlawful combination, agreement and conspiracy, the business of said The New York Butchers' Dressed Meat Company has been greatly injured, and the stockholders thereof have, and the plaintiff herein has, by reason thereof, been greatly injured. That as a result thereof, the value of the stock of said The New York Butchers' Dressed Meat Company has depreciated and deteriorated in value, and the said stockholders have and the plaintiff herein has been deprived of the proper use that should have been made of the said corporate property of said The New York Butchers' Dressed Meat Company and the profits which could and would have been made by said The New York Butchers' Dressed Meat Company had said The New York Butchers' Dressed Meat Company not been prevented and restrained, as aforesaid, from engaging in the said business unrestricted by the dominion and control of the defendants herein.

24. That prior to the said combinations, conspiracies and monopoliza-

tions by the said defendants, hereinbefore set forth, a state of lively competition existed in the several States of the United States among the dealers, at wholesale, in cattle and the products thereof. That by reason of the said acts of the defendants, hereinbefore set forth, the said state of competition has been practically destroyed. That by reason of the said non-competitive condition thus created by the defendants, the plaintiff has been deprived of the said element of competition, and it has been impossible for the plaintiff to obtain the benefit of competition in his purchases from dealers at wholesale in meats obtained from cattle and the products thereof, and that as a result of the absence of said competition the business of the plaintiff of purchasing in the States of New York and in other States of the United States meats obtained from cattle and the products thereof, and selling the same at retail, has been greatly injured.

25. That the plaintiff has been injured by the defendants, by reason of the said unlawful acts and deeds forbidden by Act of Congress of the United States, dated July 2, 1890, entitled "An Act to Protect Commerce against Unlawful Restraints and Monopolies," in the sum of $45,000.

Wherefore plaintiff demands judgment against the defendants and each of them, jointly and severally, for the sum of $135,000.00, being three-fold damages by him aforesaid, and for the costs of this suit, including a reasonable attorney's fee, pursuant to the Laws of the United States in such case made and provided.

HAYS, HERSHFIELD & WOLF,
Plaintiff's Attorneys,
Office & Post Office Address,
No. 115 Broadway,
Borough of Manhattan,
New York City.

STATE OF NEW YORK,
County of New York, } ss.:

PETER SCHMIDT, being duly sworn, deposes and says that he is the plaintiff herein; that he has read the foregoing complaint and knows the contents thereof; that the same is true to his own knowledge except as to the matters therein stated to be alleged upon information and belief, and as to those matters he believes it to be true.

PETER SCHMIDT.

Sworn to before me this
6th day of August, 1909,

ELI M. COHEN,
Notary Public,
New York County.

COMMON LAW FORM X.—STATEMENT OF CLAIM UNDER PENNSYLVANIA.

(Practice Act of 1915.)

In the United States District Court for the Eastern District of Pennsylvania.

CHARLES [SANER] and ED. P. [DOCHERTY], citizens and residents of the State of Nevada, *vs.* G. HENRY [Smith], a citizen of the State of Pennsylvania, and a resident of the Eastern District thereof.	September Sessions, 1920. No. 7450.

The plaintiffs, Charles [Saner] and Ed. P. [Docherty], both of whom are citizens and residents of the State of Nevada claim of the defendant, G. Henry [Smith], a citizen of the State of Pennsylvania and a resident of the Eastern District thereof, the sum of fifty-seven thousand two hundred sixty-six dollars 64/100 ($57,266.64) with interest at 6% from the first day of July, 1919, which is justly due and payable to the plaintiffs by the defendant upon a cause of action whereof the following is a statement.

(1) At the times herein mentioned the plaintiffs were and now are citizens and residents of the State of Nevada and the defendant herein named was and now is a citizen of the State of Pennsylvania and a resident of the Eastern District thereof.

(2) On the 15th day of April, 1919, at Pioche, Nevada, the defendant, G. Henry [Smith], with others did, for value received, execute and deliver to the plaintiffs, a joint and several promissory notes for sixty-seven thousand five hundred dollars ($67,500) a true copy of which is as follows:

$67,500. Gold.

Pioche, Nevada, April 15th, 1919.

On or before June 1st, 1919, after date, for value received, I, we, or either of us, promise to pay to the order of CHARLES [SANER] and ED. P. [DOCHERTY] ..... Sixty Seven Thousand Five Hundred Dollars, negotiable and payable at the BANK OF PIOCHE, INC., in U. S. Gold Coin, with interest at the rate of six per cent per annum from date until paid, and if suit be instituted for the collection of this note, we agree to pay Court costs and a reasonable attorney's fee.

No. (SIGNED) G. HENRY [SMITH],
MELVILLE [LETGIL],
PETER [LABE],
RALPH H. [CAMEL],
C. E. [NESSON].

DUE June 1st, 1919,
U. S. Revenue Stamps for $13.50 Cancelled.

(3) The following payments have been made on account of the principal of said note as appears by endorsements thereon:

May 17, 1919	$4,419.71
May 25, 1919	3,335.48
May 26, 1919	1,426.86
May 31, 1919	2,437.91
June 30, 1919	628.82
July 10, 1919	1,444.60
August 7, 1919	1,748.04
Total payments	$15,439.42
Leaving a balance of principal due amounting to	$52,060.58

(4) Interest has been paid on the said note upon the times and to the dates herein stated, to wit:

May 17, 1919	$348.75 to May 17, 1919
June 30, 1919	412.54 to June 30, 1919

(5) No further payments of principal or of interest have been made on said note.

(6) Although plaintiffs have made demand upon the said defendant for the payment of the aforesaid note, said defendant has neglected and refused to make payment and still refuses and neglects to make payment of the balance due on the said note or of any interest due thereon.

(7) By reason of such refusal and neglect to make payment as aforesaid, the plaintiffs have been compelled to bring this suit for the collection of the said note.

(8) By reason of the institution of this said suit the defendant, under the terms of the note aforesaid is now indebted to the plaintiffs for the balance of principal and interest due as aforesaid, and for a reasonable attorney's fee together with all court costs incurred in these proceedings.

(9) The plaintiffs aver that a reasonable attorney's fee for services in this suit would be 10% of the amount remaining due and owing by the defendant, or the sum of five thousand two hundred and six dollars 6/100 ($5,206.06).

(10) Wherefore the plaintiffs, Charles [Saner] and Ed. P. [Docherty] claim to recover from the said defendant, G. Henry [Smith], the said sum of fifty-seven thousand two hundred and sixty-six dollars 64/100 ($57,266.64) together with interest on $52,060.58 from July 1, 1919.

VAN DUSEN & JOHNSON,
Attorneys for Plaintiffs.

STATE OF NEVADA, }
COUNTY OF LINCOLN. } ss.

ED. P. [DOCHERTY], being duly sworn according to law, deposes and says that he is one of the plaintiffs named in the foregoing statement of

claim and that he has read the said statement of claim and that the facts therein set forth are true and correct.

ED. P. [DOCHERTY].

Sworn to and subscribed before me this 14th day of October, 1920.

G. W. FRANKS,
Notary Public.

[SEAL.]

Commission expires, Aug. 17, 1924.

COMMON LAW FORM XI.—COMPLAINT TO ENFORCE LIABILITY OF WITHDRAWING STOCKHOLDER.

[From Brandenburg on Bankruptcy.]

District Court of the United States for the Southern District of New York.

HEINRICH ZEINS as Trustee in Bankruptcy for ..... Company,
Plaintiff,
against
JACOB KAMMERMAN,
Defendant.

Plaintiff complains of defendant and alleges:

I. That on the ——— day of ———, 19—, the ——— Company was a manufacturing corporation duly organized and existing under the laws of the state of ———, and owned and operated a manufacturing plant known as the ———, in the city of ———, ——— County, ———, and continued to exist as such corporation and to own and operate said manufacturing plant until its adjudication in bankruptcy hereinafter mentioned.

II. That the capital stock of said corporation consisted of ——— shares of the par value of ——— Dollars ($———) each, and all of said stock was issued and delivered to actual purchasers thereof and the full amount of the par value of said stock paid in by the owners and holders thereof at the time hereinbefore mentioned.

III. That on said ——— day of ———, 19—, after the organization of said corporation, defendant became a stockholder therein, holding ——— shares of capital stock thereof of the par value of ——— Dollars ($———); that defendant continued to own and hold said stock until the ——— day of ———, 19—, when he surrendered all of it to the stockholders of said corporation, and said corporation then entered into an agreement in writing with defendant to refund to defendant the full par value of said stock, to wit, ——— Dollars ($———).

IV. That between the ——— day of ———, 19—, and the ——— day of ———, 19—, said officers and stockholders paid defendant in monthly

installments, each month, during said time, the sum of ——— Dollars ($———), in consideration of which the said ——— shares of stock held and owned by the defendant were withdrawn and refunded to the stockholders of said corporation and surrendered and cancelled, contrary to the provisions of § ——— of the General Statutes of ———, and no other certificates of stock were issued in lieu thereof.

V. That at the time of the withdrawal and refunding of all of the stock of this defendant, as above set forth, there existed debts and liabilities of said corporation unsecured and past due exceeding in the amount the sum of ——— Dollars ($———); that said debts and liabilities remained unpaid from the time of the withdrawal and refunding of the stock of defendant as aforesaid continuously to the time of the adjudication of said corporation in bankruptcy as hereinafter alleged and are still unpaid, notwithstanding the creditors of said corporation to whom said debts and liabilities were owing have duly filed their claims in the bankruptcy proceedings hereinafter alleged, and the same have been allowed.

VI. That on the ——— day of ———, 19—, the said ———, was duly adjudicated a bankrupt upon a petition filed by (*or*, against) it on the ——— day of ———, 19—, by order of the United States District Court for the ——— District of ———, according to the provisions of the acts of Congress relating to bankruptcy.

VII. That on the ——— day of ———, 19—, plaintiff was duly elected trustee of the estate of said bankrupt, and thereafter duly qualified as such trustee and ever since has been and now is the duly qualified and acting trustee in bankruptcy of the said ———.

VIII. That plaintiff has been duly authorized and directed by the said United States District Court, in said bankruptcy proceedings, to commence this action in his capacity as such trustee to recover for the use of the creditors of said corporation the money so refunded to defendant.

IX. That prior to the commencement of this action plaintiff, as such trustee, demanded of defendant the return of the money so refunded to him, but defendant refused and still refuses to return the same, or any part thereof.

X. That there are insufficient assets in the hands of plaintiff to pay the unsecured debts and liabilities of said corporation, and it is necessary to secure the return of the money, belonging to said corporation, so wrongfully refunded to defendant, and to apply the same to the payment of the debts of the corporation for which the same is liable.

WHEREFORE, plaintiff demands judgment against defendant for the sum of ——— Dollars ($———), with interest thereon at the rate of ——— per cent per annum from the ——— day of ———, 19—, together with the costs and disbursements of this action.

———,
Attorney for Plaintiff.

COMMON LAW FORM XII.—PLAINT OR DECLARATION IN ACTION IN NEW JERSEY DISTRICT FOR DOWER.

District Court of the United States for the District of New Jersey.

On the ——— day of March, 1921.

MARIE DUDLEY, who is and at the time of the commencement of this action was a citizen and resident of the State of New York and who is a widow, and who was during his life the wife of Edward Dudley, deceased, by Roger Foster her attorney demands against Edward Lawrence Dudley who is and who was at the time of the commencement of this action a citizen and resident of the City and County of Camden, in the State of New Jersey, and Irene Goodman who is and at the time of the commencement of this action was a citizen and resident of the City of Philadelphia in the State of Pennsylvania, both individually and as executors named in the paper purporting to be the last will and testament of said Edward Dudley, which paper was admitted to probate by the Surrogate of the County of Camden in the State of New Jersey on or about September 24, 1920 (she also demands against Edward H. Goodman the husband of said May Irene Goodman, who is and at the time of the commencement of this action was a resident and citizen of the City of Philadelphia and State of Pennsylvania), the third part of the following land and premises in the State of New Jersey of which her said husband was seized together with the buildings thereupon and the appurtenances thereof namely, The following property in the County and City of Camden:

(1.) Certain property known as "The Grange," which is situated on the northerly side of Federal Street and comprises eighteen and eight-tenths (18.8) acres more or less, together with the buildings upon the same, in which the said Edward Dudley had one-half interest.

(2.) Certain farm land on the southerly side of Federal Street, comprising fifteen and three-tenths (15.3) acres more or less, the exact location and boundaries whereof are unknown to this plaintiff, in which the said Edward Dudley had one-half interest in thirteen (13) acres and whole interest in the remaining two and three-tenths (2.3) acres.

(3.) Certain farm land on the northerly side of Westfield Avenue comprising twelve (12) acres more or less of upland, and twelve (12) acres more or less of lowland, the exact location and boundaries whereof are unknown to this plaintiff, in which the said Edward Dudley had a three-quarters interest.

(4.) A certain triangular field on the southerly side of Westfield Avenue comprising six and forty-two-hundredths (6.42) acres more or less, the exact location and boundaries whereof are unknown to this plaintiff.

(5.) A lot or lots of land with a building thereupon, beginning at a point on the westerly side of 4th Street, one hundred and fifty-two (152) feet southerly from the southwesterly corner of Market and 4th Streets; also northwesterly corner of 4th and Carter's Place; thence westerly along

northerly side of Carter's Place or along eighty-four (84) feet to corner in easterly line of land, formerly belonging to the Estate of Daniel S. Carter, deceased; thence north by easterly line said last mentioned land and parallel with said 4th Street sixteen (16) feet to corner of land lately belonging to the said Carter Estate; thence easterly parallel with Market Street on land between the two brick houses eighty-four (84) feet to westerly side of 4th Street; thence southerly along westerly side of said 4th Street sixteen (16) feet to beginning. The said lot of land and building are usually designated as No. 35 North 4th Street.

(6.) Situated in the City and County of Camden, a lot of land beginning at a point on the northerly side of Liberty Street distant two hundred and eighty (280) feet westerly from the northwesterly corner of Liberty Street and 4th Street, running thence northerly and parallel to 4th Street one hundred (100) feet; thence, westerly and parallel to Liberty Street twenty (20) feet; thence southerly and again parallel to 4th Street one hundred (100) feet and easterly twenty (20) feet along the said northerly side of Liberty Street to the point or place of beginning.

(7.) Situated in the City and County of Camden a lot of land beginning at a point on the westerly side of 2nd Street distant three hundred and two (302) feet and seven and one-quarter (7¼) inches southerly from the southwesterly corner of Market Street and 2nd Street; running thence westerly and parallel to Market Street one hundred and seventy (170) feet; thence southerly and parallel to 2nd Street twenty (20) feet and four (4) inches; thence southerly and parallel to Market Street one hundred and seventy (170) feet; thence northerly twenty-seven (27) feet and four (4) inches along the said westerly side of 2nd Street to the point or place of beginning, and which is believed to be known as Number 33 North 2nd Street.

(8.) 20 lots on the easterly side of 32nd Street. The exact location and boundaries whereof are unknown to this plaintiff, in which the said Edward Dudley had one-half interest.

(9.) 20 lots on the westerly side Cambridge Street. The exact location and boundaries whereof are unknown to this plaintiff, in which the said Edward Dudley had one-half interest.

(10.) 2 lots on the easterly side of Cambridge Street. The exact location and boundaries whereof are unknown to this plaintiff, in which the said Edward Dudley had one-half interest.

(11.) A lot of land situated in the Town of Stockton, County of ———, beginning at a point on the southerly side of Fulton Street distant one hundred and sixty (160) feet westerly from the southwesterly corner of Fulton Street and Seventh Street, running thence southerly and parallel to Seventh Street one hundred and ten (110) feet; thence westerly parallel to Fulton Street forty (40) feet, thence northerly again parallel with Seventh Street one hundred and ten (110) feet, and thence northerly again parallel with Seventh Street one hundred and ten (110) feet, and thence easterly forty (40) feet along the said southerly side of Fulton

Street to the point or place of beginning, which are sometimes designated as lots 22 and 24 and parts of 21 and 23 on a map known as Pannia or with some similar name.

(12.) Tract of Woodland Delaware Township, County of ———— about seventy (70) acres, more or less the exact location and boundaries whereof are unknown to this plaintiff.

As the dower of the said Marie Dudley of the endowment of the said Edward Dudley, deceased, heretofore her husband, whereof she hath nothing; the value of which dower right and interest exclusive of interest and costs is in excess of three thousand ($3,000) dollars, together with the sum of five thousand ($5,000) dollars damages because of the refusal and the failure of the said defendants to assign said dower to her although assignment thereof was duly demanded, and also because of the refusal of the said defendant to allow her her widow's right of quarantine in the said property known as The Grange until the assignment of her dower therein, although such right of quarantine therein and her admission and her entry into said Grange was duly demanded by her the said Marie Dudley, which damages have been caused to her and suffered by her because of the acts of said defendants and thereupon she brings this suit.

ROGER FOSTER,
69 West 55th Street, New York.
Plaintiff's Attorney,

FORM XIII.—WRIT OF DOWER.

THE UNITED STATES OF AMERICA,
The District of New Jersey. } ss.

(*L. S.*) *The President of the United States of America to the Marshal of the United States for the District of New Jersey, Greeting.*

Command Edward Lawrence Dudley and May Irene Goodman and each of them individually and as executors of the paper purporting to be the last will and testament of Edward Dudley, deceased (and Edward H. Goodman, the husband of said Mary Irene Goodman), that justly and without delay, they and each of them render to Marie Dudley, who was the wife of Edward Dudley, deceased, her reasonable dower, which to her belongs in certain property in the State of New Jersey of which the said Edward Dudley was seized with the buildings thereupon and with the appurtenances thereon, namely [here insert description of property] of which property she, the said Marie Dudley, has nothing as she saith, and thereupon complained that said Edward Lawrence Dudley and May Irene Goodman, and each of them individually and as executors of the paper purporting to be the last will and testament of Edward Dudley, deceased (and Edward H. Goodman, the husband of the said May Irene Goodman), deforce her; wherefore lest they shall render the same under her, then

summoned by good summoners the aforesaid Edward Lawrence Dudley, and May Irene Goodman and each of them individually, and as executors of the paper purporting to be the last will and testament of Edward Dudley, deceased (and Edward H. Goodman, the husband of the said May Irene Goodman), that they and each of them be and appear before our judges of our District Court of the United States for the district of New Jersey and before said court at Trenton on the ———— day of ————, 1921, next to show wherefore they do it not; and have you then and there the names of those summoners, and this writ.

Witness the Honorable John Rellstab,
District Judge of the United States
for the District of New Jersey.

————————————

Clerk.

FORM XIV.—NOTICE OF FILING AND PETITION AGAINST UNITED STATES UNDER TUCKER ACT OF MARCH 3, 1887.

Jud. Code § 24, Subd. 20. See *Supra*, §§ 96, 97.

[From record in Bigby v. U. S., 188 U. S. 400.]

[*District*] *Court of the United States for the Eastern District of New York.*

WILLIAM SAMUEL BIGBY
against
THE UNITED STATES OF AMERICA.

Sirs: Please take notice that the within amended petition was duly filed with the clerk of the [District] Court of the United States for the Eastern District of New York on the 27th day of November, 1899, which court has jurisdiction of the case set forth in said petition and in which district plaintiff resides.

New York, November 27th, 1899.

Yours, etc., ROGER FOSTER,
Attorney for Plaintiff, Petitioner,
35 Wall Street, Borough of Manhattan, New York.

To the Honorable the Attorney General of the United States and to the Honorable the Attorney of the United States for the Eastern District of New York.

[*District*] *Court of the United States for the Eastern District of New York.*

WILLIAM SAMUEL BIGBY
against
THE UNITED STATES OF AMERICA.

To the Honorable the Judges of the [District] Court of the United States for the Eastern District of New York and to the Honorable the [District] Court of the United States for the Eastern District of New York:

Your petitioner, by Roger Foster, his attorney, respectfully shows:

I. The United States of America is a corporation created by the Constitution of the United States, with its principal office in the City of Washington and the District of Columbia; and your petitioner alleges upon information and belief, that within the meaning of the definitions of the New York Code of Civil Procedure said United States of America is a foreign corporation.

II. Your petitioner resides at Nos. 29 and 31 De Kalb avenue in the borough of Brooklyn, County of Kings and City of New York; and in the Eastern District of New York.

III. On or about November 27th, 1899, your petitioner at the request of the said United States of America and at the request of the officers, employees and duly authorized agents of the said United States of America, each of which officers, agents and employees was acting within the scope of his authority, entered into a passenger elevator in the United States court-house and post-office building in said borough of Brooklyn, which said building and elevator were then owned and controlled by the United States of America and which elevator was designed and intended by the said United States of America for the use of persons on their way to the office of the marshal of the United States for the Eastern District of New York; which entry was made by your petitioner while on his way to the said marshal's office upon official business.

IV. The United States of America then and there entered into an implied contract with your petitioner wherein and whereby for a sufficient valuable consideration it agreed to carry your petitioner safely; to operate said elevator with due care; and to employ for the purposes of the operation of said elevator a competent and experienced person.

V. In violation of said contract said United States of America failed to carry your petitioner safely; and failed to operate said elevator with due care; and failed to employ for the operation of said elevator and to put in charge of the same a competent and experienced person; and violated its said contract with your petitioner in other ways.

VI. In consequence of the failure of the United States and of its employees in charge of said elevator to carry your petitioner safely and to operate said elevator with due care; and in consequence of the failure of the United States to employ a competent and experienced person to operate said elevator with due care; and in consequence of the failure of the United States to employ a competent and experienced person to operate said elevator; and in consequence of the incompetence and inexperience of the person then engaged in operating said elevator and in charge of the same, and in consequence of the said violation by the United

States of its said contract your petitioner while entering the said elevator without negligence on his part was caused to fall, and his foot, ankle and leg were crushed between said elevator and the top of the entrance into the elevator shaft or a projection in the shaft of said elevator or in some other manner, and the back of your petitioner and other parts of the body of your petitioner were also consequently injured and your petitioner consequently suffered a laceration of the ligaments of his ankle, and he consequently was caused much bodily and mental pain.

VII. In consequence thereof your petitioner was obliged to spend and incur considerable sums of money for medical and surgical attendance and he was confined to the house and prevented from attending to his business and from earning money for a considerable period of time, and he has been made permanently lame and his said foot, ankle and back have been permanently injured; and he has been thus and otherwise damaged, in the sum of ten thousand dollars ($10,000).

Wherefore, your petitioner prays for a judgment or decree against the United States of America upon the facts and law for the sum of ten thousand dollars ($10,000), together with his reasonable costs and disbursements for such other and further relief in the premises as may be just.

WILLIAM SAMUEL BIGBY,
Petitioner.

ROGER FOSTER,
Petitioner's Attorney,
35 Wall Street, New York.

STATE OF NEW YORK,
County of Kings,
Eastern District of New York. } ss.

William Samuel Bigby, being duly sworn, deposes and says: I am the above named petitioner. The foregoing petition is true to my own knowledge except as to the matters therein stated to be alleged upon information and belief, and as to those matters I believe it to be true.

WILLIAM SAMUEL BIGBY.

Sworn to before me this 27th day of November, 1899.

E. M. SMITH, [SEAL.]
Notary Public, Kings County, New York.

COMMON LAW FORM XV.—PLEAS WHERE COMMON LAW PRACTICE PREVAILS.

[76 Fed. 427 in which the author was counsel.]

And the said defendant by John R. Emery, its attorney, comes and defends the wrong and injury when, &c., and as to the said first count

of the said declaration says that the said indenture therein referred to as made on or about February thirtieth, eighteen hundred and ninety, and of which a copy is alleged to be annexed to said declaration as "Exhibit 1," is not its deed and of this it puts itself upon the country, &c.

And this defendant, for a further plea to said first count of said declaration, by leave of the court first had and obtained, according to the form of the statute in such case made and provided, says that the said indenture therein referred to as made on or about April seventh, eighteen hundred and ninety, and of which a copy is alleged to be attached to said declaration as "Exhibit 2" is not its deed, and of this it puts itself upon the country, &c.

And this defendant, for a further plea to said first count of the said declaration, by like leave of the court first had and obtained, says that the plaintiff ought not to have or maintain his aforesaid action thereof against it, because it says that the said defendant did not in manner and form as is in said count alleged, convey to this defendant eleven thousand two hundred and forty tons of ice, of two thousand pounds to the ton; then and there situate and being in the ice houses referred to in said count, or any portion thereof; and that the plaintiff did not in manner and form as is in said count alleged, deliver to this defendant eleven thousand two hundred and fifty tons, of two thousand pounds to the ton, of good mercantile ice of not less than twelve inches in thickness, or any portion thereof, and that this defendant did not, in manner and form as is therein alleged, accept the same in part performance of the said instrument bearing date February thirteenth, eighteen hundred and ninety, referred to in the said count; and that the said plaintiff, in manner and form as is in said count alleged, did not pack and deliver free on board of vessels suitable and properly dunnaged for a voyage to Newark, six thousand one hundred and fifty-four and fourteen hundred and eighty two-thousandths tons, of two thousand pounds to the ton, of good mercantile ice of not less than twelve inches in thickness, in accordance with the promise covenant and undertaking of the plaintiff, with this defendant referred to in said count of said declaration or any portion thereof; and that the plaintiff was not, in manner and form as is in said count alleged, ready or willing and did not tender or offer to deliver at the places in said agreement designated, free on board of a vessel suitably and properly dunnaged for a voyage to Newark, five thousand and ninety-five and five hundred and twenty-two thousand tons of ice stored, and being in the ice houses in the parish of Rothesay, referred to in said count of said declaration, or any portion thereof; and that the said plaintiff was not, in manner and form as is in said count alleged, ready or willing, and did not tender or offer to deliver to this defendant three thousand seven hundred and fifty tons, of two thousand pounds to the ton, of good mercantile ice of not less than twelve inches in thickness purchased by the plaintiff, or any portion thereof; and that the plaintiff did not, in manner and form as is therein alleged, tender or offer to indemnify this defendant

for any additional expense it might be put to by reason of the said purchase of said three thousand seven hundred and fifty tons of ice; and that the said defendant did not, in manner and form as is in said count alleged, notify the said plaintiff that it would not in its part perform the covenants and agreements by it to be performed under the agreement in writing referred to in said count; and of this the defendant puts itself upon the country, &c.

And this defendant, for a further plea to said first count of the said declaration, by like leave of the court first had and obtained, says that the said plaintiff ought not to have or maintain its aforesaid action thereof against it, because he says that the said plaintiff during the said months of June, July, August and September delivered to the defendant only six thousand one hundred and fifty-five tons of ice, all of which was paid for by the said defendant to the said plaintiff before the commencement of this suit, and that as to the balance of the said fifteen thousand tons, viz., eight thousand eight hundred and fifty-five tons, the said plaintiff did not, in manner and form as is in said count in that behalf alleged, or at the times and in the manner required by the said agreement referred to in said account, tender or offer to deliver the same, or any portion thereof, and of this the defendant puts itself upon the country, &c.

And the said defendant, for plea to said second count to the said declaration, by leave of the court for that purpose first had and obtained, according to the form of the statute in such case made and provided, says that the said indenture therein referred to as made on or about February thirtieth, eighteen hundred and ninety, and of which a copy is alleged to be annexed to said declaration as "Exhibit 1," is not its deed, and of this it puts itself upon the country, &c.

And this defendant, for a further plea to said second count of the said declaration, by like leave of the court first had and obtained, says that the said indenture therein referred to as made on or about April seventh, eighteen hundred and ninety, and of which a copy is alleged to be attached to said declaration as "Exhibit 2," is not its deed, and of this it puts itself upon the country, &c.

And this defendant, for a further plea to the said second count of the said declaration, by like leave of the court first had and obtained, says that the said plaintiff ought not to have or maintain his aforesaid action thereof against it, because it says that the said plaintiff was not in manner and form as is in said count alleged, ready and willing, and did not offer to deliver to the said defendant, or request it to accept the said chattels in the said count mentioned or any portion thereof; and that the said plaintiff did not, in manner and form as is therein alleged, deliver to the defendant eleven thousand two hundred and fifty tons of ice, of two thousand pounds to the ton, of good mercantile ice of not less than twelve inches in thickness, or any portion thereof, and that the defendant did not, in manner and form as is in said count alleged, accept the same

in part performance of the said contract referred to in said count; and that the said plaintiff did not, in manner and form as is in said count alleged, pack or deliver six thousand one hundred and fifty-four tons of good mercantile ice, or any portion thereof, in accordance with the said promise and undertaking of the plaintiff; and that the said plaintiff, in manner and form as is in said count alleged, was not ready or willing and did not tender or offer to deliver at the places in said agreement specified, free on board of vessels suitably and properly dunnaged for a voyage to Newark, five thousand and ninety-five and five hundred and twenty two-thousandth tons of ice, or any portion thereof; and that the said plaintiff was not, in manner and form as is in said count alleged, ready or willing, and did not tender or offer to deliver to the defendant three thousand seven hundred and fifty tons, of two thousand pounds to the ton, of good mercantile ice of not less than twelve inches in thickness, purchased by the plaintiff, or any portion thereof; and that the said plaintiff did not, in manner and form as is in said count alleged, tender or offer to indemnify the defendant for any additional expense it might be put to by reason of the said purchase; and that the plaintiff did not, in manner and form as is in said count alleged, request the defendant to accept the same, and of this the defendant puts itself upon the country, &c.

And this defendant, for a further plea to the said second count of the said declaration, by like leave of the court first had and obtained, says that the said plaintiff ought not to have or maintain his aforesaid action thereof against it, because he says that the said plaintiff during the said months of June, July, August and September delivered to the defendant only six thousand one hundred and fifty-five tons of ice, all of which was paid for by the said defendant to the said plaintiff before the commencement of this suit, and that as to the balance of the said fifteen thousand tons, viz., eight thousand eight hundred and fifty-five tons, the said plaintiff did not, in manner and form as is in said count in that behalf alleged, or at the times and in the manner required by the said agreement referred to in said account, tender or offer to deliver the same, or any portion thereof, and of this the defendant puts itself upon the country, &c.

And the said defendant, for plea to said third count to the said declaration, by leave of the court for that purpose first had and obtained, according to the form of the statute in such case made and provided, says that the said indenture therein referred to as made on or about February thirteenth, eighteen hundred and ninety, and of which a copy alleged to be annexed to said declaration as "Exhibit 1," is not its deed, and of this it puts itself upon the country, &c.

And this defendant, for a further plea to said third count of the said declaration, by like leave of the court first had and obtained, says that the said indenture therein referred to as made on or about April seventeenth, eighteen hundred and ninety, and of which a copy is alleged

to be attached to said declaration as "Exhibit 2," is not its deed, and of which it puts itself upon the country, &c.

And the said defendant, for a further plea to said third count of the said declaration, by like leave of the court for that purpose first had and obtained, says that the said plaintiff ought not to have or maintain his aforesaid action thereof against it, because it says the said plaintiff did not, in manner and form as is in said count alleged, convey to the defendant eleven thousand two hundred and fifty tons of ice as alleged in said count, or any portion thereof; and that the said plaintiff did not, in manner and form as is in said count alleged, pack and deliver six thousand one hundred and fifty-four and fourteen hundred and eighty two-thousandths tons, of two thousand pounds to the ton, of good mercantile ice, in accordance with the said promise and undertaking of the plaintiff as alleged in said count; and that the said plaintiff, in manner and form as is in said count alleged, was not ready or willing and did not offer to pack and deliver free on board of vessels suitably and properly dunnaged for a voyage to Newark, and at the places designated in the said agreements mentioned in said count, three thousand and ninety-five and five hundred and twenty two-thousandths tons of ice cut and stored, as alleged in said count, or any portion thereof; and that the said plaintiff, in manner and form as is in said count alleged, was not ready or willing and did not offer to make up the quantity of fifteen thousand tons to be delivered under the said agreement referred to in said count, or any portion thereof, or to indemnify the defendant for any additional expense it might be put to; and that the said plaintiff did not, in manner and form as is in said count alleged, request the defendant to accept the same or any portion thereof; and that the said defendant did not, in manner and form as is in said count alleged, notify the plaintiff that it would not accept any more ice under said instruments in writing referred to in said count, and of this it puts itself upon the country, &c.

And this defendant, for a further plea to said third count of the said declaration, by like leave of the court first had and obtained, says that the said plaintiff ought not to have or maintain his aforesaid action thereof against it, because he says that the said plaintiff during the said months of June, July, August and September delivered to the defendant only six thousand one hundred and fifty five tons of ice, all of which was paid for by the said defendant to the said plaintiff before the commencement of this suit, and that as to the balance of the said fifteen thousand tons, viz., eight thousand eight hundred and fifty-five tons, the said plaintiff did not, in manner and form as is in said count in that behalf alleged, or at the times and in the manner required by the said agreement referred to in said account, tender or offer to deliver the same, or any portion thereof, and of this the defendant puts itself upon the country, &c.

JOHN R. EMERY,
Attorney for Defendant.

United States of America, District of New Jersey, *ss.*—William H. Lyon, being duly sworn according to law, on his oath says, that he is the President of the Newark City Ice Company, the defendant named in the above suit; that the above pleas are not intended for the purpose of delay, and that he verily believes the defendant has a just and legal defence to said action on the merits of the case.

WILLIAM H. LYON.

Sworn and subscribed this fourteenth day of November, 1891, before me.

WM. H. EMERSON,
Notary Public of N. J.

[L. S.]

COMMON LAW FORM XVI.—ANSWER UNDER CODE PRACTICE.

[262 Fed. 680.]

District Court of the United States for the Southern District of New York.

ANNIE S. SIMONS,
Plaintiff,

against

WILLIAM NELSON CROMWELL, described in the summons as Thomas Nelson Cromwell, and LOUIS H. CRAMER, as executors under the Last Will and Testament of Frank Leslie, deceased.

Clerk's Index
No. L 17-20.

The defendant Louis H. Cramer, Executor, by Edgar T. Brackett, his attorney, makes his answer to the complaint herein as follows:

1st. Said defendant admits that the allegations contained in the paragraphs of said amended complaint numbered II, III, IV, and XIII, and that the estate of the testatrix at the time of her death was the value of approximately $1,800,000, and that the testatrix bequeathed to the plaintiff only the sum of $10,000.

2nd. Said defendant denies all of the allegations in the paragraphs of said amended complaint numbered XIV, XVII, XIX and XXII.

3rd. Said defendant denies that he has any knowledge or information sufficient to form a belief as to any of the allegations in said amended complaint contained, except as to those hereinbefore specifically admitted or controverted.

FOR A SECOND, SEPARATE AND DISTINCT DEFENSE TO THE FIRST CAUSE OF ACTION:

4th. The said defendant avers that, excluding from the computation of the time which has elapsed since the accruing of the first alleged cause of action set forth in the amended complaint herein, the period of eighteen months which have elapsed since the death of the said Frank Leslie, the

said alleged cause of action did not accrue within six years next before the commencement of this action.

FOR A THIRD, SEPARATE AND DISTINCT DEFENSE TO THE FIRST CAUSE OF ACTION:

5th. Said defendant avers that the alleged agreement, by its terms, was not to be performed within one year from the making thereof. That no such agreement, or any note or memorandum thereof, was ever made in writing, and subscribed by the said Frank Leslie, whose estate is sought to be charged therewith, or by her lawful agent.

FOR A SECOND, SEPARATE AND PARTIAL DEFENSE TO THE SECOND CAUSE OF ACTION:

6th. Said defendant alleges that as to all services alleged in said second cause of action to have been rendered prior to November 16, 1909, the said cause of action therefor did not accrue within the six years just prior to the commencement of said action, after excluding from the computation of time the period of eighteen months which elapsed immediately after the death of the said Frank Leslie.

FOR A SECOND, SEPARATE AND DISTINCT DEFENSE TO THE THIRD CAUSE OF ACTION:

7th. The said defendant avers that excluding from the computation of the time which has elapsed since the accruing of the second alleged cause of action set forth in the complaint herein, a period of eighteen months which have elapsed since the death of the said Frank Leslie, the said alleged cause of action did not accrue within six years next before the commencement of this action.

FOR A THIRD, SEPARATE AND DISTINCT DEFENSE TO THE THIRD CAUSE OF ACTION:

8th. Said defendant avers that the alleged agreement by its terms was not to be performed within one year from the making thereof; that no such agreement or any note or memorandum thereof, was ever made in writing and subscribed by the said Frank Leslie, whose estate is sought to be charged therewith, or by her lawful agent.

FOR A FURTHER AND SEPARATE DEFENSE TO THE FIRST, SECOND AND THIRD ALLEGED CAUSES OF ACTION:

9th. Said defendant alleges that said Frank Leslie died in the City, County and State of New York, on or about the 18th day of September, 1914, being at the time a resident therein, and leaving a last will and testament; that, thereafter, and on or about December 7, 1914, said will was duly admitted to probate by the Surrogates' Court of the County of New York, State of New York, which had jurisdiction in the premises and letters testamentary thereunder were, thereupon, duly issued to the defendants, who thereupon entered upon their duties as such executors and still continue to act as such.

10th. That on or about the 15th day of December, 1915, a proceeding was duly instituted in said Surrogates' Court, which is a court of limited jurisdiction, and has jurisdiction to hear and determine and finally adjudicate all claims of creditors against the estate of a decedent whose will has

been admitted to probate in said court, and said proceeding was entitled "In the Matter of the Judicial Settlement of the Account of Proceedings of Louis H. Cramer and William Nelson Cromwell, as Executors of the Last Will and Testament of Frank Leslie, deceased." That said proceeding was brought, among other things, to fix and determine the interest and rights in the said estate of the legatees and creditors of the said decedent, including the plaintiff herein, and in said proceedings said court had jurisdiction to hear and finally adjudicate the claim of the plaintiff against said estate.

11th. That the plaintiff herein was a party to said accounting proceeding, and was duly cited to appear therein and service of the citation therein was duly made upon the plaintiff by publication, pursuant to an order of said Surrogates' Court, filed and entered in the office of the Clerk of said Surrogates' Court on December 17th, 1915; that said service of said citation was duly made in pursuance of the statutes of the State of New York, and such Surrogates' Court thereby obtained jurisdiction to hear and determine any and all claims of the plaintiff against said estate.

12th. That the plaintiff failed to appear in such accounting proceeding, and, thereafter, such steps were had therein that a decree as duly entered therein and filed in the office of the Clerk of the Surrogates' Court of the County of New York, on the 24th day of July, 1917, which adjudged that the balance of the moneys held by the said executors be available to the payment of the legacies bequeathed in the said will of decedent, so far as the parties to said proceeding were concerned, including the plaintiff herein. That said decree has not been appealed from and the time to appeal therefrom has expired, and the same is final, and is in full force and effect, and that, upon information and belief, by said decree, the plaintiff is finally barred and estopped from maintaining this action and from obtaining, or enforcing any judgment thereon.

WHEREFORE, the defendant Cramer prays that the amended complaint be dismissed with costs.

EDGAR T. BRACKETT,
Attorney for Defendant Cramer,
Town Hall,
Saratoga Springs, N. Y.

STATE OF NEW YORK,
County of New York. } ss.:

Louis H. Cramer, being duly sworn, says that he is one of the defendants in the above entitled action; that he has read the foregoing amended answer and knows the contents thereof, and that the same is true to his own knowledge, except as to the matters therein stated to be alleged upon information and belief, and as to those matters he believes it to be true.

LOUIS H. CRAMER.

Subscribed and sworn to before me
this 6th day of August, 1918.
AGNES C. MONAHAN, Notary Public.

COMMON LAW FORM XVII.—AFFIDAVIT OF DEFENSE UNDER PENNSYLVANIA PRACTICE ACT OF 1915.

STATE OF PENNSYLVANIA, }
County of Philadelphia. } ss.

G. Henry Smith, being duly sworn according to law, deposes and says that he is the defendant in the above entitled cause and that he has a just, true and complete defense to the whole of the plaintiffs' claim of the following nature and character, to wit:

1. Admitted.

2. I admit that I did, together with others, make, execute and deliver a promissory note in the sum of $67,500.00, an approximately correct copy of which is annexed to the statement of claim, on or about the 15th day of April, 1919. I deny that the said note was delivered to the plaintiffs herein for value and I aver that the said note was made and executed under the circumstances set forth in paragraph 11 hereof.

3. I admit that payments on the dates and in the amounts set forth in the third paragraph of the statement of claim were made on behalf of myself and the other makers of the aforesaid promissory note to the plaintiffs herein. I deny that the said payments were made on account of the principal of the said note and aver that the said payments were made in accordance with the facts set forth in paragraph 12 hereof.

4. I admit that payments on the dates and in the amounts set forth in the fourth paragraph of the statement of claim were made on behalf of myself and the other makers of the aforesaid promissory note to the plaintiffs herein. I deny that the said payments were made on account of the interest of the said note and aver that the said payments were made in accordance with the facts set forth in paragraph 12 hereof.

5. I admit that no payments have been made on account of the principal or of the interest of the said note other than in the manner and form set forth in paragraph 12 hereof.

6. I deny that any demand has been made by the plaintiffs for the payment of the aforesaid note other than the suit herein. I admit that I have neglected and refused and aver that I still refuse to pay the aforesaid note or any part thereof.

7. Denied.

8. I deny that I am indebted to the plaintiff for any sum whatsoever for any attorney's fees or costs, whether reasonable or otherwise.

9. I deny that ten per cent of the sum of $52,000 would be a reasonable attorney fee for maintaining a suit and pray that if material the plaintiffs prove what a reasonable attorney's fee would be.

10. I admit that the plaintiffs claim to recover from me the sum of $57,266.64. I deny that they have any claim whatsoever against me.

11. For further defense to the matters set forth in the statement of claim I aver that on or about the 15th day of April, 1919, I, together with Melville [Letgil], Peter [Labe], Ralph [Camel] and [C. E. Nesson],

entered into a contract to purchase from Charles [Laner] and Ed. P. [Docherty], the plaintiffs herein, a certain mining lease and supplemental agreement for the sum of $67,500, the said mining lease to be that made by the Nevada Volcanic Mines Company to Charles [Laner] and Ed. P. [Docherty] for a certain portion of a certain lode mining claim known as the Volcanic Lode Mining Claim, dated on or about the 15th day of February, 1919, which said lease had been supplemented by an agreement between the parties to the lease, which was subsequently reduced to writing and dated April 17th, 1919, and which said lease provided that the same should not be assigned without the consent of the lessors. I aver that the said promissory note was delivered to the Bank of Pioche, Inc., a certain corporation organized under the laws of the State of Nevada, and having its principal office and doing business at Pioche, in Lincoln County, Nevada, for the sole and express purpose of delivering the same to the plaintiffs herein when, and only when, the said [Laner] and the said [Docherty], or either of them, should deliver to the said Bank of Pioche, for the defendant and the said Melville [Letgil], Peter [Labe], Ralph [Camel] and C. E. [Nesson], and the said note was not to be otherwise effectual, to wit: the aforesaid mining lease and supplemental agreement, with the assignment thereof to the defendant and the said Melville [Letgil], Peter [Labe], Ralph [Camel] and C. E. [Nesson], and the lessors consent to the said assignment in writing. I aver that up to the time of the maturity of the said note neither the said lease, nor the supplemental agreement, nor the assignment of the said lease nor of the supplemental agreement, nor consent of the lessors to the said assignment had been obtained by the said [Laner] or the said [Docherty], nor had they been delivered to the said Bank of Pioche but the said transaction, as the plaintiffs well knew, had never been consummated and I aver that the consent to the assignment of the said lease and the supplemental agreement has never been signed by the aforesaid Nevada Volcanic Mines Company nor has it been delivered to the Bank of Pioche aforesaid, nor to this defendant, nor to any of the above mentioned makers of the aforesaid promissory note, to wit: Melville [Letgil], Peter [Labe], Ralph [Camel] and C. E. [Nesson].

12. I aver that in accordance with the verbal agreement made and entered into between the plaintiffs and myself, and the above mentioned Melville [Letgil], Peter [Labe], Ralph [Camel] and C. E. [Nesson], we took possession of the said mine and operated the same for the account of the plaintiffs pending the consummation of the transaction, whereby we were to purchase the said lease and supplement agreement, and that the amounts mentioned in the third and fourth paragraphs as being paid by me to the plaintiffs were the amounts paid by me and the other parties aforesaid, from the operation of the said mine which we paid over to the lessees thereof and that the said payments were in no sense made on account of the principal of the said note.

13. I further aver that during the month of August, 1919, and subsequent to the 7th day of August, I, and the above named Melville [Letgil],

Peter [Labe], Ralph [Camel] and C. E. [Nesson] surrendered the property mentioned in the said lease and supplemental agreement to the plaintiffs herein and cancelled the agreement for the purchase of the said lease and they, to wit, the plaintiffs, accepted the delivery of the said property and took possession thereof and have since operated it.

14. I am advised by counsel, and, therefore, aver that by reason of the facts set forth in the 11th, 12th and 13th paragraphs of this affidavit of defense I have received no consideration whatsoever for the said note; that if the same was delivered to the plaintiffs by the said Bank of Pioche it was delivered in breach of contract; that the plaintiffs took no title to the said note and that I have given no consideration for the said note.

15. I aver that the plaintiffs and the said Bank of Pioche, in willful and deliberate disregard of the trust reposed in the said Bank of Pioche and in violation of its express parole contract with me, by fraud, coven and collusion, have conspired together and seek by the above entitled cause to collect the said note, well knowing that there was no consideration therefor.

I, therefore, owe the plaintiffs nothing.

All of which facts, as far as they are stated upon this deponent's own knowledge are true and so far as they are stated upon information obtained from others, I believe and aver and expect upon the trial of this cause, to be able to prove.

G. HENRY SMITH.

Sworn to and subscribed before me this 9th day of November, 1920.

WM. S. FENERTY,
Notary Public.

[SEAL.]

Com. ex. Jan. 7th, 1923.

[Endorsed by defendant's attorney, Graham C. Woodward.]

COMMON LAW FORM XVIII.—SIMILITER.

[76 Fed. 427.]

And the said plaintiff, as to the said pleas of the said defendant by him, first, secondly, thirdly, fourthly, fifthly, sixthly, seventhly, eighthly, ninthly, tenthly, eleventhly, twelfthly, and thirteenthly above pleaded, and whereof he has put himself upon the country, does the like.

ROGER FOSTER,
Plaintiff's Attorney.

COMMON LAW FORM XIX.—REPLY FOR THE PLAINTIFF UNDER CODE PRACTICE.

[Judgment upon verdict for plaintiff approved by C. C. A. Second Circuit. The author was counsel.]

United States District Court, For Southern District of New York.

JOHN YUHASZ,
Plaintiff,
vs.
CARNEGIE STEEL COMPANY,
Defendant.

Plaintiff replying to the allegations contained in Paragraphs VIII and IX of defendant's answer herein, alleges:

I. He denies each and every allegation therein contained, except as hereinafter set forth.

FOR A SECOND DEFENSE.

I. Plaintiff alleges that the agreement so alleged in said Paragraphs VIII and IX to have been made and executed by him (if any there be) was procured by the defendant by means of false and fraudulent representations and statements on the part of defendant, its agents and servants, that the same was a receipt only for his wages during the time he was incapacitated and unable to work, and denies that defendant, its agents and servants, or any person whomsoever ever read, interpreted, explained, or stated and represented to him that the said alleged release was in full settlement and satisfaction of all claims and demands against said defendant by reason of the injuries received by him while in defendant's employ, as aforesaid, and he further alleges that he is unable to read and write the English language, and had no knowledge as to the contents of said alleged release, other than the statements and representations so made to him by defendant, its agents and servants that the same was for the payment of wages during the time that he had been incapacitated and unable to work, as aforesaid, and plaintiff relying upon the same, and not otherwise signed the said alleged release.

II. Plaintiff further alleges that since the discovery of the said fraud so practiced upon him by defendant, its agents and servants, as aforesaid, and before the making and serving of this reply, and on the 20th day of December, 1913, he duly caused the said sum of $66.70 so given to him by defendant to be tendered back with interest to defendant, but it refused to receive the same.

III. That this plaintiff has ever since remained and still is ready and willing to return the said sum of $66.70 with interest to defendant, but the defendant has hitherto refused to receive the same.

IV. That this plaintiff now brings the said sum of $66.70 with interest into Court, ready to be paid to defendant, if it will accept the same.

Wherefore, plaintiff demands judgment that the said alleged release be

declared and adjudged invalid and of no effect, and for judgment as prayed for in the amended complaint herein, with costs.

L. B. TROTTER,
Plaintiff's Attorney.
309 Broadway,
New York, N. Y.

STATE OF NEW YORK,
County of New York,
Borough of Manhattan } ss.:

John Yuhasz, being duly sworn, deposes and says that he is the plaintiff in the within entitled action; that he has heard read the foregoing reply and knows the contents thereof; that the same is true to his own knowledge, except as to the matters therein stated to be alleged on information and belief, and that as to those matters he believes it to be true.

JOHN YUHASZ.

Sworn to before me this 22nd
day of December, 1913.
Everett A. Bennett,
Notary Public, No. 215,
New York County.

COMMON LAW FORM XX.—BILL OF PARTICULARS.

[262 Fed. 680.]

District Court of the United States for the Southern District of New York.

ANNIE S. SIMONS,
Plaintiff,
against
THOMAS NELSON CROMWELL and LOUIS H. CRAMER, as executors under the Last Will and Testament of Frank Leslie, deceased.
Defendants.

The plaintiff above named, in answer to the requests of the defendants presents this her Bill of Particulars of the matters set forth in the complaint herein.

AS TO PARAGRAPH SIXTH.

The plaintiff will claim and plaintiff claims that she rendered the services alleged in said paragraph.

1. In the year 1899 between the first day of November and the twenty-fourth day of December. During the years 1900 and 1901 the plaintiff saw Mrs. Leslie at different times the exact date of which she is now unable to specify but she rendered no services for Mrs. Leslie which she now recol-

lects during the said years 1900 and 1901 and she makes no claim that she rendered such services during said two years.

During the year 1902 between the first day of February, 1902, and the 20th day of May, 1902.

During the year 1903 between the first day of February and the 30th day of April, of said year.

During the year 1904 between the first day of February and the 30th day of April of said year.

Subsequently between the first day of August and the 30th day of September of said year.

During the year 1905 between the first day of February and the 30th day of April of said year, and also between the first day of August and the 30th day of September of said year.

During the year 1906 between the first day of August and the 30th day of September of said year.

During the years of 1907 and 1908 between the first day of August and the 30th day of September of each of said years.

During the year 1909 between the first day of August and the 30th day of September of said year.

During the years 1910 and 1913 between the first day of August and the 30th day of September in each of said years.

Because of the lapse of time the plaintiff is unable to specify the dates with more accuracy than she has done in this bill of particulars and in the complaint herein.

2. The places where the plaintiff will claim such services were rendered were: The City of Charleston, South Carolina, Sherry's Hotel in the Borough of Manhattan, City and County of New York, the Hotel Chelsea in the Borough of Manhattan, City and County of New York, the Hotel Sherman Square, Borough of Manhattan, City and County of New York, at Hampton Park Terrace in Cranford, New Jersey, and on railroad trains between the City of New York and the City of Charleston, South Carolina.

3. The dates in 1899 on which plaintiff will claim that the request alleged in paragraph sixth of the complaint was made were in or about the first ten days of November, 1899, and subsequently during the times previously specified at the particular times when the services therein specified in the complaint were made. This plaintiff is unable to state the dates of said requests with more accuracy than she has done herein and in her complaint.

4. The request alleged in paragraph sixth of said complaint was first made in writing in a letter written by Mrs. Frank Leslie to the plaintiff at some time during the first ten days of November, 1899. The said letter was destroyed by plaintiff at or shortly after the time when she received the same and before she performed any of said services. The other requests were oral and were made at or shortly before the said services were rendered.

5. The places where plaintiff will claim said request was made was as regards the written request, in the Borough of Manhattan, City of New York, from which said letter was dated. As regards said oral requests, in the Borough of Manhattan, City of New York.

AS TO PARAGRAPH SEVENTH.

1. The dates in the year 1902 between which plaintiff will claim and does claim that the services mentioned in said complaint were rendered by her are between the first day of February, 1902, and the 31st day of May, 1902.

2. The places where the plaintiff will claim and does claim that said services were rendered were the Chelsea Hotel in the City of New York, The City of Charleston, South Carolina, and on a railroad train between New York City and South Carolina.

3. The date on which the plaintiff will claim and does claim that the first request alleged in said paragraph was made was in or about the first fifteen days of the month of February, 1902. This plaintiff is unable to specify the date more correctly. The subsequent requests were made at or shortly before the different services specified and referred to in said paragraph were rendered. This plaintiff cannot specify the said dates more accurately than she has done in this bill of particulars and in her complaint herein.

4. The first request alleged in said paragraph was in writing namely, a telegram sent by or on behalf of Mrs. Leslie to this plaintiff and received by this plaintiff at some time during the first half of February, 1902. The said telegram was destroyed by this plaintiff immediately after the same was received. She is unable to state now the date when she received the same. She is unable to state now the contents thereof. She is unable to state now by whom the same was signed. The subsequent requests were oral.

5. The place where the plaintiff will claim and does claim that said requests were made were regards the first request in the Borough of Manhattan, City, County and State of New York, whence said telegram was sent. The places where said oral requests were made were at the places where said services were performed as is hereinabove specified.

AS TO PARAGRAPH EIGHTH.

1. The dates in the years 1903, 1904, 1905, 1906, 1907, 1908, 1909 and 1913 between which the plaintiff will claim and does claim that the services alleged in said paragraph were performed were as follows: Between the first day of February and the 30th day of April in the years 1903, 1904, and 1905 and each of them. In the years 1904, 1905, 1906, 1907, 1908, 1909 and 1913 between the first day of August and the 30th day of September in each of said years. During the two years the date of which the plaintiff does not now exactly recollect but which according to her best recollection were the years 1906 and 1907, between the first day of February and the 30th day of April in each of said years.

2. The places where the plaintiff will claim and does claim that the said services were rendered were the Chelsea Hotel and the Sherman Square Hotel in the City of New York, The City of Charleston, South Carolina, and on a railroad train between New York City and South Carolina,

and at Hampton Park Terrace, at Cranford, New Jersey, and also in vehicles in the streets and Central Park of the City of New York.

3. The dates on which the plaintiff will claim and does claim that the request and requests alleged in said paragraph was and were made during the winters of the years 1903 and 1904 in or about the first fifteen days of the month of February of each of said years. This plaintiff is unable to specify the date more correctly. The subsequent requests were made at or shortly before the different services specified and referred to in said paragraph were rendered. This plaintiff cannot specify the said dates more accurately than she has done in this bill of particulars and in her complaint herein.

4. The places where the plaintiff will claim and does claim that the said requests were made were in the Borough of Manhattan, City and County of New York, in the City of Charleston, South Carolina, and at Hampton Park Terrace at Cranford, New Jersey. The said requests were made partly in writing and partly orally. Such of said requests that were made in writing were contained in letters sent by Mrs. Frank Leslie to this plaintiff. The said letters have been destroyed and were destroyed during the life of Mrs. Leslie. This plaintiff is unable to recollect the contents of the same and this plaintiff is unable to recollect the dates of any of the same.

AS TO PARAGRAPH TENTH.

The date or dates on which the plaintiff will claim the promise or promises alleged in said paragraph were made.

1. The dates on which the plaintiff will claim and does claim that the promise or promises alleged in said paragraph were made were some time during the month of February, 1902, the exact date of which plaintiff is unable to specify through lack of recollection thereof. Subsequently in or about the month of March during the year 1903 and at other times which this plaintiff is now unable through lack of recollection to specify.

2. The places where the plaintiff will claim said promises were made were at the house of Mrs. W. W. Simons on Franklin Street, Charleston, South Carolina, and also in Mrs. Leslie's carriage in Central Park, in the City of New York, and in other places which the plaintiff is now, through lack of recollection unable to specify.

3. Said promises were all oral. None of them was in writing.

Because of the lapse of years the plaintiff's recollection as regards the exact dates is now uncertain and she asks leave in case she is unable to refresh her recollection at or before the trial of this action to change some of the dates hereinabove specified.

The foregoing bill of particulars is as full and accurate an answer to each of the demands of the defendants as this plaintiff is able to make at the present time.

ANNIE S. SIMONS.

STATE OF NEW YORK,
County of New York,
Southern District of New York. } ss.:

ANNIE S. SIMONS, being duly sworn, deposes and says: I am the plaintiff above named. The foregoing bill of particulars is true to my own knowledge except as to the matters therein stated to be alleged upon information and belief and as to those matters I believe the same to be true.
[SEAL.]
Sworn to before me this 1st day of October, 1917.
SARA A. THORNTON.

ANNIE S. SIMONS.

COMMON LAW FORM XXI.—NOTICE OF MOTION FOR LEAVE TO REFRAME COMMON LAW PLEADING INTO BILL IN EQUITY.

[144 Fed. 679.]

[District] Court of the United States, Southern District of New York.

CHRISTIAN DANCEL and MARY DANCEL, as Administrators of the Goods, Chattels and Credits of Christian Dancel, Deceased.
against
GOODYEAR SHOE MACHINERY COMPANY OF PORTLAND, MAINE.

Take notice that upon the hereto annexed petition and papers and upon the order of the United States Circuit Court of Appeals and the mandate thereof, on file with the Clerk of this Court, and upon all proceedings herein had, I shall move this Court on behalf of the plaintiffs and petitioners herein, at a term thereof, to be held in the rooms of this Court, in the Post Office Building in the Borough of Manhattan, City of New York, on the 20th day of February, 1903, at the opening of the Court on that day or as soon thereafter as counsel can be heard, for an order permitting the petitioners and plaintiffs herein to reframe their complaint into a bill in equity, and for such other order or relief in the premises as may be just and equitable in the premises.

Dated New York, Feb. 16, 1903.

J. PHILIP BERG,
Attorney for Petitioner and Plaintiffs,
No. 140 Nassau Street, Manhattan Borough, New York City.

To Edwards H. Childs, Esq., Attorney for Defendant.

COMMON LAW FORM XXII.—PETITION FOR LEAVE TO REFRAME COMMON LAW PLEADING INTO BILL IN EQUITY.

[144 Fed. 679.]

[District] Court of the United States for the Southern District of New York.

CHRISTIAN DANCEL and MARY DANCEL, as Administrators of the Goods, Chattels and Credits of Christian Dancel, Deceased,
against
GOODYEAR SHOE MACHINERY COMPANY OF PORTLAND, MAINE.

To *the Honorable, the Judges of the [District] Court of the United States for the Southern District of New York.*

The petition of Christian Dancel and Mary Dancel, administrators of the goods, chattels and credits of Christian Dancel, deceased, by J. Philip Berg, their attorney, respectfully shows:

I. Heretofore and on or about October 15th, 1900, an action above entitled, was duly commenced by the above named plaintiffs against the above named defendant in the Supreme Court of the County of New York by the issue and service of a summons and notice in pursuance of Section 419 and the other provisions of the New York Code of Civil Procedure in the City and County of New York, upon William D. Van Roden who had been duly designated by said defendant as a person in the State of New York upon whom process addressed to said defendant might be served and who had duly consented to act in that capacity. Said defendant is and then was a foreign corporation organized and existing under the laws of the State of Maine. No appearance was made in said action on behalf of said defendant within twenty days after service of said summons and thereafter on or about November 8th, 1900, a judgment was duly entered against said defendant directing that the plaintiffs above named recover of said defendant the sum of $10,233.80. Thereafter defendant moved to open its said default and to set aside judgment and on or about December 5th, 1900, an order was duly entered by said Court in said action directing that said default be opened and that said judgment be vacated upon condition that defendant make and file with the clerk of said Court its bond with the American Surety Company of New York as surety conditioned for the payment of any judgment the plaintiffs may recover against the defendant in said action not exceeding the sum of $12,000, including interest and costs. The said defendant thereupon appeared in said action by Edwards H. Childs as its attorney who still appears for it herein, and on or about December 5th, 1900, filed in said clerk's office a bond with the said Surety as directed in said order. Thereupon on or about December 10, 1900, said defendant filed its petition and bond for removal and procured a removal of said action into this

Court. Thereafter these plaintiffs served an amended complaint upon said defendant which prayed judgment for the amount due under the agreement for the payment of the sum of $416.66⅔ to plaintiffs' intestate, every month during the life of certain letters patent under a certain agreement made between the plaintiffs' intestate and the Goodyear Shoe Machinery Company of Hartford, Connecticut, which agreement, it was alleged in said complaint, had been assumed by said defendant. Said complaint did not specify whether relief was sought in law or equity. The defendant thereupon served a demurrer to said amended complaint with demurrer was in the form of a common law demurrer and did not comply with the equity rules and practice regulating the demurrers in equity. Said demurrer named but one ground, namely: "That the said amended complaint does not state 'facts sufficient to constitute a cause of action.'" Said defendant thereupon on or about January 29th, 1901, noticed said demurrer for argument as a common law demurrer upon the common law side of this Court.

On or about January 29, 1901, said defendant filed in the Clerk's office of this Court a note of issue describing the issues raised by the demurrer in said suit as "issues at law" and thereafter on or about April 20, 1901, said demurrer was argued orally before the Hon. Hoyt H. Wheeler, a District Judge of the United States, duly authorized to preside as a Judge of this Court, and printed briefs were then submitted to him. Upon said argument neither orally nor in its printed briefs did the defendant suggest the objection that the plaintiffs could only have relief against the defendant in a Court of Equity; and it was assumed by the plaintiffs and the defendant and by the attorneys and counsel of both of them that if the plaintiffs were entitled to any relief, such relief could only be obtained in an action at law. Thereupon on or about May 13, 1901, an order was duly filed and made herein by Judge Wheeler overruling said demurrer and on or about May 16, 1901, an interlocutory judgment was duly entered herein in accordance with said order overruling said demurrer with leave to defendant to answer. Subsequently on or about June 4, 1901, said defendant duly served and filed herein its answer to said amended complaint. Said answer neither mentioned or suggested that the plaintiffs' remedy was in equity and not at law. The issues raised by said answer were thereafter duly brought on for trial at a jury term of this Court on or about November 19, 1901. Both parties duly waived a jury and the case was tried with the consent of both parties before Judge Wheeler, who directed judgment for the plaintiffs upon the pleadings for the sum of $10,780.33 with costs. Upon said trial the defendant neither claimed nor suggested that the plaintiffs' remedy was in equity and not at law. Thereupon on or about December 2, 1901, a judgment was duly entered herein in favor of said plaintiffs against said defendant for the sum of $10,810.33. The said defendant thereupon sued out a writ of error to procure a review of said judgment by the United States Circuit Court of Appeals for the Second Circuit. At or about the time of its petition

for said writ of error, said defendant filed certain assignments of errors in the Clerk's office of this Court. In said assignment of errors said defendant neither claimed nor suggested that the plaintiffs' remedy against the defendant herein was in equity and not at law.

Thereafter the said writ of error came on for argument before said Circuit Court of Appeals. In its argument of and in support of said writ of error said defendant, which then was plaintiff in error, for the first time claimed and argued that these plaintiffs could have no remedy in a court of common law. The brief of said defendant then stated on pages 17 and 18: "It is but fair to the learned Judge before whom "the cause came in the Court below to state that this point was not argued "before him." On or about December, 1902, said Circuit Court of Appeals handed down an opinion written by Judge Wallace. In said opinion said Circuit Court of Appeals overruled all the defenses to this action made by the defendant in the Circuit Court, and held that the payments under the contract annexed to the complaint were due and must be paid by the defendant's company after the death of Christian Dancel; but said Court further held that the plaintiffs' remedy upon the facts of this case was in equity and not at law. Thereafter on or about December 30, 1902, an order was entered upon said writ of error by said Circuit Court of Appeals which directed, "That the judgment of said Circuit Court be "and it hereby is reversed with costs, taxed at the sum of $124.07 with- "out prejudice to an application by plaintiffs for leave to reframe the "complaint into a bill in equity."

Subsequently on or about January 26, 1903, said defendant moved to resettle said order by striking out the words: "That the judgment "of said Circuit Court be and it hereby is reversed with costs, taxed "at the sum of $124.07 without prejudice to an application by plain- "tiffs for leave to reframe the complaint into a bill in equity." But said motion was denied by said Circuit Court of Appeals. Subsequently a mandate was issued out of said Circuit Court of Appeals which on or about February 6, 1903, was duly filed in the Clerk's office of this Court. Said mandate directed: "That the judgment of said Circuit Court be "and it hereby is reversed with costs, taxed at the sum of $124.07, with- "out prejudice to an application by plaintiffs for leave to reframe the "complaint into a bill in equity. You, therefore, are hereby commanded "that further proceedings be had in said cause, in accordance with the "opinion of this Court as according to right and justice, and the laws "of the United States, ought to be had, the said writ notwithstanding."

II. In all its proceedings herein until said opinion of the Court of Appeals was handed down these plaintiffs were advised by their attorney, J. Philip Berg, that their remedy against the defendant was at common law and not at equity; and they believed that the opinion of the Supreme Court of the United States, speaking through Mr. Justice Gray in the case of the Union Mutual Life Ins. Co. against Hanford, 143 U. S. 187, established that position. That opinion said: "The question whether the

"remedy of the mortgagee against the grantee," who has brought the equity of redemption and covenanted with the mortgagor to pay the mortgage, "is at law and in his own right, or in equity and in the right "of the mortgagor, only is (as was adjudged in Willard *v.* Wood, above "cited, 135 U. S. 309), to be determined by the law of the place where "that suit is brought. By the law of Illinois, where the action was brought "as by the law of New York and of some other States, the mortgagee "may sue at law the grantee, who, by the terms of an absolute con- "veyance from the mortgagor, assumes the payment of the mortgage debt, "Dean *v.* Walker, 107 Illinois, 540, 545, 550; Thompson *v.* Dearborn, 107 "Illinois, 87, 92; Bay *v.* Williams, 112 Illinois, 91; Burr *v.* Beers, 24 "N. Y. 178; Thorp *v.* Keokuk Coal Co., 48 N. Y. 255."

Your petitioners by the failure of the said defendant and its attorney to make this objection in this Circuit Court were misled into the belief that the defendant herein was willing to have this suit continued, determined and tried as an action at common law and waived all objections to such procedure. Had the defendant made this objection in said Circuit Court, these plaintiffs would have continued this suit after its removal as a suit in equity.

III. Since the commencement of this action and on or about November 19, 1900, the defendant filed in the office of the Secretary of the State of New York a paper revoking its designation of the said Van Roden as a person upon whom process addressed to said defendant could be served. Defendant has ceased to transact business in the State of New York and there is no person in the State of New York, service of process upon whom, in a new suit, will bind said defendant. The defendant has transferred all its property in the State of New York; and these plaintiffs have searched diligently but have been unable to find any property of said defendant within the State of New York which it has not transferred. The plaintiffs are residents of the State of New York. If these plaintiffs are not allowed a repleader and permission to continue this suit on the equity side of this Court, they will be unable to begin a new suit at law and equity against said defendant in this State; and they will lose the benefit of the security of the bond for $12,000.00 given by defendant as aforesaid.

Wherefore your petitioners pray that an order be entered granting a repleader herein permitting your petitioners to file in the Clerk's office of this Court as continuation of this suit, a bill in equity to enforce said contract and directing that the said defendant file an answer plea or demurrer thereto within twenty days and that in default thereof a decree taking said bill as confessed may be entered against said defendant, and that your petitioners may have such other and further relief as may be just and thus your petitioners will ever pray.

CHRISTIAN DANCEL,
MARY DANCEL.

J. PHILIP BERG, ESQ.,
Plaintiffs and Petitioners' Attorney.

STATE OF NEW YORK, *County of New York, ss:*

Christian Dancel and Mary Dancel, being severally duly sworn, depose and say: The foregoing petition is true to our and each of our own knowledge except as to the matters therein stated to be alleged upon information and belief and as to those matters we and each of us believe it to be true.

CHRISTIAN DANCEL,
MARY DANCEL.

Sworn to before me this 16th day of February, 1903.

H. D. WILSON,
[SEAL] Notary Public (No. 16), Kings County, N. Y.

Certificate filed in New York County.

COMMON LAW FORM XXIII.—ORDER GRANTING LEAVE TO REFRAME COMMON LAW PLEADING INTO BILL IN EQUITY.

[144 Fed. 679.]

At a stated Term of the [District] Court of the United States for the Southern District of New York held at the Post Office Building in the City of New York and County of New York on the 21st day of February, 1903.

Present: Hon. E. Henry Lacombe, Circuit Judge.

CHRISTIAN DANCEL and MARY DANCEL, as Administrators of the Goods, Chattels and Credits of Christian Dancel, Deceased,
Plaintiffs,
against
GOODYEAR SHOE MACHINERY COMPANY OF PORTLAND, MAINE,
Defendant.

On reading and filing the petition of Christian Dancel and Mary Dancel, sworn to February 16, 1903, and the notice of motion by said petitioners for the relief prayed in said petition and upon the mandate of the United States Circuit Court of Appeals herein, the order of this Court upon this mandate, and upon all the papers and proceedings herein; and upon the affidavit of Edwards H. Childs, Esq., sworn to February —, 1903, in opposition to said motion; and after hearing Roger Foster, Esq., of counsel for the petitioners herein in support of said motion for the relief prayed in said petition, and Edwards H. Childs, Esq., in opposition thereto; on motion of J. Philip Berg, Esq., attorney for said petitioners, it is

Ordered that the prayer of said petition and that said motion be and the same hereby is granted; that said petitioners, and the plaintiffs in the above entitled action are hereby granted a repleader herein and that they are permitted to file in the Clerk's office of this Court as a continuation of this suit a bill in equity to enforce the contract described in the original complaint herein and that the defendant herein is directed

to file an answer, plea or demurrer to said bill in equity on or before the next rule day of this Court, which is at least twenty days after the filing of said bill in equity and that in default of the filing by said defendant of a demurrer, plea or answer within said time, said bill in equity to be taken as confessed by said defendant; upon conditions, however, the plaintiffs pay the defendant or its attorney the costs heretofore taxed herein, namely, the sum of one hundred twenty-four and 7/100 ($124.07) dollars to be paid by the plaintiffs (or in the event of a refusal to accept), deposited with the Clerk of this Court to the credit of defendant within twenty days after the filing of such bill in equity.

E. H. LACOMBE,
U. S. Circuit Judge.

COMMON LAW FORM XXIV.—NOTICE OF MOTION TO TRANSFER PART OF CASE TO EQUITY SIDE OF THE COURT.

[247 U. S. 231. In which the author was counsel.]

United States District Court for the Southern District of New York.

ANNIE S. SIMONS,
Plaintiff,
against
WILLIAM NELSON CROMWELL, described in the summons as "Thomas" Nelson Cromwell, and Louis H. Cramer, as Executors under the last Will and Testament of Frank Leslie, deceased,
Defendants.

Sir:

Please take notice that upon the annexed affidavit of Eustace Seligman, verified the 20th day of July, 1917, and upon the complaint and answer herein, the undersigned will apply to this Court at a Special Term for motions thereof to be held in the Post Office Building in the City of New York on the 26th day of July, 1917, at 10.00 o'clock in the forenoon of that day or as soon thereafter as counsel can be heard, for an order remanding the first cause of action alleged herein to the equity side of the Court, and for such other and further relief as may be just together with the costs of this motion.

Dated, July 20, 1917.

SULLIVAN & CROMWELL,
Attorneys for Defendant,
William Nelson Cromwell, Exec.,
49 Wall Street,
New York, N. Y.

EDGAR T. BRACKETT,
Attorney for Defendant,
Louis H. Cramer, Exec.,
Saratoga Springs,
New York.

To ROGER FOSTER, Esq.,
Attorney for Plaintiff,
55 Liberty Street,
New York, N. Y.

COMMON LAW FORM XXV.—AFFIDAVIT IN SUPPORT OF SUCH NOTICE.

[247 U. S. 231.]

United States District Court for the Southern District of New York.

ANNIE S. SIMONS,
Plaintiff,
against
WILLIAM NELSON CROMWELL, described in the summons as "Thomas" Nelson Cromwell, and Louis H. Cramer, as Executors under the last Will and Testament of Frank Leslie, deceased,
Defendants.

STATE OF NEW YORK, County of New York, } *ss.:*

Eustace Seligman, being duly sworn, deposes and says that he is associated with Sullivan & Cromwell, attorneys for William Nelson Cromwell, executor, one of the defendants herein.

That this action was commenced against the defendant William Nelson Cromwell on June 15, 1917, and that the said defendant served his answer herein on July 5, 1917.

That this action has been placed by Plaintiff upon the docket on the law side of the Court, its number being L 17-20, and that a notice that this action will be brought to trial at a term held for trials of common law causes on the 2nd day of October, 1917, has been served by plaintiff herein on July 10th, 1917.

That the first cause of action alleged in the complaint herein is one upon an alleged contract with the decedent, Frank Leslie, to make a bequest to the plaintiff. That such first cause of action stated in such complaint does not constitute a cause of action at law, but if any constitutes a cause of action in equity.

Wherefore, deponent respectfully requests that the motion to remand the first cause of action alleged in the complaint herein to the equity side of this Court be granted.

EUSTACE SELIGMAN.

Sworn to before me this 20th
day of July, 1917.
JOHN J. TIERNEY,
Notary Public,

Kings Co., N. Y., No. 2, Reg. No. 8001.
Certificates Filed,
New York Co., N. Y., No. 12, Reg. No. 8019,
Bronx Co., N. Y., No. 2, Reg. No. 811.

COMMON LAW FORM XXVI.—ORDER SENDING PART OF CAUSE TO EQUITY SIDE OF COURT.

[Set aside upon application for Mandamus, 247 U. S. 231.]

At a Stated Term of the United States District Court for the Southern District of New York held in and for the Southern District of New York at the Post Office Building, New York City, on the 25th day of October, 1917.

Present—Honorable CHARLES M. HOUGH, Circuit Judge.

ANNIE S. SIMONS,
Plaintiff,
against
WILLIAM NELSON CROMWELL, described in the Summons as "Thomas Nelson Cromwell" and Louis H. Cramer, as Executors under the Last Will and Testament of Frank Leslie, deceased,
Defendants.

Upon reading and filing the notice of motion to transfer the first cause of action set forth in the complaint herein to the equity side of this Court and the affidavit thereto annexed, verified by Eustace Seligman the 20th day of July, 1917, and after hearing Clarke M. Rosecrantz, Esq., and Hiram C. Todd, Esq., of counsel for the defendants for the motion and Roger Foster, Esq., attorney for the plaintiff in opposition thereto, and the same having been duly considered by the Court.

Now, on motion of Sullivan & Cromwell, attorneys for William Nelson Cromwell as executor of the Last Will and Testament of Frank Leslie, deceased, and Edgar T. Brackett Esq., attorney for Louis H. Cramer as executor of the Last Will and Testament of Frank Leslie, deceased, it is

Ordered that the said motion be and the same hereby is granted and the first cause of action set forth in the complaint herein be and the same hereby is transferred to the equity side of this Court; and further

Ordered that the said first cause of action be and the same is hereby stricken out of the complaint in this action at law (but only for the purpose of transfer as aforesaid) and that plaintiff have (and she is hereby given) twenty days after the service of this order wherein to make such amendment to the complaint herein (after the said striking out and transfer aforesaid) as she may be advised; and further

Ordered that the Clerk of this Court do forthwith and as of the date of this order docket as an equity cause the said first cause of action set forth in the said complaint, and the plaintiff is hereby given twenty days from the service of this order wherein to amend or replead on the equity side of this court, and defendants are hereby given twenty days from the expiration of said twenty days hereinabove given to plaintiff for the filing and service of an amended bill in equity (as the case may be) wherein to

answer without prejudice to any motion that said defendants may be advised to make under and pursuant to the rules of the Supreme Court of the United States in equity; and further.

Ordered that the trial of this action at law be and the same hereby is stayed until (at the earliest) the term of December, 1917, without prejudice to any application that plaintiff may be advised to make for a stay of proceedings or further deferment of trial, when and if said plaintiff takes an appeal or sues out a writ of error or otherwise lawfully seeks to review this order or any part thereof.

C. M. HOUGH,
C. J.

COMMON LAW FORM XXVII.—NOTICE OF MOTION TRANSFERRING CAUSE OF ACTION FROM EQUITY TO COMMON LAW DOCKET.

United States District Court, Southern District of New York.

ISAAC TARANTO, ALBERT TARANTO and LEON TARANTO, co-partners doing business under the firm name and style of NISSIM TARANTO,
Plaintiffs,
against
L. & E. FRENKEL,
Defendant.

Sir:

PLEASE TAKE NOTICE, that upon the pleadings herein, we shall move this Court at a Stated Term thereof to be held in the Post Office Building in the Borough of Manhattan, City and County of New York, on Friday, the 20th day of January, 1922, for an order dismissing the above entitled suit upon the ground that the bill of complaint states no cause of action, and for want of equity, or, in the alternative, for an order transferring said cause to the common law calendar of this Court for trial by jury upon the ground that the defendant is entitled by the Constitution and Statutes of the United States to the trial by a jury of the issues therein joined, and for such other and further relief in the premises as may be just.

Dated, New York, January 10th, 1922.

Yours, etc.,
SLADE & SLADE,
Attorneys for Defendant,
Office & P. O. Address,
200 Broadway, Borough of Manhattan,
New York City.

To MESSRS. GLEASON, VOGEL & PROSKAUER,
Attorneys for Plaintiffs,
111 Broadway, New York City.

COMMON LAW FORM XXVIII.—NOTICE OF TRIAL.

[144 Fed. 679.]

United States [District] Court, Southern District of New York.

CHRISTIAN DANCEL and MARY DANCEL, as Administrators of the Goods, Chattels and Credits of Christian Dancel, Deceased,
against
GOODYEAR SHOE MACHINERY COMPANY OF PORTLAND, MAINE.

Served January 29, 1901.

Take notice that the issues of law in the above entitled cause will be brought on for argument and trial and a motion made to dismiss the complaint therein at the October, 1900, Term of the Circuit Court of the United States of America, for the Southern District of New York, in the Second Circuit, appointed to be held at the United States Court Rooms in the United States Court and Post Office Building in the Borough of Manhattan in the City of New York, in said Southern District of New York, at the next session thereof at which the trial and argument of issues of law in actions of law may be had, at the opening of Court on the first day of said session or as soon thereafter as counsel can be heard.

Dated New York, January 29th, 1901.

EDWARDS H. CHILDS,
Attorney for Defendant, 59 Wall Street,
Manhattan Borough, New York City, New York.

To J. Philip Berg, Esq., Attorney for Plaintiffs.

COMMON LAW FORM XXIX.—ORDER FOR DEDIMUS POTESTATEM.

At a stated term of the United States [District] Court held at the United States Court Building in the city of New York, for the Southern District of New York, on the 13th day of April, 1874. Present: the Honorable Samuel Blatchford, the District Judge.

THE UNITED STATES
vs.
S. N. WOLFF et al.

On reading and filing affidavit of plaintiff's attorney and notice of motion, with proof of due service thereof on attorneys for the defendant, Alphonse de Reisthal, who only has appeared herein, George Bliss, Esq., appearing for the plaintiff, and W. J. A. Fuller, Esq., for the defendant, Alphonse de Reisthal.

It is, on motion of George Bliss, Esq., United States Attorney, ordered that a *dedimus potestatem* be issued in this cause out of this court, directed to the United States Consul, and to such deputy or representative

of said consul as may be authorized by him to act in his place and stead, at the following named places, respectively, viz.: To E. P. Beauchamp, United States Consul at Aix-la-Chapelle (Aachen), Germany, and his deputy or representative; to W. P. Webster, United States Consul at Frankfort-on-the-Main, and his deputy or representative; to H. Kreisman, United States Consul at Berlin, Prussia, and his deputy or representative; to J. S. Stuart, United States Consul at Leipzic, Germany, and his deputy or representative; to Daniel McM. Gregg, United States Consul at Prague, Austria, and his deputy or representative; to S. H. M. Byers, United States Consul at Zurich, Switzerland, and his deputy or representative; to examine the following-named persons under oath as witnesses herein; viz.: A. Amberg, and the person or persons composing the firm of A. Hirsch & Co., of Cassel, Germany; S. N. Wolff, of Neidheim, near Cassel, aforesaid; the person or persons composing the firm of Lutger Brothers, of Petersmuhle, near Solingen, Germany; Carl Aufermann, of Losenbach, near Liedenscheid, Germany; V. T. Pospichel, of Wiessenthal, Bohemia; and the person or persons composing the firm of Leopold Czech & Co., of Haida, Bohemia; the person or persons comprising the firm of E. Kreimer & Co., Berlin, Prussia; W. Wagner, Jr., of Plattenberg, Switzerland, and T. L. Lurman, and J. W. Maes, of Iserlohn, Germany.

It is further ordered that the examination above provided for shall take place during the months of July and August, 1874, and at such times within said months as is hereinafter designated.

It is further ordered that either party to this action shall have liberty to examine not only the witnesses herein named, but any other witnesses that either party may desire to examine at the aforesaid places of Aix-la-Chapelle, Frankfort-on-the-Maine, Berlin, Leipzic, Prague, or Zurich, before either of the persons herein authorized to take testimony; provided, however, that the names of said witnesses and their places of residence shall be given to the attorney of the opposite side in New York, before June 6, 1874, or such notice be given in Europe to the opposite counsel acting there for either party to this action, in either of the aforesaid places of Aix-la-Chapelle, Frankfort-on-the-Main, Berlin, Leipzic, Prague, or Zurich, where such other witnesses are to be examined, two days before such examination.

It is further ordered that, prior to June 6, 1874, the attorneys for the respective parties shall give notice in New York, each to the other, of the names and European addresses, for the last week in June, 1874, of the counsel for the respective parties who are to take testimony under this commission.

It is further ordered that the examination of witnesses shall be had at the following places, in the following order, and not otherwise, viz.: First, at Aix-la-Chapelle, next at Frankfort-on-the-Main, next at Berlin, next at Leipzic, next at Prague, next at Zurich; that four weeks shall elapse between the examination of witnesses at Prague and Zurich; that the examination shall commence at Aix-la-Chapelle, on the 6th day of July, 1874, or within two days thereafter; and that no examination shall be had of

witnesses at any place after the examination has been finished at that place, or the examination of witnesses commenced at another place.

It is further ordered that the counsel for the plaintiff shall have with him at any and all examinations of said witnesses, or either of them, all the original invoices mentioned in the declaration herein, or copies or duplicates thereof, and which are in the possession of the plaintiff, and that counsel for defendant shall have full and free inspection thereof, and liberty to take copies of the same.

It is further ordered that all directions herein contained as to time, place, order and manner of examination of said witnesses may be changed or modified by the written consent of the counsel for the respective parties in Europe or in New York.

It is further ordered that the examination of all witnesses under this commission shall be oral, or taken by question and answer, in the usual manner of taking oral depositions, by examinations, cross-examination, and redirect examination; that the testimony given under such examination shall be reduced to writing, signed by the witnesses, and certified by the commissioners, respectively, and by them transmitted by mail to the clerk of this court at the city of New York, unless otherwise mutually agreed upon by said counsel for both parties.

It is further ordered that all testimony taken under the commission provided for herein, shall be taken subject to all legal objections at the trial of this action. SAM BLATCHFORD.

COMMON LAW FORM XXX.—DEDIMUS POTESTATUM.

THE UNITED STATES OF AMERICA,
Southern District of New York. } *ss.:*

The President of the United States of America to Sylvanus Brown, James Black, and Frederick Brooks [*or if a single commissioner is named,* addressed to him alone]. GREETING:

Know ye, that we, in confidence of your prudence and fidelity have by these presences to give any two or more of you [or, *in case a single commissioner is appointed,* do give you] full power and authority diligently to examine upon their respective corporal oaths or affirmations before you to be taken Grace Howe and Adams Spies as witnesses upon the part of plaintiff [or defendant, *as the case may be*] in a certain cause now pending undetermined in the District Court of the United States for the Southern District of New York wherein James Fifield is plaintiff and George Aber is defendant touching the premises [*or* on the interrogatories hereunto annexed].

And we do further empower any two or more of you [*or in case of a single commissioner* empower you] to examine on the same behalf, and in like manner, any other person or persons who may be produced as witnesses before you.

And we do hereby require any two or more of you [*or in case of a single*

commissioner require you] before whom such testimony may be taken, to reduce the same to writing and to close it up under your hand and seal, directed to Alex. Gilchrist, Jr., Clerk of the District Court of the United States, for the Southern District of New York in the Borough of Manhattan, City, County and State of New York; and that you return the same, when executed as above directed, annexed to this writ, with the title of the cause indorsed on the envelope containing the same, into the said District Court before the judges thereof with all convenient speed.

Witness, Hon. Learned Hand, Judge of the District Court of the United States for the Southern District of New York at the City of New York, the 7th day of February, in the year of our Lord, one thousand nine hundred and twenty-two.

ALEX. GILCHRIST, JR.,
Clerk.

ROGER FOSTER,
Attorney for defendant.

COMMON LAW FORM XXXI.—NOTICE OF DEPOSITION UNDER REVISED STATUTES.

United States [District] Court of the Northern District of New York.

GEORGE H. BENJAMIN, Plaintiff,
against
THE JOHN T. NOYE MFG. CO., Defendant. } In Equity.

Please take notice that the complainant herein will take the testimony of George H. Benjamin, F. Rudinger and George V. Hecker, all of whom reside at the City of New York, and State of New York, and others, each and all of whom reside more than one hundred (100) miles from the place of trial herein, and more than one hundred (100) miles from any place at which a [District] Court of the United States for the Northern District of New York is appointed to be held by law, at the final hearing for use on behalf of the complainant, before Henry T. Brennan, Esq., a Notary Public in and for the City and County of New York, who is not of counsel nor interested in this cause, at the office of Brown & Jones, at No. 35 Wall Street, in the said City of New York, and State of New York, on the 4th day of January, 1892, at 11 o'clock A. M., and thereafter from day to day as the taking of the depositions may be adjourned; and such testimony will be so taken in accordance with the provisions of sections 863, 864 and 865 of the Revised Statutes of the United States and the Equity Rules.

BROWN & JONES,
Complainant's Solicitors,
No. 35 Wall Street, New York.

Dated New York, Dec. 28, 1891.

To JOHN ROE, ESQ., Defendant's Solicitor,
No. 377 Main Street, Buffalo, New York.

COMMON LAW FORM XXXII.—CERTIFICATE BY NOTARY TO DEPOSITION DE BENE ESSE.

COMMONWEALTH OF MASSACHUSETTS, *Suffolk, ss:*

I, George Hogg, a notary public in and for said County, Commonwealth and State, duly commissioned and qualified, and authorized to administer oaths, and to take and certify depositions, do hereby certify. That on May 31, 1904, I was attended at my office, No. 87 Milk Street, in the County of Suffolk, City of Boston, and Commonwealth of Massachusetts, by Roger Foster, Esq., of counsel for the complainants, and by Edwards H. Childs, Esq., solicitor and counsel for defendant; that the aforenamed witness, Frank G. Day, who was of sound mind and lawful age, and was by me first carefully examined and cautioned, and duly sworn to testify to the truth, the whole truth and nothing but the truth; that he thereupon testified as is above set forth; that the deposition by him subscribed, as above set forth, was reduced to writing by me and by no other person and was subscribed by said witness in my presence and in the presence of said counsel at the said time and place; and that all was done in the presence of said counsel for said complainants and defendant.

I further certify that I caused correct copies of the extracts from the books and papers there offered in evidence to be made; and that correct copies thereof thus made are annexed to said deposition; and that all the proceedings in the course of taking said deposition are correctly and accurately set forth in the course of said deposition.

I further certify that the reason for taking said deposition was and is that Frank G. Day lives in the City of Newton, County of Middlesex, State and Commonwealth of Massachusetts, and more than one hundred miles from the place where the said civil issue and suit in equity is appointed by law to be tried; and that I am neither of counsel nor attorney for either of said parties to said suit nor interested in the event of said cause; and that it being impracticable for me to deliver said deposition and the exhibits and the copies of exhibits thereto attached with my own hand into the Court for which they were taken, I have retained the same for the purpose of being sealed up and directed with my own hand and until they were so sealed up and directed, and for the purpose of being, and until they were speedily and safely transmitted to said Court for which said deposition was taken and to remain under my seal until there opened.

As witness my hand and seal as such Notary Public for the City of Boston, County of Suffolk, Commonwealth and State of Massachusetts, on this thirty-first day of May, A. D., 1904.

[SEAL.] GEORGE HOGG,
Notary Public.

Boston, June 1st, 1904.

I hereby certify that the following is a true account of expenses incurred in taking the three foregoing depositions:

Paid stenographers	$ 41.25
bookkeeper	15.00
for expressage	1.00
Services as Notary	50.00
	$107.25

[SEAL.] GEORGE HOGG,
Notary-Public.

COMMON LAW FORM XXXIII.—CERTIFICATE BY NOTARY TO DEPOSITION DE BENE ESSE CONTAINING EXTRACTS FROM BOOKS AND PAPERS.

COMMONWEALTH OF MASSACHUSETTS, *Suffolk, ss:*

I, George Hogg, a Notary Public in and for the said County and Commonwealth, and State, duly commissioned and qualified, and authorized to administer oaths, and to take and certify depositions, do hereby certify that, pursuant to the annexed notice, of which I annex a copy instead of the original, for the reason that the original was previously filed in the Clerk's office of the Circuit Court of the United States for the District of Massachusetts, and in pursuance of the stipulation hereto annexed and the order of Judge Colt adjourning the taking of the depositions described in said notice and stipulation until 10:30 A. M., April 25th, 1904, which order was filed and entered in the Clerk's office of said court on April 18th, 1904, and a copy thereof is hereto annexed; said notice and stipulation having been made in the civil cause depending in the Circuit Court of the United States for the Southern District of New York in equity, wherein Christian Dancel and Mary Dancel, as administrators of the goods, chattels and credits of Christian Dancel, deceased, are complainants, and the Goodyear Shoe Machinery Company of Portland, Maine, is defendant; I was attended at my office, No. 87 Milk Street, in the County of Suffolk, City of Boston and Commonwealth of Massachusetts, by Roger Foster, Esq., of counsel for the complainants, and by Edwards H. Childs, Esq., solicitor and counsel for defendant, on April 25th, 1903; that the aforenamed witness Sidney W. Winslow, who was of sound mind and lawful age and was by me first carefully examined and cautioned and duly sworn to testify the truth, the whole truth and nothing but the truth; that he thereupon testified as is above set forth, and that the deposition by him subscribed, as above set forth, was reduced to typewriting by Miss Blanche S. Levy, by and under my personal supervision and by no other person, and in the presence of said witness and counsel, and was subscribed by said witness in my presence and in the presence of said counsel, and was taken at the place in the annexed notice specified and at the time set forth in said order; and that all was done in the presence of said counsel for said complainants and defendant. I further certify that correct copies of the extracts from the books then offered in evidence are

hereinbefore set forth in said deposition as there stated; and that the papers annexed to the deposition of the said Winslow were then offered in evidence and marked by me; and that all the proceedings in the course of taking said deposition are correctly and accurately set forth in the course of said depositions. I further certify that the reason for taking said deposition was and is that said Sidney W. Winslow lives in the town of Beverly, County of Essex, State and Commonwealth of Massachusetts, and more than one hundred miles from the place where the said civil issue and suit in equity is appointed by law to be tried; and that I am neither of counsel nor attorney to either of the parties to said suit, nor interested in the event of said cause, and that it being impracticable for me to deliver said deposition and the exhibits thereto attached with my own hand into the Court for which they were taken, I have retained the same for the purpose of being sealed up and directed with my own hand and until they were so sealed up and directed, and for the purpose of being, and until they were speedily and safely transmitted to said Court for which said deposition was taken and to remain under my seal until there opened. As witness my hand and seal as such Notary Public at the City of Boston, County of Suffolk, Commonwealth and State of Massachusetts on this twenty-fifth day of April, A. D. 1904.

GEORGE HOGG,
Notary Public.

[SEAL.]

COMMON LAW FORM XXXIV.—SUBPOENA DUCES TECUM IN AID DEPOSITION DE BENE ESSE.

UNITED STATES OF AMERICA.

[SEAL.]

Massachusetts District, ss:

The President of the United States of America, to the Marshal of the District of Massachusetts or either of his Deputies, Greeting:

You are hereby required to summon

Sidney W. Winslow, individually and as President of the Goodyear Shoe Machinery Company of Portland, Maine, otherwise known as the United Shoe Machinery Company of Portland, Maine, and to Meylert Bruner, individually and as treasurer of the Goodyear Shoe Machinery Company of Portland, Maine, otherwise known as the United Shoe Machinery Company of Portland, Maine, and George W. Brown, of Boston, Massachusetts, if they may be found in your district.

We command You, That all business and excuses being laid aside, you appear and attend before George Hogg, Esq., Notary Public, at number 87 Milk Street, Boston, Massachusetts, on the 25th day of April, 1904, at 10:30 o'clock in the morning, to testify and give evidence *de bene esse* in pursuance of the Revised Statutes of the United States in a certain action

now pending undetermined in the Circuit Court of the United States, for the Southern District of New York, between Christian Dancel and Mary Dancel as Administrators of the Goods, Chattels and Credits of Christian Dancel, deceased, complainants, and the Goodyear Shoe Machinery Company of Portland, Maine, defendant, on the part of the complainants and that you bring with you and produce at the time and place aforesaid (1) All records of the minutes of the meetings of the directors of the Goodyear Shoe Machinery Company of Hartford, Connecticut, and all such containing records of the minutes of the meetings of the stockholders of the same, and all books containing the records of the minutes of the meetings of the directors of the Goodyear Shoe Machinery Company of Portland, Maine, and all books containing records of the minutes of the meetings of the stockholders of the same; which relate to and all of the same which mention the acquisition of the property of the Goodyear Shoe Machinery Company of Hartford, Connecticut by the Goodyear Shoe Machinery Company of Portland, Maine; (2) All contracts in relation to said transfer; (3) All resolutions and entries in the stock transfer books and other books of the Goodyear Shoe Machinery Company of Portland, Maine, and all such in such books of the Goodyear Shoe Machinery Company of Hartford, Connecticut, which mention and all which contain any reference to the exchange of stock of the Goodyear Shoe Machinery Company of Portland, Maine, for stock in the Goodyear Shoe Machinery Company of Hartford, Connecticut; (4) All books and records of the Goodyear Shoe Machinery Company of Portland, Maine, which show; (*a*) the proceedings taken by its incorporators at the time of its incorporation and the amount of its capital stock which had then been subscribed for; (*b*) the consideration paid for the same prior to March 9th, 1893; (*c*) the consideration paid for the stock which said corporation issued to the stockholders of the Goodyear Shoe Machinery Company of Hartford, Connecticut; (*d*) the consideration paid by the Goodyear Shoe Machinery Company of Portland, Maine, for the conveyance made to it by the Goodyear Shoe Machinery Company of Hartford, Connecticut. (5) All books containing records of the minutes of the meetings of the stockholders of the Goodyear Shoe Machinery Company of Hartford, Connecticut, and all such containing the records of the minutes of the meetings of the directors of the same, during the year 1893 and since that time. (6) All books of account of the Goodyear Shoe Machinery Company of Hartford, Connecticut, which show the indebtedness of said corporation in the year 1893, all books of account of said corporation since said time and all books of account of the Goodyear Shoe Machinery Company of Portland, Maine, which show payment made by said last named corporation on account of the indebtedness of the Goodyear Shoe Machinery Company of Hartford, Connecticut, and all such that contain any reference to such indebtedness; Now in your custody, and all other deeds, evidences, and writings which you have in your custody or power concerning the transaction in question, that for default and non-appearance they will have to abide the pains and penalties of the law in that behalf made and provided.

Hereof Fail Not, and make due return of this writ with your doings thereon, unto our said Court, as soon after the service thereof as may be.

Witness the Honorable Melville W. Fuller, at Boston, this 18th day of April, in the year of our Lord one thousand nine hundred and four.

L. C. TUCKER,
Deputy Clerk of the Circuit Court of the
United States for the District of Massachusetts.

A true copy attest:
BENJ. P. PICKERING,
Deputy U. S. Marshal.

COMMON LAW FORM XXXV.—SUBPOENA DUCES TECUM UPON TRIAL.

The President of the United States of America, to A. S. T. Mason, Greeting:

[COURT SEAL.] WE COMMAND YOU, That all and singular business and excuses being laid aside, you and each of you appear and attend before the Judge of the District Court of the United States of America for the Southern District of New York, at a Stated Term of said Court, to be held at the United States Court Room No. 3, on the 12th floor of the Woolworth Building, Broadway and Park Place in the City of New York, in and for the said Southern District of New York, on the 27th day of February, 1922, at half past ten o'clock in the forenoon, and also bring with you a letter signed in the name of Leon Taranto addressed to Ralph L. Fuller dated on or about the 9th of January, 1920, then and there to testify and give evidence in a certain cause pending in the said Court, and then and there to be tried between Isaac Taranto, Albert Taranto and Leon Taranto, co-partners doing business under the firm name and style of Nissien Taranto, plaintiffs and L. & E. Frenkel, Inc., defendant, on the part of the defendant. And this you, or any of you, are not to omit, under the penalty upon you, and every of you, of Two Hundred and Fifty Dollars.

WITNESS, HON. LEARNED HAND, Judge of the District Court of the United States, for the Southern District of New York at the City of New York, the 25th day of February in the year of our Lord one thousand nine hundred and twenty-two.

ALEX GILCHRIST, JR.
Clerk.

ROGER FOSTER,
Attorney for defendants.

COMMON LAW FORM XXXVI.—RETURN OF SERVICE OF SUBPOENA AD TESTIFICANDUM.

Boston, April 18th, 1904.

United States of America, Massachusetts District, ss.:

Pursuant hereunto, I have summoned the within named Mylert Bruner at Boston by giving to him in hand a true and attested copy of this summons

with $1.60, his legal fee. I also on April 19 summoned the within named Sidney W. Winslow at Boston by giving to him in hand a true and attested copy of this summons with $3.50, his legal fee.

I also made search for Geo. W. Brown but failed to find him in my District, I was informed he has gone to Hot Springs.

BENJ. P. PICKERING,
Deputy U. S. Marshal.

FEES

Service	$1.00
Trial	.24
	$1.24
Paid Witnesses	5.10
	$6.34

COMMON LAW FORM XXXVII.—LETTERS ROGATORY.

UNITED STATES OF AMERICA,
Southern District of New York.

[SEAL.] *The President of the United States of America to the President of the Court of S. Angelo dei Lombardie in the Kingdom of Italy,* GREETING:

Whereas a certain suit is pending in our [District] Court for the Southern District of New York, in which Giovanni P. Riva, as administrator of the estate of Angelo di Nicola, deceased, is plaintiff, and the New York Central and Hudson River Railroad Company is defendant, and it has been suggested to us, that justice cannot completely be done between the said parties, without the testimony of Grazia di Venturo, Antonio Torrello, and Maria Michela Torrello, all of whom reside at Bagnoli Irpino within your jurisdiction.

We therefore request you that in furtherance of justice you will by the proper and usual process of your court, cause said Grazia Di Venturo, Antonio Torrello and Maria Michela Torrello to appear before you, or some competent person by you for that purpose to be appointed and authorized, at a precise time and place by you to be fixed, then and there to make answer on their oaths and affirmations to the several interrogatories hereunto annexed; and that you will cause their depositions to be committed to writing, and to be returned to us under cover addressed to the clerk of the [District] Court of the United States for the Southern District of New York, at the City of New York, and State of New York, in the United States of America, duly closed and sealed up together with these presents, and we shall be ready and willing to do the same for you in a similar case when required.

Witness [Hon. Learned Hand, Judge], of the [District] Court of the United States [for the Southern District of New York], at the City of New York, the 24th day of December, in the year of our Lord one thousand eight hundred and ninety-one.

ALEX GILCHRIST, Clerk. [L. S.]

COMMON LAW FORM XXXVIII.—STIPULATION WAIVING TRIAL BY JURY.

[76 Fed. 427.]

Afterwards, to wit, on the twelfth day of March, 1892, the parties aforesaid, by their attorneys aforesaid, waived a jury for the trial of the issues in above cause by stipulation in writing there filed with the clerk of said court, of which the following is a copy:

District Court of the United States for the District of New Jersey, Fred S. Fisher against the Newark Ice Company.

It is hereby stipulated and agreed, between the attorneys for the respective parties hereto, that a trial by jury in this action be, and the same hereby is waived; and that the issues of fact herein may be tried and determined by the Circuit Court of the United States for the District of New Jersey, without the intervention of a jury; and that said court shall make special findings upon the facts herein, which shall have the same effect as the verdict of a jury.

Dated Trenton, N. J., March 12th, 1892.

ROGER FOSTER,
Plaintiff's Attorney.
JOHN R. EMERY,
Defendant's Attorney.

COMMON LAW FORM XXXIX.—ORDER FOR TRIAL BY COURT WITHOUT A JURY.

[76 Fed. 427.]

At a stated term of the [District] Court of the United States for the District of New Jersey, held in the post office building, in the city of Trenton and State of New Jersey, on the fourteenth day of March, 1892.

Present, the Hon. Edward T. Green, United States District Judge.

Fred S. Fisher against the Newark City Ice Company.

On reading and filing the stipulation hereto annexed, signed by the attorneys for both parties hereto, and on the consent of the attorneys for both parties hereto, it is ordered that the issues of fact herein be tried by this court without intervention of a jury; and that said court shall make special findings upon the facts herein, which shall have the same effect as the verdict of a jury.

EDW. T. GREEN, J.

COMMON LAW FORM XL.—STIPULATION FOR REFERENCE OF ACTION AT COMMON LAW.

United States [District] Court for the Southern District of New York.

ANDREW BROWN, Plaintiff,
against
THE NEW YORK, LAKE ERIE AND WESTERN RAILROAD COMPANY, Defendant.

It is hereby stipulated and agreed that the above entitled action be referred to Hamilton Cole, Esq., as sole referee, to hear and determine all the issues thereof, and that judgment may be entered upon his report as such referee, with the same force and effect as upon a hearing and decision of the court. And it is further stipulated and agreed that the said referee shall make special findings of fact herein, and that said findings when adopted by the court shall have the same force and effect as and shall be deemed findings of the court. It is further stipulated and agreed by and between the parties hereto, that this action and the issues therein may be tried and determined by the court without the intervention of a jury, and a jury is hereby waived. It is further stipulated and agreed that judgment shall not be entered herein until after ten days' notice of the filing of the report of the referee, and of the judgment proposed to be entered thereon. It is further stipulated and agreed that the referee's fees shall be taxed as costs herein.

Dated New York, April 23, 1888.

C. L. ATTERBURY, Atty. for Plaintiff.

BUCHANAN & STEELE, Defendant's Attorneys.

COMMON LAW FORM XLI.—ORDER APPOINTING REFEREE TO TRY ACTION AT COMMON LAW.

At the April Term of the United States [District] Court for the Southern District of New York, held in New York City, at the Post Office, on April 24, 1898. Present: HON. WILLIAM J. WALLACE, Circuit Judge.

ANDREW BROWN, Plaintiff,
against
THE NEW YORK, LAKE ERIE AND WESTERN RAILROAD COMPANY, Defendant.

On reading and filing the annexed stipulation, it is

Ordered that the above-entitled action be referred to Hamilton Cole, Esq., as sole referee, to hear and determine all the issues thereof, and that judgment may be entered upon his report as such referee with the same force and effect as upon a hearing and decision of the court.

And it is further ordered that the said referee shall make special findings of fact herein, and that said findings when adopted by the court shall have the same force and effect as and shall be deemed findings of the court.

It is further ordered that this action and the issues therein may be tried and determined by the court without the intervention of a jury.

It is further ordered that judgment shall not be entered herein until after ten days' notice of the filing of the report of the referee, and of the judgment proposed to be entered thereon.

It is further ordered that the referee's fees be taxed as costs herein.

(Signed) WM. J. WALLACE.

(A copy.)

[SEAL] TIMOTHY GRIFFITH, Clerk.

COMMON LAW FORM XLII.—STIPULATION TO PROCEED WITH ELEVEN JURORS.

[215 U. S. 609; in which the author was counsel.]

[TITLE.]

And now, December 24th, 1908, it is agreed by counsel for plaintiff and defendant in the above cause that John T. Greenwood, one of the jurors in the above cause, shall be this day excused from further duty and that the cause proceed with eleven jurors.

GRAHAM C. WOODWARD,
Attorney for Plaintiff.
ALEX. SIMPSON, JR.,
Attorney for Defendants.

COMMON LAW FORM XLIII.—VERDICT IN DISTRICTS OF PENNSYLVANIA.

[215 U. S. 609; in which the author was counsel for plaintiff.]

And afterwards, to wit, on the 30th day of December, 1908, the jurors aforesaid upon their oaths and affirmations respectively do say that they find for plaintiff and assess the damages at one hundred and nine thousand eight hundred and forty-eight and 92-100 dollars.

COMMON LAW FORM XLIV.—EXTRACT FROM MINUTES OF TRIAL AND VERDICT INSERTED IN JUDGMENT ROLL UNDER CODE PRACTICE.

[Simons v. Cromwell, affirmed by C. C. A. on January 18, 1922.]

[TITLE.]

Now comes the plaintiff by Roger Foster, her attorney and moves the trial of this cause. Likewise come the defendants by Sullivan & Cromwell their attorneys and Edgar T. Brackett and Philip L. Miller of counsel. Thereupon a jury is duly impaneled and sworn and the cause proceeds to trial. Thereafter on Tuesday, March 15, 1921, on motion of defendant's attorney, ORDERED 2nd and 3rd causes of actions dismissed. Exception to plaintiff. After hearing the evidence for the respective parties, the arguments of counsel and the charge of the Court, the jury retire in charge

of an officer duly qualified to attend them and upon their return say they find a verdict for the Plaintiff for $40,000.00 and interest from September 8, 1915. Defendant's attorney moves to set aside the verdict and for a new trial. Denied—Exc. An extract from the minutes.

[Seal.] ALEX. GILCHRIST, JR., Clerk.

COMMON LAW FORM XLV.—ORDER FOR JUDGMENT AFTER TRIAL BY THE COURT WITHOUT A JURY.

[Fisher v. Newark City Ice Company, 76 Fed. 427.]

This cause having come on to be heard for the assessment of the plaintiff's damages in accordance with the mandate of the Circuit Court of Appeals herein; and a jury having been waived by both parties hereto; and testimony having been taken, depositions read and witnesses examined on behalf of both parties upon the assessment of said damages; and Roger Foster, Esq., counsel for the plaintiff, and F. W. Stevens, Esq., and John O. H. Pitney, Esq., of counsel for the defendant, having been duly heard and due deliberation having been had; now, on motion of Roger Foster, plaintiff's attorney, I hereby find that the plaintiff's damages are thirteen thousand three hundred and eighty-seven 92/100 ($13,387.92) dollars, at which sum they are hereby assessed; and it is hereby ordered that the clerk of this court enter judgment in favor of the plaintiff against the defendant for that sum, viz., thirteen thousand three hundred and eighty-seven 92/100 ($13,387.92) dollars, with costs.[1]

M. W. ACHESON,
Circuit Judge.

[1] For a Form of Findings by the Court see Court of Claims Form II, infra.

COMMON LAW FORM XLVI.—POSTEA UNDER COMMON LAW PRACTICE.

[Reversed 62 Fed. 569, in which the author was counsel.]

And at the term aforesaid, upon the day last aforesaid, it is upon the said facts specially found, as aforesaid, by the said court, considered that the said plaintiff take nothing by his said writ, but that he be in mercy, &c., and that the said defendant do go thereof without day, &c.

And it is further considered by the court, now here before the judge thereof, that the said defendant do recover against the said plaintiff, for the costs and charges by him laid out about his defence in this behalf, before the judge thereof, now here adjudged to the said defendant, and with his assent, according the form of the statute in such case made and provided, and that the said defendant have execution thereof.

Judgment signed this thirtieth day of January, A. D., eighteen hundred and ninety-four.[1]

EDW. T. GREEN, J.

[1] For Form of Judgment under Code Practice see that recited in mandate, Appellate Form XXIX.

COMMON LAW FORM XLVII.—JUDGMENT UNDER CODE PRACTICE.

[Amato v. Northern Pacific Railroad Company, 144 U. S. 465.]

The issues of this action having been duly brought on for trial and tried before the Hon. Alfred C. Coxe, district judge, and a jury, at a stated term of this court, held in and for the southern district of New York, at the post-office building, in the city of New York, in said district, on the 17th day of April, 1891, and a verdict for the plaintiff having been duly rendered on the 17th day of April, 1891, assessing his damages in the sum of four thousand dollars ($4,000), and the costs of the plaintiff having been duly taxed at the sum of thirty-three and ten-hundredths ($33.10) dollars:

Now, on motion of Roger Foster, attorney for the said plaintiff—

It is adjudged that this plaintiff recover of said defendant the sum of four thousand ($4,000) dollars, found by said jury, and the sum of twenty-six and sixty-six hundredths ($26.66) dollars as interest thereon, and the sum of thirty-three and ten-hundredths ($33.10) dollars, costs aforesaid, amounting in all to the sum of four thousand and fifty-nine and seventy-six hundredths ($4,059.76) dollars, and that said plaintiff have execution against the defendant therefor.

Judgment signed this 28th day of May, 1891.

JOHN A. SHIELDS, Clerk.

COMMON LAW FORM XLVIII.—EXECUTION AGAINST PROPERTY OR FIERI FACIAS.

[58 Fed. 55.]

The President of the United States of America to the Marshal of the Southern District of New York, Greeting:

You are commanded, that of the goods and chattels of The Northern Pacific Railroad Company in your district you cause to be made the sum of four thousand fifty-nine dollars and seventy-six cents, which lately, in the [District] Court of the United States for the Southern District of New York, Dominick Amato recovered against the said Northern Pacific Railroad Company, in an action between Dominick Amato, plaintiff, and the Northern Pacific Railroad Company, defendant, in favor of said plaintiff, Dominick Amato, as appears by the record filed in the Clerk's office of said [District] Court on the twenty-eighth day of May, one thousand eight hundred and ninety-one, as amended by order of Court filed and entered June 3, 1891. And if sufficient personal property of the said judgment debtor cannot be found in your district, that then you cause the same to be made out of the real property belonging to such judgment debtor on the above mentioned day, or at any time thereafter, in whose hands soever the same may be, and return this execution within sixty days after its receipt by you to the Clerk of said [District] Court.

Witness, the Honorable Learned Hand, Judge of the [District] Court of the United States, for the Southern District of New York, at the City of New York, on the third day of June, one thousand nine hundred and twenty-one, and of the Independence of the United States the one hundred and thirty-second.

[SEAL.] ALEX. GILCHRIST, JR., Clerk.

COMMON LAW FORM XLIX.—WRIT OF VENDI EXPONAS.

THE UNITED STATES OF AMERICA,
Southern District of New York. } ss.

The President of the United States of America to the Marshal of the Southern District of New York, Greeting:

You are hereby commanded to expose to sale the following described . . . . . property, viz.: [insert description of the property], which, according to command, you have levied on, and which remains in your hands unsold, as you have certified to the Judges of the District Court of the United States for the Southern District of New York aforesaid, to satisfy a judgment of said court, rendered at the October term thereof and entered on or about October 17th in the year 1921 in favor of James Fifield against George Aber for the sum of five thousand ($5,000) dollars and one hundred and ninety-five ($195) dollars costs of suit with interest thereon from the 1st day of April, 1921, until paid, together with the further sum of fifty ($50) dollars costs of increase on said judgment; and also the costs that may accrue on this writ. And if, in your opinion, the property remaining in your hands, not sold, will be insufficient to satisfy the judgment aforesaid, then you are hereby commanded that you levy the same upon other goods and chattels, lands and tenements or either, as the law shall permit, being the property of the judgment debtor; which, together with the property on hand not sold as aforesaid, will be sufficient to satisfy the judgment aforesaid. And have you the said moneys in the said District Court, before the judges thereof, at the City of New York in said District, on the first Tuesday in the month of January, next, to be paid to the persons entitled to receive the same. And have you then and there this writ.

Witness, Hon. Learned Hand, Judge of the District Court of the United States for the Southern District of New York at the City of New York, the 7th day of December, in the year of our Lord one thousand nine hundred and twenty-one.

ROGER FOSTER,
Attorney for plaintiff.

ALEX. GILCHRIST, JR., Clerk.

COMMON LAW FORM L.—WRIT OF SCIRE FACIAS.

[252 Fed. 300.]

UNITED STATES OF AMERICA, Massachusetts District. } ss.

To the Marshal of Our District of Massachusetts, or Either of his Deputies. Greeting:

Whereas, [James Aber] before our Judges of our District Court of the United States for the District of Massachusetts, holden at Boston, within and for our said district of Massachusetts, on the 25th day of March in the year of our Lord one thousand nine hundred sixteen and by the consideration of our said court, recovered against Edward Wade, the sum of $4,000 and also $97 for costs and charges by plaintiff about his suit in that behalf expended; whereof the said Edward Wade is convict, as to us appears of record. And although judgment be thereof rendered, yet the execution of the said debt or damage and costs doth yet remain to be made—whereof the said James Aber has made application to us to provide remedy for him in that behalf: Now to the end that justice be done, we command you, that you make known unto the said Edward Wade that he be before our Judges of our said District Court, to be holden at Boston within and for our said district of Massachusetts, on the 10th day of April, to shew cause (if any he has), wherefore the said James Aber ought not to have execution against him, the said Edward Wade, for his debt or damage, and costs aforesaid; and further to do and receive that which our said court shall then consider; and there and then have you this writ, with your doings therein. Herein fail not. Witness, Hon. James M. Morton, Jr., United States District Judge, at Boston, the 5th day of April in the year of our Lord one thousand nine hundred and sixteen.

——— ———, Clerk.

ADMIRALTY FORMS

FORM I.—LIBEL IN REM.

[Prepared by CHARLES C. BURLINGHAM, Esq., of the New York Bar.]

To the Honorable Charles L. Benedict, Judge of the District Court of the United States for the Eastern District of New York:

The libel of A., B., C. and D. against the steamships X. and Y., their engines, etc., and against all persons claiming any interest therein, in a cause of action, civil and maritime, of a nature hereinafter more specifically set forth, alleges as follows:—

First. At all the times hereinafter mentioned the libelants were underwriters, members of Lloyds, and lawfully engaged in and transacting the business of marine insurance in London, England.

Second. On or about the 11th day of June, 18—, the firm of R. & Company, merchants, of the city of New York, shipped, in good order and condition, on board the steamer X., then lying in the port of New York, and bound to the port of H., to be transported in said steamer to said port of H., three hundred and ten tubs of butter, one hundred and forty-five of which were marked "A," one hundred of which were marked "B," and sixty-five of which were marked "C," and which tubs of butter the agents of said steamer X. did agree to transport to and deliver at H. by the said steamer X. to the order of the shipper, and at the time aforesaid did issue a bill of lading in accordance with such agreement. Said goods were shipped by R. & Company for joint account with F. G. & Company, of H., and were owned by the said R. & Company and the said F. G. & Company jointly, and after said shipment the bill of lading issued as aforesaid therefore was duly indorsed by said R. & Company and delivered to said F. G. & Company.

Third. On or about the 11th day of June, 18—, the firm of M. & S., merchants, of the city of New York, shipped in good order and condition on board said steamer X., to be transported in said steamer from the port of New York to the port of H., one hundred and two boxes of cheese, thirty-nine of which were marked [F] twenty-six of which were marked [F] and thirty-seven of which were marked [F] and which boxes of cheese the agents of said steamer did agree to transport to and deliver at H. to the order of the shippers, and at the time aforesaid did issue a bill of lading in accordance with such agreement. Said goods were shipped by said M. & S. for account of the firm of F. G. & Company, of H., who were and continued to be the owners of the said goods, and after said shipment

said bill of lading issued as aforesaid therefor was duly indorsed by said M. & S. and delivered to said E. G. & Company.

Fourth. On or about the 12th day of June 18—, the said steamer X. set sail from the port of New York, bound for the port of H., having on board both aforesaid lots of merchandise, which had been shipped on board said steamer at said port of New York in good order and condition, and at about half-past one o'clock in the afternoon of June 13, 18—, the said steamer X., when about three hundred and ten miles east of Sandy Hook, came into violent collision with said steamer Y., and by said collision a large hole was made in the starboard side of the steamer X., by reason whereof the compartments in which the above mentioned lots of merchandise were stowed were flooded, and the said lots of merchandise were wholly lost to the owners, most of them being lost through the said hole into the sea and the others being jettisoned.

Fifth. On or about the 29th day of December, 18—, the libelants, in the regular course of their business as marine insurers, issued to D. & W., for and in consideration of the premiums paid, an open policy of insurance in the sum of £5000, British sterling, bearing date on said 29th of December, 18—, and in and by said policy of insurance the libelants agreed to insure the said D. & W., as well as in their own name as for and in the name and names of every other person or persons to whom the same did, might, or should appertain in part or in whole, and did cause them and each of such persons to be insured at and from New York and [or] Philadelphia and [or] Portland and [or] Boston to London and [or] port or ports, place or places, on the west coast of Great Britain, upon any kind of goods and merchandise against loss or damage arising from adventures and perils of the sea and all other perils, loss, and misfortunes that might come to the hurt, detriment, or damage of said goods upon the voyage; that by the terms of said policy of insurance the libelants A. and B. each became insurer in the sum of £——, British sterling, of said £5000, British sterling, which was the total sum covered by said policy, and the other libelants each became insurer to the extent of £——, British sterling, and the libelants agreed to become insurers in such proportions upon any shipment declared under the said policy of insurance; that thereafter and in the month of June, 18—, D. & W. declared insurance upon said lot of three hundred and ten tubs of butter to the amount of £555, British sterling, for the benefit of the owners of the said tubs of butter, and they further declared insurance upon said lot of one hundred and two boxes of cheese in the sum of £150, British sterling, for the benefit of the owners of the said boxes of cheese, and the said insurance was accepted and indorsed by and for the libelants upon said policy, said sums insured being only equal to or less than the true value of said goods.

Sixth. The aforesaid collision occurred as follows. The X., up to within a very short time before the collision, was proceeding on an easterly course at the rate of about fourteen miles an hour, which speed she maintained until the collision; and the said steamer Y., up to within a very short time before the collision, was proceeding on a west by north course, bound from Liverpool to New York, at a high rate of speed; the sea was

smooth, and there was little wind, but there was a dense fog, in which the said steamers had been running for a long time before the collision; neither vessel had sufficient lookouts; both vessels were giving at intervals signals with their steam whistles. While so proceeding, the officers of the steamer Y. heard the fog signal of the X. over the port bow of their vessel, and gave orders to the man at the wheel to port, which order was executed; and the officers of the X. heard the fog signal of the steamer Y. over their starboard bow of their vessel, and gave orders to the man at the wheel to starboard, which order was executed. A few minutes later, each steamer became visible to those on board of the other steamer, close at hand; whereupon those in charge of the steamer Y. ordered her engines to be stopped and reversed, but before any perceptible influence was exerted on the speed of the steamer the two vessels came into collision.

Seventh. The collision was due to the fault and negligence of those in charge of the steamers X. and Y. respectively, in that they were proceeding at too high a rate of speed, in that they had no good and sufficient lookouts, in that they did not give the proper signals by which to indicate each to the other their respective courses and movements, in that they did not heed and note the signals given by the approaching vessel, and in that they did not stop and reverse their engines before the collision and at such time as to overcome their headway, and to the fault of those in charge of the navigation of the steamer Y. in that they ported their helm and did not hold their course, and to the fault of those in charge of the navigation of said steamer X. in that they starboarded their helm instead of porting; and the said collision was not in any respect due to the fault of the libelants.

Eighth. By reason of the the premises and the collision aforesaid, and the resultant loss and destruction of said lots of merchandise, the libelants as insurers as aforesaid became liable to pay, and have paid, on or about the 15th day of August, 18—, to the said F. G. & Company, for the loss as aforesaid for said three hundred and ten tubs of butter, the sum of £555, British sterling, and for the loss and destruction of said one hundred and two boxes of cheese as aforesaid, the further sum of £150, British sterling, and have become subrogated to all the rights of the owners of said merchandise, and that they have received the sum of £69 1 2, British sterling, being allowance in general average for goods jettisoned.

Ninth. By reason of the premises and the payment aforesaid, the libelants have sustained damages in the sum of £635 18 10, British sterling, equivalent in money of the United States to three thousand and eighty four dollars ($3084), with interest thereon from the 15th day of August, 18—, no part of which has been paid, although payment thereof has been duly demanded by the libelants.

Tenth. Said steamers X. and Y. are now within this district, and within the jurisdiction of this court.

Eleventh. All and singular the premises are true and within the admiralty and maritime jurisdiction of this honorable court.

Wherefore the libelants pray that process, in due form of law and ac-

cording to the course and practice of this court in case of admiralty and maritime jurisdiction, may issue against the said steamship X. and Y., their engines, etc., and that all persons claiming any interest therein may be cited to appear and answer the matters aforesaid, and that said steamships X. and Y., their engines, etc., may be condemned and sold to satisfy the claims of the libelants aforesaid, with interest thereon from the 15th day of August, 18—, and costs.

A., B., C. & D.,
By H. B. B., Attorney.

UNITED STATES OF AMERICA,
District of Maryland. } ss.

H. B. B., being duly sworn, says that he is the attorney in fact of the libelants above named, none of whom are now in the United States; that dependent has read the foregeoing libel, and the same is true to the best of his knowledge. H. B. B.

Sworn to before me, this —— day of —— 18—.

[SEAL.] —— ——, Notary Public.

D. & F., Proctors for Libelants.

FORM II.—INTERROGATORIES ANNEXED TO LIBEL.

District Court of the United States for the Eastern District of New York.

THE W. MARINE INSURANCE CO., Libelant.,
against
THE C. STEAMSHIP CO., L'D, AND ANOTHER, Respondents.

Interrogatories propounded by the libelant to the respondent, The C. Steamship Company, L'd, which it is required to answer by its officers or its duly authorized agents or servants in writing and under oath.

First Interrogatory.—By whom were the 760 sacks of flour mentioned in the fourth article of the libel herein delivered in the steamship X., and by whom were they delivered to the respondent, The C. Steamship Company, L'd? State fully the circumstances attending such delivery as well to the X. as to the said respondent, giving time and place of such delivery.

Second Interrogatory.—Did the said steamer X. or the said respondent give any receipt for the said 760 sacks of flour or for any of them to the person or persons or corporation delivering the said goods?

Third Interrogatory.—Have you or have you ever had what purported to be a copy of the bill of lading issued for any of the goods referred to in the fourth, fifth, sixth, and seventh articles of the libel herein? For which of the said goods have you had such copy of bill of lading? From whom did you receive each such copy, and when and where? Answer fully, stating particularly which lots of cargo were covered by each of such copies of bills of lading. Were such copies of bills of lading such as are ordinarily known as "ship's copies" or "carrier's copies?"

New York, November 9, 18—. —— ——,
Proctors for Libelant.

FORM III.—LIBEL IN PERSONAM WITH CLAUSE OF FOREIGN ATTACHMENT.

To the Honorable John T. Nixon, Judge of the District Court of the United States for the District of New Jersey:

The libel and complaint of —— ——, residing at Brooklyn, N. Y., —— —— and —— ——, residing at —— and —— ——, residing at ——, for themselves as sole owners of the late bark K., and of her tackle, apparel, and furniture, and in behalf of the shippers and owners of the cargo laden thereon, as carriers thereof, and —— —— aforesaid, as master of said bark, for himself and in behalf of the officers and the survivors of the crew thereof, as owners of their personal effects, against the —— Company, a foreign corporation, in a cause of collision, civil and maritime, alleges as follows:

First. That at the time of the collision hereinafter set forth the libelants were the sole owners of the British bark K., which was a vessel of 1136 tons register, and was up to the time of the said collision stout, tight, staunch, well equipped and appointed.

Second. That at the time of the collision hereinafter set forth the respondent was, and for a long time previous thereto had been, a corporation created by and existing under the laws of a foreign government, to wit: the Empire of Germany, or of some kingdom or free city that has now become a part of said empire, and owned or chartered divers steamships with which they navigated the ocean. That among other steamships, owned by said company, was the steamship V., which said company employed in carrying cargo and passengers between the ports of —— and New York, and at the time of the collision said steamship was in possession of the agents or servants or mariners employed by said company, and was being navigated by them.

Third. That on or about the ——day of ——, 18—, the libelants' said bark, with a full and valuable cargo of cement, pipe-clay, and empty petroleum barrels, and other merchandise, left the port of ——bound on a voyage to New York, under command of a competent master with a good and sufficient crew, and being well furnished and provided with all requirements for navigation, as required by law.

All went well until the ——day of ——, 18—. At about two o'clock in the afternoon of that day, the bark came into collision with said steamship V., when in about latitude 41° 08′ north, and longitude 65° 08′ west, as ascertained by dead reckoning.

The weather was thick, with snow squalls and dense vapor; the wind was blowing strong from the west northwest, and the bark was sailing on her starboard tack close hauled, heading about southwest by south, and making an average rate of speed of about four knots an hour. All sails were furled, except the foresail, fore lower topsail, main lower topsail, reefed upper main topsail, inner jib, fore topmast, staysail, main topmost staysail, main trysail, mizzen staysail, and reefed spanker.

The mate was in charge of the deck, and a competent lookout was

stationed on the top gallant forecastle of the bark, by whom single blasts were made with a fog horn at short intervals of about a minute, and by whom a careful lookout was kept. A competent able seaman was at the wheel. The rest of the watch were all at their posts, listening carefully for signals, and looking out for other vessels.

Two or three minutes before the collision, the mate, while standing on the forecastle head—the vapor suddenly lifting or clearing—saw indistinctly the bow of a steamship, which proved to be the V., and which appeared to be about half a mile distant, and off the bark's starboard bow, and about four points toward the starboard beam, heading for the bark. The bark kept steadily on her course by the wind, and the lookout made one loud blast of the fog horn towards said steamship. Almost immediately, one short blast of the whistle of the steamship was heard, and she was seen to be under a port helm, carrying full sail, and approaching at great speed, and heading to cross the bow of the bark. When the bark was two ship's lengths off from the steamship, and a collision was inevitable, the helm of the bark was put hard a port to deaden her way and lessen the damage, if possible, but the steamship's port-quarter came into collision with the bark's bows nearly at right angles. The force of the collision carried away the bark's jib-boom, bowsprit, foremast and all gear attached, and smashed the bows completely in, cutting away the deck frame aft to within one beam of the forward hatch, and cutting away all the stem above the twentyfeet line—the bark drawing at the time about fourteen feet of water—and carrying overboard and drowning two men who had remained at their posts of duty on the forecastle head.

As said steamship passed on to the leeward of the bark horns were blown, the bell rung, and shouts given to the steamship to stop. The steamship passed out of sight, the vapor and now shutting in thicker. Afterwards it cleared again and the steamship was seen lying to leeward, and soon after was seen signaling, asking if the bark was leaking. The bark, not then knowing the extent of the leak, replied, "Do not abandon me," and signaled for a boat from the steamship. A boat and crew thereupon came up and inquired of the master whether he would abandon the bark.

At that time the full extent of the injuries to the vessel was unknown. The master, therefore declined to abandon his vessel, and requested that the steamship should lie by him until morning, which the officer in charge of the steamship's boat promised and agreed to do, and thereupon returned to the steamship.

The bark was found to be leaking, and shortly after the departure of the steamship's boat the wind increased. The maintopmast head with the mizzen topgallant mast was carried away, taking with them the main topgallant mast with the yards attached, which fell on the deck, partially disabling the captain and the sailmaker and breaking the starboard and doing other injuries. Nevertheless, every effort was made by the officers and crew to save their vessel by throwing overboard cargo to lighten her forward, by cutting away wreckage, and by closing over the bow with a sail. The waves washed violently over the bow, threatening the lives of

the crew, tearing in pieces the sail, and rendering vain all efforts to close the breach made by the collision.

During the night the storm increased to a heavy gale, and the pumps had be be kept going constantly, the vessel laboring fearfully in the fierce sea, the officers and men expecting her to founder at any moment. When daylight came the weather was clear but overcast. On going aloft no steamer was to be seen. The men of the bark then discovered that they had been deserted by the steamship in spite of their repeated requests and the promise of the officer to lie by them during the night.

Thereafter, on Saturday and Sunday, the officers and crew had to make extraordinary exertions to keep their wrecked vessel afloat. As many men as could be spared from the pumps, which were kept continually going, were employed in attempting to board up the broken bows, which were pitching into the heavy seas and rendering their efforts unavailing. On Monday morning the vessel was on a severe cross-sea, the officers and men were almost overcome by their exhausting labors, when the steamship R. hove in sight. The bark set a signal of distress. The R. bore down, and succeeded in sending a lifeboat to the rescue of the survivors upon the wreck. The sea was running so dangerously that the boat dared not come alongside but remained over a hundred feet astern. The master and the survivors of the crew were lowered over the bark's stern and hauled through the sea to the lifeboat,—the master being the last to leave the vessel,—and were taken on board the R., having lost all their personal effects, and were humanely cared for until, on April 2nd, 188—, they were safely landed at Antwerp.

Fourth. That said collision and loss took place without any fault or want of maritime conduct on the part of the mariners or persons in charge of the libelants' bark, but solely through the negligence and misconduct and unseamanlike action of the officers or person in charge of the steamship V., in the following particulars among others:—

1. Said steamship was proceeding at full speed of not less than fourteen knots per hour, although for more than three hours before the collision the weather had been thick with falling snow and dense vapor.

2. Said steamship was carrying all sail set before the wind, thus using every means to accelerate her speed, instead of going at moderate speed, as she was by law required to do.

3. Said steamship was not blowing proper fog whistle as she was by law required to do, and if any such whistles were blown they were sounded irregularly, or were not loud enough to be heard by vessels lying to the leeward.

4. Said steamship had no proper lookouts stationed where they are required to be; and, in particular, the libelants charge that it was the duty of the officers of said steamship to station a competent man at the foremast head, where the vapor would have been less dense and objects were discoverable before they became visible from the steamship's deck.

5. Said steamship, proceeding before the wind, was burning a large quantity of soft coal which generated a great amount of smoke that

blew forward of her funnels and, being caught in her foresail and driven downward by the dampness of the atmosphere, blew ahead of her bows and obscured the view from her deck and from the forward bridge, rendering an additional masthead lookout and a reduction of speed specially necessary.

6. The officers of said steamship were guilty of fault and violation of law, in not immediately stopping or slowing their engines upon sighting said bark.

7. The officers of said steamship, having failed to see said bark by their gross inattention and neglect of the above precautions, were further at fault and were guilty of criminal negligence in attempting to cross the bark's bows instead of keeping out of her way by starboarding their helm and going under the stern of said bark, as they might readily have done, and so avoided her altogether.

8. The master of said steamship deserted said bark at nightfall, upon the wind increasing, and was thereby guilty of base and unseamanlike behavior in abandoning the survivors of the collision, and refusing to stand by the wreck until morning as had been promised in his behalf.

9. The master and the officers of said steamship were also at fault in not making a truthful report of said collision upon the arrival of said steamship at the port of New York, and, in particular, in not reporting the lives lost overboard from said bark, which casualty had been plainly visible from said steamship.

10. The officers of the V. are also chargeable with other faults and negligences, which the libelants pray they may be permitted to specify more particularly at the trial hereof.

Fifth. That by reason of said collision the libelants have sustained severe damages, as follows, that is to say: They allege the bark K., together with her equipment, ship stores, and pending freight to have been of the value of forty-six thousand five hundred dollars; and that as carriers of the cargo therein, and in behalf of the owners thereof, the libelants have sustained and are entitled to damages to the value thereof, which amounts to twenty thousand dollars; that the personal effects of the master lost by said collision were of the value of five hundred dollars, and of the mates and mariners about thirteen hundred dollars, making the total sum claimed by the libelants from the respondent to be sixty-eight thousand three hundred dollars, together with interest thereon, by reason of the wrongful acts of the said company through its agents, servants, and mariners in bringing about the aforesaid collision.

Sixth. That the respondent is, as heretofore alleged a foreign corporation, as the libelants are informed and believe, and that said company has property within the jurisdiction of this Honorable Court, to-wit, a certain steamship called the L.

Seventh. That all and singular the premises are true and within the admiralty and maritime jurisdiction of this Honorable Court.

Wherefore the libelants pray that process in due form of law accord-

ing to the course of this Honorable Court may issue against said respondent, the president or officers thereof, and that they may be required to answer on oath this libel and the matters herein contained, and that, if said company cannot be found, then the goods, chattels, and effects thereof within the jurisdiction of this Court may be attached to an amount sufficient to answer the libelants' claim, and that this Honorable Court will be pleased to decree to the libelants the payment of the amount which shall be due unto them for the cause aforesaid, and that the respondent may be condemned to pay the same with interest thereon and the costs of this suit, and that the libelants may have such other and further relief as in law and justice they may be entitled to receive.

Sworn to for themselves, and on behalf of their co-libelants, this —— day of April, 188—.

Notary Public, City and County of New York.
—— ——, Proctors for Libelants.
—— ——, Advocate.

FORM IV.—STIPULATION FOR LIBELANT'S COSTS.

District Court of the United States for the Eastern District of New York.

Stipulation for libelant's costs entered into pursuant to the rules and practice of this court.

WHEREAS a libel was filed in this Court, on the —— day of ——, 1891, by the R. R. Company against the steam-tug E., her engines, etc., and the schooner F., her tackle, etc., for the reasons and causes in said libel mentioned, and praying that said vessels be condemned and sold to pay the claim of the libelant, and the said libelant, and John Doe and Richard Roe, sureties, parties hereto, hereby consenting, and agreeing that in case of default or contumacy on the part of the libelant, or its sureties, execution may issue against their goods, chattels, and lands for the sum of two hundred and fifty dollars:

Now, therefore, it is hereby stipulated and agreed, for the benefit of whom it may concern, that the stipulators undersigned shall be, and each of them is, bound in the sum of two hundred and fifty dollars, conditioned that the libelant above named shall appear and answer to the cause and to interrogatories, and shall pay all such costs as shall be awarded against it by this court, or, in case of appeal, by the Appellate Court.

R. R. Co.
JOHN DOE.
RICHARD ROE.

Taken and acknowledged this —— day ——, 1890, before me.

[SEAL.] —— ——, Notary Public.

SOUTHERN DISTRICT OF NEW YORK, ss.

John Doe and Richard Roe, parties to the above stipulation, being duly sworn, do depose and say that they reside in the Southern and Eastern Districts of New York, and each that he is worth the sum of five hundred dollars, over and above all his just debts and liabilities.

Sworn to, etc.

FORM V.—CLAIM OF OWNER.

At a stated term of the District Court of the United States for the Southern District of New York, held at the United States Court Rooms in the City of New York, on the 5th day of November, 1891. Present: The Honorable Addison Brown, District Judge.

THE SCHOONER R., HER TACKLE, ETC.,
ads.
RICHARD ROE.

And now X. Y., part owner of the schooner R., intervening for the interest of himself and A. B., C. D., and E. F., his co-owners, in the said schooner, appears before the Honorable Court, and makes claim to the said schooner, etc., as the same are attached by the marshal under process of this Court at the instance of Richard Roe, and the said X. Y. avers that he was in possession of the said schooner at the time of the attachment thereof, and that the persons above named are true and *bona fide* owners of the said schooner, and that no other person is the owner thereof, wherefore they pray to defend accordingly.

X. Y.

Sworn to and subscribed, this 5th day of November, A. D. 1891, before me.

[SEAL.] D. E., Notary Public.

S. & G., Proctors for Claimants.

FORM VI.—CLAIM OF AGENT.

At a Stated Term, etc. Present: The Honorable — ————, District Judge.

THE STEAMSHIP O., HER ENGINES, ETC.,
HER CARGO AND FREIGHT,
ads.
JOHN SMITH.

And now B. and Company, intervening as agents for the interests of the Steamship Company, Limited, in the said steamship O., her cargo, and freight, appear before the Honorable Court and make claim to the said steamship, her cargo, and freight, as the same are attached by the marshal, under process of this Court at the instance of John Smith, and the said B. Company aver that they were in possession of the said

steamship, her cargo, and freight at the time of the attachment thereof, and that the corporation above named is the true and *bona fide* owner of the said steamship, and the carrier of said cargo, and that no other person is the owner or carrier thereof; and said B. and Company are the true and lawful bailees thereof, as agents, wherefore they pray to defendant accordingly.

B. & Co., Agents for the S. S. Co., L'd.

S. & G., Proctors for Claimant.

SOUTHERN DISTRICT OF NEW YORK, } ss.
City and County of New York. }

A. B., being duly sworn, deposes and says that he resides in the City of New York; that he is a member of the firm of B. and Company above named; that the owner of said steamship is a foreign corporation, having its principal office in Liverpool, and that this deponent is duly authorized to put in this claim in behalf of the owner of the said steamship; and that the said claim is true to the knowledge of this deponent, except as to the matters therein stated on information and belief, and that as to such matters he believes it to be true.

Sworn to, etc.

FORM VII.—STIPULATION FOR CLAIMANT'S COSTS.

District Court of the United States for the District of New Jersey.

Stipulation entered into pursuant to the rules and practice of this court.

Whereas a libel was filed in this Court on the 10th day of April, in the year of our Lord one thousand eight hundred and ninety, by A. B. and others against 500 tons of chalk lately laden on board the steamship G., for the reason and cases in said libel mentioned, and praying that process may issue against said chalk, and the parties hereto hereby consenting that in case of default or contumacy on the part of the claimant or its surety execution for the sum of two hundred and fifty dollars may issue against their goods, chattels, and lands;

And whereas also a claim has been filed in said cause by The N. J. Lime Co.:

Now, therefore, it is hereby stipulated and agreed, for the benefit of whom it may concern, that the stipulators undersigned shall be, and each of them is hereby, bound in the sum of two hundred and fifty dollars, conditioned that the claimant above named shall pay all costs and expenses which shall be awarded against it by the final decree of this Court, or upon an appeal, by the Appellate Court.

THE N. J. LIME CO., by X. Y., President.
JOHN DOE.

Taken and acknowledged, this 10th day of April, 1891, before me.

——— ———, Notary Public.

[Affidavit as in Form IV.]

FORM VIII.—STIPULATION FOR VALUE.

District Court of the United States for the Eastern District of New York.

Stipulation for value entered into pursuant to the rules and practice of this court.

Whereas a libel was filed on the —— day of ——, 1890, by A., B., C., and D., against the steamship X., her engines, etc., impleaded, for the reasons and causes in the said libel mentioned; and whereas the said steamship is in the custody of the Marshal under the process issued in pursuance of the prayer of said libel [*or*, whereas the libelants have agreed not to issue process against said steamship in consideration of the owners thereof appearing and filing a claim thereto and stipulations for costs and value]: And whereas a claim to said vessel has been filed by the Steamship Company, L'd, and the value thereof has been fixed by consent for the purposes of bonding [*or*, by appraisement] at the sum of six thousand dollars, as appears from said consent [*or*, appraisement] now on file in said Court; and the parties hereto hereby consenting and agreeing that in case of default or contumacy on the part of the claimant or its sureties, execution for the above agreed value, with interest thereon from this date, may issue against their goods, chattels, and lands:

Now, therefore, the condition of this stipulation is such, that if the stipulators undersigned shall at any time, upon the interlocutory or final order or decree of the said District Court or any Appellate Court to which the above named suit may proceed, and upon notice of such order or decree, to S. & G., Esquires, Proctors for the Claimant of said steamship X., abide by and pay the money awarded by the final decree rendered by the Court, or the Appellate Court, if any appeal intervene, then this stipulation to be void, otherwise to remain in full force and virtue.

S. S. Co., L'd.
JOHN DOE.
by B. & Co., Agents.
RICHARD ROE.

Taken and acknowledged, this —— day of ——, 1890, before me,
[SEAL.] —— ——, U. S. Commissioner.

[Same affidavit as in Form IV.]

The value of the steamship X, is hereby fixed by consent for the purposes of bonding at the sum of six thousand dollars.

Dated, ——, 1890.

L. & K., Proctors for Libelants.
S. & G., Proctors for Claimants.

FORM IX.—BOND TO MARSHAL.

District Court of the United States of America for the Eastern District of New York.

Know all men by these presents that we, X. Y., claimant, and Richard Roe and John Doe, sureties, are held and firmly bound unto A. W., Marshal of the United States for the Eastern District of New York, in the sum of four thousand dollars, to be paid to the said A. W., for the payment of which, well and truly to be made, we bind ourselves and each of us, our and each of our heirs, executors, and administrators, jointly and severally, firmly by these presents. Sealed with our seals, and dated the 16th day of April, 1891.

Whereas a libel has been filed in the District Court of the United States for the Eastern District of New York, on the 14th day of April, 1891, by J. S., libelant, against the brig Q., for the sum of two thousand dollars, on which process of attachment has issued, and the said brig is in custody of the marshal under the said attachment, and X. Y. has applied for a discharge of said brig from the custody of the marshal, and has filed a claim claiming the said brig as owner, and has filed a stipulation for the claimant's costs, pursuant to the rules and practice of the said Court:

Now, therefore, the condition of this obligation is such, that if the above bounden X. Y., Roe and Doe, shall abide by and perform the decree of this Court, then this obligation shall be void, otherwise the same shall be and remain in full force and virtue.

X. Y. [SEAL.]
RICHARD ROE. [SEAL.]
JOHN DOE [SEAL.]

Sealed and delivered, and taken and acknowledged, this 16th day of April, 1891, before me,

[SEAL] —— ——, Notary Public.

[Same affidavit as in Form IV.]

FORM X.—ORDER APPOINTING APPRAISERS.

At a stated term, etc. Present: The Honorable Charles L. Benedict, District Judge.

ROBERT PICKFORD et al.
vs.
THE BARK B., HER TACKLE, ETC.

Upon the affidavit of —— —— [*or* consent of the parties hereto], now, on motion of S. & G., proctors for the owners of said bark B., it is ordered that F. E. M. and A. S. be, and they are hereby appointed appraisers to appraise the value of the bark B., her tackle, etc., and return the appraisement made to the clerk of this Court forthwith; [and that before proceeding to make such appraisement said appraisers choose in

writing a third person, who shall act with them in case they disagree as to the value of said vessel, that the appraisement be made in the first instance by the two appraisers herein named, and that, in case they cannot agree, then the third person so chosen act with them, and the appraisement of two of said appraisers stand as the appraisement of said vessel.]

FORM XI.—NOTICE TO APPRAISERS.

[TITLE.]

SIR: Take notice that you together with A. S. have been appointed appraisers to appraise the value of the bark ——. You will please call at the office of the Clerk of the United States District Court, in the City of Brooklyn, at —— o'clock A. M., on the —— instant, and take and subscribe the oath required by law.

Yours, &c., B. LINCOLN BENEDICT, Clerk.

To F. E. M.

Dated, Brooklyn, Dec. 1, 1891.

FORM XII.—OATH OF APPRAISERS.

[TITLE.]

We, the undersigned, having been appointed appraisers to appraise the value of the bark B., do solemnly swear that we will faithfully appraise the same to the best of our skill and ability.

Subscribed and sworn to, etc.

F. E. M.
A. S.

FORM XIII.—NOTICE OF APPRAISEMENT.

[TITLE.]

The undersigned, having been appointed appraisers to appraise the bark B., her tackle, etc., do hereby give public notice, that they will proceed to appraise said bark at the South Central Wharf, Atlantic Basin, where she now lies, on the 4th instant, at ten o'clock A. M. of that day.

Dated, Brooklyn, Dec. 2, 1891.

F. E. M.,
A. S.,
Appraisers.

FORM XIV.—REPORT OF APPRAISERS.

[TITLE.]

We, the undersigned, having been duly appointed and sworn as appraisers to appraise the Bark B., her tackle, etc., do report that we have

examined and appraised said bark, and do find that said bark, her tackle, etc., are worth the sum of $1,400.

All of which is respectfully submitted.

Dated, Brooklyn, Dec. 4, 1891.

F. E. M.
A. S.

FORM XV.—EXCEPTIONS TO LIBEL.

[TITLE.]

The claimant hereby excepts to the libel herein for insufficiency and indistinctness, in the following respects:—

1. It does not disclose how the steamer C. bore when first seen from the tug E.

2. It does not disclose what lights of the steamer C. were seen from the tug E., and when they were seen and how they bore.

S. & G., Proctors for Claimant.

FORM XVI.—ANSWER IN ADMIRALTY.

To the Honorable Addison Brown, Judge of the District Court of the United States for the Southern District of New York:

J. S. and others, owners and claimants of the steamship T., her engines, etc., as the same are proceeded against on the libel of M. and N. in a cause of contract civil and maritime, answer said libel and complaint as follows:—

First. The claimants admit the partnership of the libelants, and they have no knowledge or information sufficient to form a belief as to the other allegations of the first article of said libel.

Second. The claimants admit that on or about the 31st day of December, 1885, at Genoa, Italy, there was shipped in apparent good order and condition by R. & Co. on board said steamship, then lying in said port of Genoa, and bound for the port of New York, 113 iron drums represented to contain glycerine, said to be marked and numbered as alleged in the second article of said libel, and that thereafter the master or agent of said vessel signed bills of lading for said merchandise, wherein and whereby they acknowledged the receipt thereof in apparent good order and condition, and agreed to deliver the same, subject to the exceptions and conditions mentioned in said bills of lading, in the like good order and well conditioned as received, at the port of New York, unto Drexel, Morgan & Company, or assigns, upon the payment of freight agreed upon.

Further answering, the claimants deny each and every other allegation of the second article of said libel.

Third. The claimants have no knowledge or information sufficient to form a belief as to the allegations of the third article of said libel, and therefore deny the same.

Fourth. The claimants admit that thereafter said vessel sailed from the port of Genoa on her voyage to New York, where she arrived on or about the 27th day of March, 1886, and there delivered said merchandise in the like good order and condition in which the same was received, subject to the exceptions and conditions mentioned in the said bills of lading.

They admit that three of the said drums were damaged, and that part of the contents thereof was lost. They admit that payment of the claim of $150 has been demanded of the agents of said steamship, and refused.

Further answering, the claimants deny each and every allegation of the fourth article of said libel not hereinbefore specifically admitted.

Fifth. The claimants admit the jurisdiction of this court, and deny the other allegations of the seventh article of said libel.

Sixth. Further answering, the claimants allege that said steamship T. is, and was at the times herein mentioned, a British vessel, hailing from ——, and sailing under the British flag.

That the drums of glycerine hereinbefore mentioned were well and properly stowed by a competent stevedore in the manner usual and customary at the port of shipment, and were well and sufficiently dunnaged. That a bill of lading was duly given therefor, to which the claimants beg leave to refer and make a part of this their answer, whereby it was stipulated and agreed that said merchandise should be delivered, subject to the exceptions and conditions therein mentioned, from the ship's deck, where the ship's responsibility should cease, . . . at the port of New York, . . . the act of God, the Queen's enemies, . . . loss or damage resulting from any of the following perils, whether arising from the negligence, default, or error in judgment of the pilot, master, mariners, engineers, or other persons in the service of the ship, namely, . . . or other perils of the seas, rivers, navigation, or land transit, of whatever nature or kind soever and howsoever caused, excepted; . . . weight, measurement, contents, quality, brand, and value unknown; and not accountable for loss or damage resulting from sweating, leaking, breakage, rust, decay, . . . deterioration in quality, slightness or insufficiency of packages, stowage, or contract with or smell or evaporation from any other goods. And it was further agreed that the ship-owner was "not to be liable for any damage to any goods which is capable of being covered by insurance, nor for any claim, notice of which is not given before the removal of the goods." And, "in case of damage, loss or non-delivery, the ship-owner . . . not to be liable for more than the invoice value of the goods."

That thereafter said vessel with said merchandise on board sailed from the said port of Genoa to the port of Leghorn, thence to Castellamare, thence to Catacolo, thence to Patros, thence to Trieste, and thence to certain Sicilian ports, thence to Naples, thence to Gibraltar, and thence to New York, where she arrived after an unusually long and boisterous passage on or about the 26th day of March, 1886.

That during said voyage said vessel encountered very heavy weather in the Adriatic and Mediterranean and in the Atlantic, which caused

the vessel to strain and labor heavily, and roll and pitch and ship large quantities of water, and the cargo to work and strain.

That whatever damage was done to said drums of glycerine resulted from the perils of the seas aforesaid, and is due in no way to any fault or negligence on the part of the claimants, or of the master, officers, or agents of said vessel; all of whom, on the contrary, did everything in their power for the protection and care of said merchandise.

That the said drums in which the said glycerine was packed were of fragile materials and brittle metal, entirely insufficient to withstand ordinary sea perils, and that the breaking of said drums was caused by such insufficiency, and by defects thereof, as well as by the bad weather encountered by the said vessel, and by perils of the seas, and by other causes excepted in said bill of lading.

That by the law of the flag of said steamship as well as by the law of the place of the contract, all of the exceptions of said bill of lading, as above set forth, are valid against the shippers of said merchandise, and against the libelants; and the claimants beg leave to refer to such laws, which they will prove upon the trial hereof.

That all and singular the premises are true.

Wherefore the claimants pray that said libel may be dismissed with costs.

J. S. AND OTHERS,

[*Verification.*] By G. BROTHERS, Agents.

FORM XVII.—PETITION TO BRING IN VESSEL UNDER ADMIRALTY RULE 56.

To the Honorable Edward T. Green, Judge of the District Court of the United States for the District of New Jersey:

The petition of John Smith, sole owner of the ship Emily, against the steam-tug Franklin, her engines, etc., and against all persons claiming any interest therein, in a cause of collision, civil and maritime, alleges as follows:

First. The petitioner was at the times hereinafter mentioned, and is now, the sole owner of the ship Emily, which is a British vessel, hailing from Liverpool, England, of 864 tons register, and was up to the time of the collision hereinafter mentioned tight, staunch and strong, and in every way seaworthy.

Second. [Sets forth facts of collision between ship Emily in tow of tug and a dredge at anchor.]

Third. Said collision was not caused or contributed to by any negligence on the part of the petitioner or of those in charge of said ship, but was caused by the negligence of the steam-tug Franklin, in the following respects among others. [Here faults are specified.]

Fourth. On or about the 5th day of November, 1888, Richard Roe filed a libel and commenced a suit in this court against said ship Emily, her tackle, etc., only, for damages alleged to have been sustained by said steam dredge by the collision aforesaid, in the sum of $5,000; and

on or about the 12th day of November, 1888, the petitioner duly filed in said cause a claim to said ship Emily, her tackle, etc., with the stipulation for costs required by the rules and practice of this Court, and also a stipulation in the sum of $6,500, the agreed value of said ship. Your petitioner has not yet filed his answer to said libel, the process not having yet been returned.

And your petitioner alleges that said steam-tug Franklin, her engines, etc., ought to be proceeded against for said damages in the same suit as said ship.

Fifth. Said steam-tug Franklin is now within this district and within the jurisdiction of this Court.

Sixth. All and singular the premises are true, and within the jurisdiction of the United States and of this Honorable Court.

Wherefore your petitioner prays that process may issue accordingly to the practice of this Court and the rules of the Supreme Court in Admiralty against the steam-tug Franklin, her engines, etc., to the end that said tug may be proceeded against in this suit for damage alleged to have been sustained by the libelant Roe, as if said tug had been originally proceeded against herein. And the petitioner further prays that all persons claiming any interest in said tug Franklin may be cited to appear and answer the libel herein and this petition, and that said tug Franklin may be condemned and sold to satisfy the claim of the libelant for damages, if any, with interest and costs, and also the costs of petitioner herein, and that the petitioner may have such other or further relief as may be proper.

Sworn to, etc. JOHN SMITH.

FORM XVIII.—INTERLOCUTORY DECREE AND DEFAULT IN ADMIRALTY.

At a stated term, etc. Present: Hon. —— ——, Judge.

[TITLE.]

The marshal having returned on the monition issued in the above entitled cause that he had attached the said vessel, her tackle, apparel and furniture, and upon the certified copy order of publication that he had given due notice to all persons claiming the same that the court would, on this day, proceed to the trial and condemnation of the said vessel, her tackle, etc., should no claim be interposed for the same; whereupon, on motion of D. & F., proctors for the libelants, proclamation was made for all persons interested in the said vessel, her tackle, etc., to appear and interpose their claims; and no person appearing, on like motions, it is further ordered that the defaults of all persons be, and the same are accordingly hereby, entered, and that the said vessel, her tackle, etc., be condemned to pay the demands of the libelants.

And it is further ordered that it be referred to —— ——, a commissioner of this court, to ascertain and compute the amount due the

libelants for repairs, and to report the same to this court, with all convenient speed.

FORM XIX.—INTERLOCUTORY DECREE IN ADMIRALTY.

At a stated term, etc. Present: Hon. —— ——, Judge.

[TITLE.]

This cause having been heard on the pleadings and proofs of the respective parties, and having been argued by the respective advocates, now on motion of S. and G., proctors for the libelant, it is ordered that the libelant recover herein against the ship Y., her tackle, etc., the damages sustained by him by reason of the matters set forth in the libel, and that it be referred to —— ——, a commissioner of this court, to ascertain the amount of such damages, and report thereon to this court with all convenient speed.

Third. Because he has allowed for a new wheel of the C.

Fourth. Because he has reported that the libelants are entitled to recover $3,031.11 for repairs.

Fifth. Because he has reported that the libelants are entitled to recover $3,081.52 for demurrage.

Sixth. Because he has reported that the libelants are entitled to recover the sum of $7,107.03.

Seventh. Because he has adopted an erroneous rule of damages and has allowed more than the market value of the C. during the detention.

Eighth. Because he has allowed to the libelants for demurrage more than they actually lost, viz., more than the expense incurred by them in performing the various charters of the C.

Ninth. Because he has not adopted the principle of *restitutio in integrum*, but by his report has held that the libelants could make a profit out of the disaster.

—— ——, Claimant's Proctor.

FORM XX.—FINAL DECREE IN ADMIRALTY.

At a stated term, etc. Present: —— ——, Judge.

JOHN SMITH and THOMAS BROWN, Libelants,
against
THE R. I. STEAMBOAT COMPANY, Respondent.

This cause having been heard on the pleadings and proofs of the respective parties, and having been argued by the respective advocates, now on motion of D. & F., proctors for the libelants, it is ordered, adjudged, and decreed that the libelants above named recover herein against the respondent above named the sum of $5,000, with interest thereon from the 9th day of January, 1889, amounting to $725, and costs, taxed at the sum of $112.67, making in all the sum of $5,837.67.

And it is further ordered, adjudged and decreed that, unless this decree be satisfied, or proceedings thereon be stayed on appeal, within the time limited and prescribed by the rules and practice of this court, the libelants have execution to satisfy this decree, and the stipulators for costs in behalf of the respondent cause the engagements of their stipulation to be performed.

FORM XXI.—FINAL DECREE IN ADMIRALTY.

At a stated term of the District Court of the United States for the Southern District of New York, held at the Court Rooms in the City of New York on the 3d day of April, 1891. Present: Honorable Addison Brown, Judge.

THE STEAM TOWAGE COMPANY, Libelant,
against
THE SCHOONER SARAH, HER TACKLE, ETC.
JOHN SMITH, Claimant.

This cause having come on to be heard upon the pleadings and proofs adduced by the respective parties, and having been argued by the respective advocates, now on motion of D. & F., proctors for the claimant, it is ordered, adjudged, and decreed that the libel herein be and the same hereby is dismissed with costs, and it is further ordered, adjudged, and decreed that John Smith, the claimant above named, recover herein against the libelant the sum of sixty-eight 28-100 dollars costs as taxed.

And it is further ordered that, unless this decree be satisfied or an appeal be taken therefrom within the time limited and prescribed by law and the rules and practice of this Court, the stipulators for costs on the part of the libelant cause the engagements of their stipulation to be fulfilled, or show cause within four days thereafter why execution should not issue against their goods, chattels and lands to satisfy this decree.

ADDISON BROWN.

FORM XXII.—FINAL DECREE IN ADMIRALTY.

At a stated term of the District Court, etc. Present: Hon. —— ——, Judge.

JOHN SMITH
against
THE STEAMBOAT X., HER ENGINES, ETC., AND
THE STEAM-TUG Y., HER ENGINES, ETC.

The report of the commissioner to whom it was referred to ascertain the damages sustained by the libelant by reason of the matters set forth in the libel having been filed, wherefrom it appears that such damages amount to the sum of three thousand dollars, and exceptions

to said report having been filed on the part of the libelant and both the claimants, and such exceptions having been overruled, now, on motion of D. & F., proctors for the libelants, it is

Ordered that said report be, and the same hereby is, in all respects confirmed; and it is further ordered, adjudged and decreed that the libelant recover herein as damages said sum of three thousand dollars, and as interest thereon from the date of said report the sum of one hundred dollars, and as costs the sum of two hundred dollars, making in all the sum of thirty-three hundred dollars, for which sum said steamboat X., and said steam-tug Y., their engines, etc., are hereby condemned.

And it is further ordered, adjudged, and decreed, that as between said steam-boat and said steam-tug the amount so adjudged to the libelant with the accruing interest and charges be paid by the respective claimants of said vessels in equal moieties, and that any portion of either of such moieties which the libelant shall not be able to collect from or enforce against either said steam-boat or said steam-tug, or their respective claimants, shall be collected from or enforced against the other.

And it is further ordered, adjudged and decreed that, unless this decree be satisfied or proceedings thereon be stayed on appeal within the time and in the manner prescribed by the rules and practice of this Court, the stipulators for costs and value on the part of said vessels cause the engagements of their stipulations to be performed, or show cause within the time prescribed by law why execution should not issue against their goods, chattels and lands to satisfy this decree.

FORM XXIII.—FINAL DECREE IN ADMIRALTY FOR SUMMARY JUDGMENT ON BOND TO MARSHAL.

At a stated term, etc. Present: Hon. —— ——, Judge.

JOHN SMITH
against
THE STEAMBOAT X. AND THE STEAM-TUG Y.

On reading and filing the report of A. B., to whom it was referred to ascertain the damages sustained by the libelant, whereby there is reported due the libelant as such damages the sum of $3,000, and the time to file exceptions to said report having expired, and no exceptions thereto having been filed, now on motion of D. & F., proctors for the libelant, it is

Ordered that said report be in all things confirmed, and that the libelant recover herein against the steamboat X., said sum of $3,000 reported due as aforesaid, with $100 interest, and $200 costs, making the sum of $3,300, and that said steamboat X., her enignes, etc., be condemned therefor.

And it is further ordered, adjudged and decreed that in pursuance of the Act of Congress passed March 3, 1847, a summary judgment be and the same hereby is entered against R. S., principal, and G. H. and J. K.,

sureties, on their bond given on the discharge of said steamboat from custody, for the sum of $6,000, the amount of their said bond.

And it is further ordered, adjudged, and decreed, that the libel herein be dismissed as against the steam-tug Y., with costs, and that M. N., claimant of said steam-tug, recover herein against the libelant the sum of $75 costs.

And it is further ordered, adjudged and decreed that, unless this decree be satisfied or proceedings thereon stayed on appeal within the time and in the manner prescribed by the rules and practice of this Court, the libelant have execution to enforce satisfaction of this decree as against said steamboat X., and the stipulators for costs on the part of the libelant cause the engagements of their stipulation to be performed, or show cause why execution should not issue against their goods, chattels and lands to enforce satisfaction of this decree as against the libelant.

FORM XXIV.—FINAL DECREE AND ORDER OF SALE IN ADMIRALTY.

At a stated term, etc. Present: Hon. —— ——, Judge.

[TITLE.]

[Same as last form to.]

And it is further ordered that the Clerk of this Court issue a writ of *venditioni exponas* to the Marshal of the District, for the sale of said steamboat X., returnable at the October Term, the Marshal giving six days' notice of sale, pursuant to law.

And it is further ordered that out of the proceeds of the sale of the said vessel, when paid into the Registry of the Court, the Clerk of this Court pay to the libelant or his proctor the amount reported due, together with his taxed costs.

And it is further ordered that, unless an appeal be taken from this decree within the time limited and prescribed by the rules and practice of this Court, the Clerk, after deducting the taxed costs of the officers of Court, distribute the proceeds in satisfaction of this decree, subject to all priorities as they now exist.

FORM XXV.—NOTICE OF APPEAL IN ADMIRALTY.

District Court of the United States for the Southern District of New York.

A. B., Libelant and Appellant,
against
THE SCHOONER SARAH, HER TACKLE, ETC.
M. M., Claimant and Appellee.

SIRS: Take notice that the libelant above named hereby appeals to the

United States Circuit Court of Appeals for the Second Circuit from the final decree, entered herein June 23, 1891.

Dated, N. Y., July 3, 1891. Yours, etc.,

—— ——,

Proctors for Libelant and Appellant.

To —— ——, Proctors for Claimant and Appellee.

SAMUEL H. LYMAN, Esq.,
Clerk of the District Court of the United States for the S. D. of N. Y.

FORM XXVI.—PETITION ON APPEAL.

United States Circuit Court of Appeals for the Second Circuit.

A. B., Libelant and Appellant,
against
THE SCHOONER SARAH, HER TACKLE, ETC.
M. N., Claimant and Appellee.

To the Honorable United States Circuit Court of Appeals for the Second Circuit:

The petition of A. B., the libelant herein, respectfully shows as follows:—

1. On or about December 6, 1890, the libelant filed a libel in the District Court of the United States for the Southern District of New York against the above-named schooner, in a cause, civil and maritime, to recover the sum of $1,000 for damages alleged to be due the libelant from said schooner, with interests and costs, as by reference to said libel will more fully appear.

2. On or about January 20, 1891, the claimant duly appeared and filed his answer to said libel, praying that the libel be dismissed with costs, as by reference to said answer will more fully appear.

3. In March, 1891, said cause came on for hearing before the Honorable Addison Brown, Judge of said District Court, and such proceedings were had that on April 3, 1891, a final decree was made and entered in said suit, whereby it was adjudged that the libel be dismissed and that the claimants recover the sum of $68.28 as costs.

4. The above named libelant and appellant is advised and insists that said final decree is erroneous, in that it does not decree payment of the libelant's claim with interest and costs.

5. For this and other reasons the above named libelant and appellant appeals from said final decree to the United States Circuit Court of Appeals for the Second Circuit, and on said appeal intends to seek a new decision on the law and on the facts, upon the pleadings and proofs in said District Court, and upon new pleadings and proofs to be introduced in this court, and prays that the record and proceedings aforesaid may be returned to the United States Circuit Court of Appeals for the Second Circuit, and that

said decree may be reversed and the libelants be decreed payment of their claim with interest and costs in the District Court and in this Court.

S. & G.,
Proctors for Appellants.

Dated, N. Y., July 17, 1891.

FORM XXVII.—ORDER FOR MANDATE IN ADMIRALTY.

At a stated term of the United States Circuit Court of Appeals for the Second Circuit, held in the Court Rooms in the city of New York, on the —— day of December, 1891. Present: Honorable WILLIAM J. WALLACE and Honorable E. HENRY LACOMBE, Judges.

[TITLE.]

This cause having come on to be heard on appeal from the decree of the District Court of the United States for the District of Connecticut, entered herein ——, 1891, now, on motion of D. & F., proctors for the libelant and appellant, it is

Ordered that said decree be, and the same hereby is, reversed, with costs of this Court, and that the costs of the District Court be apportioned, and that a mandate issue to said District Court directing said court to proceed in accordance with the opinion of this court.

FORM XXVIII.—MANDATE IN ADMIRALTY.

UNITED STATES OF AMERICA, ss.

The President of the United States of America, to the Honorable the Judge of the District Court of the United States for the Southern District of New York, GREETING:

[SEAL.]

Whereas, lately in the District Court of the United States for the Southern District of New York, before you, in a cause between J. S., libelant and appellee, and the steamship X., whereof A. B. is claimant and appellant, wherein the decree of said Court is in the words and figures following, viz.: [Here state substance of decree of District Court] as by the inspection of the transcript of the record of the said Court, which was brought into the United States Circuit Court of Appeals for the Second Circuit by virtue of an appeal taken out by said A. B., agreeably to the Act of Congress in such case made and provided, fully and at large appears:

And whereas, in the present term of October, in the year of our Lord one thousand eight hundred and ninety-one, the said cause came on to be heard before the said United States Circuit Court of Appeals for the Second Circuit, on the said transcript of record, and was argued by counsel.

On consideration whereof it is now here ordered, adjudged and decreed by this Court that the decree of the District Court be, and the same hereby is, affirmed, with the costs of this Court, amounting to the sum of $42.25.

You, therefore, are hereby commanded that such further proceedings be had in said cause, in conformity with the opinion of this court, as according to right and justice and the laws of the United States ought to be had, the said appeal notwithstanding.

Witness the Honorable MELVILLE W. FULLER, Chief Justice of the Supreme Court of the United States, the twenty-fourth day of December, in the year of our Lord one thousand eight hundred and ninety-one.

JOHN A. SHIELDS,
Clerk of the United States Circuit Court of Appeals for the Second Circuit.

Costs of Clerk	$12.90
Printing record	4.35
Attorney	25.00
	$42.25

FORM XXIX.—FINAL DECREE ON MANDATE IN ADMIRALTY.

At a stated term of the District Court, etc. Present: Honorable ——, Judge.

[TITLE.]

The decree of this court entered herein July 7, 1891, having been affirmed on appeal to the United States Circuit Court of Appeals for the Second Circuit, as appears from the mandate of said court filed herein December 12, 1891, now, on motion of D. & F., proctors for the libelant and appellee, it is

Ordered, adjudged, and decreed that the libelant above named recover herein the sum of $——, damages, and the further sum of $——, interest thereon from the date of the report of the commissioner herein, and the further sum of $——, costs of this court, and the further sum of $42.25, costs of said Court of Appeals, making in all the sum of $——, for which sum the above-named vessel, her tackle, etc., are hereby condemned.

And it is further ordered, adjudged and decreed that the stipulators for costs and value on the part of the claimant and the sureties on the bond given on appeal herein cause the engagements of their stipulations and bond to be performed, or show cause why execution should not issue against their goods, chattels and lands in satisfaction hereof.

FORM XXX.—LIBEL OF PETITION FOR LIMITATION OF LIABILITY.

To the Honorable Addison Brown, Judge of the District Court of the United States for the Southern District of New York:

The libel and petition of the T. Steamship Company, owner of the steamship D., in a cause of action, civil and maritime, respectfully shows:—

First. Your petitioner is a corporation duly created and organized by and under the laws of the kingdom of ——, having its principal office at ——, and owns and runs a line of steamships for the carriage of cargo and passengers between German ports and the port of New York, known as the T. Line. At the times hereinafter mentioned your petitioner was the owner of said steamship D., which was engaged in the business of carriage of cargo and passengers in said line as aforesaid.

Second. On the 20th day of March, 1889, said steamship D., having on board a large general cargo and about 500 passengers, and being fully manned with a large and competent crew, under command of an experienced master with a full corps of efficient officers, left the port of H. bound on a voyage to New York *via* the ports of C. and D. After touching at said ports, and taking on more passengers and cargo and ship's coals, said steamship left D. for New York on March 26th, passing Dennis Head on the 27th, and through Pentland Frith on the following day, whence all went well with said vessel until the 2d of April, when a storm came up, and for two days the vessel labored heavily in the seas. On the morning of the 4th the high seas continued, and finally, at 3:30 P. M., when in latitude 46° 28′ and longitude 40° 6′, a shock was felt throughout the ship. The engines were stopped instantly, and upon investigation it was found that the stern section of the propeller shaft had broken in the stern tube, and that at the same time the stern bulkhead was broken into and rivets started, letting in a large quantity of water. All the pumps were worked, the sails set. The pumps were kept going, but were unable to keep the water under control. The pumps were worked by steam, and the other compartments of the vessel kept empty; but the water continued to rise in the engineroom. A portion of the cargo was jettisoned without avail. The water in the after hold rose to a depth of three feet. The sea was still high. The storm continued, and the steamer labored heavily, and began noticeably to settle lower aft.

Third. At daylight on the 6th of April the steamship M. was sighted. She promptly offered assistance. Her commander undertook to tow the D. to the nearest land, which was the Azores. The M. accordingly began towing. The leak in the D. increased so rapidly that at 11 A. M. her passengers were begun to be transferred to the M., which was concluded at 4 P. M. The captain of the M. then declined to tow the D. longer, after the passengers had been transferred; and as the leak was increasing, the captain and crew of the D. were compelled for their own safety to abandon the vessel, which was done; and thereafter said vessel, together with all her tackle, apparel, boats and appurtenances have become a total loss, and no freight moneys have been earned, paid, or received therefrom.

Said accident happened, and the loss, damage, injury and destruction above set forth were occasioned, done and incurred without fault or privity or knowledge of your petitioner, and without the fault of any of its officers, agents or servants, but were due solely to perils of the seas.

Fourth. Nevertheless certain persons claiming to have been passengers on said vessel, and persons claiming to have lost passengers' luggage or

baggage upon the D., have already brought suit against your petitioner, and other suits are threatened. On the 6th day of May, 1889, one X. Y. commenced an action against your petitioner in the Supreme Court of the State of New York for the City and County of New York, within the Southern District of New York, to recover damages for alleged loss or destruction of luggage upon said steamship; and said action is still pending, the plaintiff's attorney being J. S., Esq., whose office is at ——, in the City of New York. Your petitioner desires to contest its liability for the loss, destruction, damage, and injury occasioned by said accident, and also to claim the benefit of the limitation of liability provided in the third and fourth sections of the Act of Congress, entitled "An Act to limit the liability of ship-owners and for other purposes," passed March 3, 1851, now embodied in §§ 4283 to 4285 of the Revised Statutes, and the various statutes in addition thereto and amendatory thereof,[1] [and is ready and willing to transfer any interest or *spes recuperandi* in the steamship D. for the benefit of all such claimants to a trustee to be appointed by this Honorable Court, although, as this petitioner is advised and believes, said steamship D. and her freight moneys, and her tackle and apparel, are now and have been a total loss.]

Fifth. Your petitioner further states the facts and circumstances by reason of which exemption from liability is claimed, as follows, in addition to the facts hereinbefore alleged:—

That the said steamship D. was in all respects sound, staunch, and seaworthy, and properly manned and equipped, and provided for the voyage in which she was engaged, and under command of proper and suitable officers.

That said accident occurred through no fault or negligence on the part of the persons on board of or having charge of the navigation of the said steamship D., but was wholly due to the perils of the seas, the severity of the storm, and the action of the elements in breaking the shaft of said steamer within the stern tube, whereby the stern bulkhead was broken and rivets started and a leak made so that it became impossible to repair her, which finally caused her to be abandoned by her passengers, officers, and crew.

That said steamship D. has not been libeled or arrested in any court to answer for said loss or destruction, but that the owners have been sued within the Southern District of New York, as aforesaid.

That your petitioner is ignorant of the amount of the losses and injuries suffered by the several freighters and owners of merchandise upon said voyage.

[1] Or in case of an appraisement, "and to that end desires an appraisement to be had of the amount or value of its interest in said steamship in the condition in which she was after said accident and damage on ——, 1889, and of her freight then pending; and for that purpose your petitioner asks that said steamship be examined and her value ascertained by a commissioner of the [District] Court, or by such other means as the court shall direct."

Wherefore your petitioner prays that this Honorable Court[1] will issue a motion against all persons claiming damages for any loss, destruction, damage, or injury occasioned by said accident, citing them to appear before this court and make due proof of their respective claims, at a time to be therein named; as to all which claims your petitioner will contest its liability, independently of the limitation of liability claimed under the act and statute aforesaid.

Also that the court will designate a commissioner before whom proof of all claims presented in pursuance of such monition shall be made; and that, upon the coming in of the report of said commissioner and upon the hearing of the cause, if it shall appear that the petitioner is not liable for such loss, damage, destruction, and injury, it may so finally be decreed by this court. And that in the meantime and until the final judgment of the court shall be rendered herein, this court will make an order restraining the further prosecution of all and any suit or suits against the petitioner, in respect to any such claim or claims, particularly by the said N. Y., who brought suit in the Supreme Court of the State of New York as hereinbefore specified; and the petitioner will ever pray, etc.

FORM XXXI.—ORDER FOR TRANSFER TO TRUSTEE.

At a stated term of the District Court of the United States for the Southern District of New York, held at the United States Court Rooms in the City of New York, on the 25th day of June, 1889. Present: Honorable Addison Brown, District Judge.

IN THE MATTER OF THE PETITION OF THE T. STEAMSHIP COMPANY AS OWNER OF THE LATE STEAMSHIP D.

Upon reading and filing the libel and petition of the T. Steamship Company as owner of the late steamship D., showing that it has been sued as such owner by one X. Y., claiming to have been owner of certain passengers' baggage lost and destroyed on such vessel at the time of the abandonment of said steamship on the 6th day of April, 1889, to recover for such loss, destruction, damage, and injury: and that other actions are threatened against said petitioner, and that the whole value of said vessel and her freight has been totally lost, and that the same is therefore not sufficient to make compensation to each of the freighters and owners therefor; and that such loss, destruction, damage, and injury was done, occasioned, and incurred without the privity or knowledge of such owner, and that said petitioner desires to claim the benefit of the limitation of liability pro-

[1] In case of appraisement, here insert "will be pleased to cause due appraisement to be had of the value of said steamship D, in the condition in which she was immediately after said accident, and is now, and, upon the ascertainment of said value, make an order for payment thereof into court, or for the giving of a stipulation, with sureties for payment thereof into court whenever the same shall be ordered, and."

vided for in the third and fourth sections of the Act of Congress, entitled "An Act to limit the liability of ship-owners and for other purposes," passed March 3, 1851, now embodied in §§ 4283 to 4285 of the Revised Statutes, and the various statutes in addition thereto and amendatory thereof, and also to contest its liability and the liability of said vessel for said loss, destruction, damage, and injury, independently of the limitation and liability claimed under said Act, said libel and petition also stating the facts and circumstances on which such exemption from limitation of liability are claimed, and praying proper relief in the premises in that behalf, and the said owner having elected to make a transfer as hereinafter provided.

It is hereby ordered, in conformity with said Act of Congress and the statutes amendatory thereof and the Rules of the Supreme Court of the United States made in pursuance thereof, that said T. Steamship Company transfer its interest in the late steamship D. and her freight for the said voyage, for the benefit of all such claimants, to Samuel H. Lyman, Esquire, of the City of New York, who is hereby appointed, pursuant to the provisions of the fourth section of said act, to be trustee for the person or persons who may prove to be legally entitled thereto.

ADDISON BROWN.

FORM XXXII.—TRANSFER TO TRUSTEE.

District Court of the United States for the Southern District of New York.

IN THE MATTER OF THE PETITION OF THE T. STEAMSHIP COMPANY AS OWNER OF THE STEAMSHIP D., FOR LIMITATION OF LIABILITY.

WHEREAS, a petition has been filed by the above-named petitioner as owner of the late steamship D. praying for a limitation of its liability in respect of such vessel; and whereas, by an order duly made herein, Samuel H. Lyman, Esq., has been appointed trustee, to whom the petitioner's interest in said steamship and her freight is directed to be transferred for the benefit of the claimants thereto:

Now, therefore, in consideration of the premises, and in compliance with the said order of this Honorable Court, the T. Steamship Company of —— above named, by its agents thereunto duly and lawfully organized, in pursuance of the Act of Congress of the United States entitled "An Act to limit the liability of shipowners, and for other purposes," passed March 3, 1851, now embodied in §§ 4283 to 4285 of the Revised Statutes, and the several statutes amendatory and supplemental thereof, and in compliance with the rules of the Supreme Court of the United States made in pursuance thereof, does hereby grant, assign, transfer, and set over absolutely all its right, title, interest, and property in and to said steamship known as the D., her engines, boilers, tackle, apparel, and furniture, or any savings, remnants, or wreckage of said steamship, her engines, boilers, tackle, apparel and furni-

ture and in and to the freight of the said steamship for her last voyage in said petition mentioned whether now or hereafter obtained, unto Samuel H. Lyman, Esq., as trustee appointed by the said order of the District Court as aforesaid, to have and to hold the same to him and his successors for the proper uses and offices of his said office of trustee. Power is hereby granted and conveyed to the said Samuel H. Lyman, Esq., trustee as aforesaid, and his successors in office, to make and enforce, by such actions at law or otherwise as may be necessary, all claims and demands of said T. Steamship Company for said steamship, her remnants, and freight.

In witness whereof said T. Steamship Company has subscribed these presents by its general agents for the United States, at the City of New York, on the twenty-fifth day of June in the year one thousand eight hundred and eighty-nine.

Taken and acknowledged in the presence of —— ——.

FORM XXXIII.—ORDER FOR MONITION.

At a stated term, &c. Present: Hon. —— ——, District Judge.

[TITLE.]

On reading the libel and petition herein, verified and filed on June 25th, 1889, for limitation of the liability of the petitioner above named, and it appearing therefrom that the steamship D. broke her shaft and was finally abandoned at sea on April 6th, 1889, and that said vessel and the cargo thereon became at total loss; and petitioner, as owner of the D., also contesting its liability and the liability of said steamship for said loss, destruction, damage, and injury, independently of the limitation of liability claimed, and said libel and petition having stated the facts and circumstances by reason of which exemption from and limitation of liability are claimed; [1] [and on reading the order of this court dated the 25th day of June, 1889, whereby it has been ordered that said petitioner transfer its interest in said steamship and her freight for the voyage in said libel and petition mentioned to Samuel H. Lyman, Esquire, to act as trustee for the person or persons who may prove to be legally entitled thereto, pursuant to the provisions of the act of Congress and the statutes amendatory thereof in said libel and petition referred to; and upon reading and filing the instrument of transfer duly executed by said petitioner by his authorized agents, bearing date the 25th day of June, 1889, whereby it appears that

[1] In case of appraisement: "and the amount or value of the interest of the petitioner in the steamship ——, her engines, etc., immediately after the accident sustained by her on the —— day of ——, having been duly appraised at the sum of —— dollars, as appears from the order entered herein on the —— day of ——, 18—, and there being no freight pending on the voyage of said steamship ——, on said —— day of ——, 18—, and the petitioner having duly given a stipulation, with sureties, for the payment of said amount into court whenever the same shall be ordered, and said stipulation having been duly approved by the court, now, on motion of D. & F. proctors for the petitioner."

the petitioner's interest in such vessel and freight have been transferred to such trustee, pursuant to such order and the said statutes and the rules of the Supreme Court of the United States in that behalf; upon motion of D. & F., proctors for said petitioner,] it is

Ordered that a monition issue, out of and under the seal of this court, against all persons claiming damages for any loss, destruction, damage, or injury occasioned by the disaster to said steamship B. and her subsequent abandonment referred to in said petition, citing them to appear before this court and make due proof of their respective claims, at or before the 10th day of October, 1889, at eleven o'clock in the forenoon; and Samuel H. Lyman, Esquire, a commissioner of the United States [District] Court, is hereby designated as the commissioner before whom such claims shall be presented in pursuance of said monition.

It is further ordered that public notice of such monition be given by the United States marshal for this district, in a newspaper, for the space of fourteen days and thereafter once in each week until the 10th day of October, 1889; and that a copy of such monition and of this order be personally served on the attorneys, proctors, or solicitors of record for the plaintiffs or libelants in each of the suits brought and pending in any court in the United States against said T. Steamship Company, to recover for any such damages, such service to be made at least one month prior to the said 10th day of October, 1889.

It is further ordered that the prosecution of all or any suit or suits, actions, or proceedings against the T. Steamship Company, in respect of any claim for damages for any loss, destruction, damage, or injury occasioned by said disaster to the steamship D., or her loss and abandonment, be, and the same hereby is, restrained.

It is further ordered that any person claiming damages as aforesaid, who shall have presented his claim to said commissioner under oath, shall be at liberty, on or before said last named date, or within such further time as this court may grant, to answer the libel and petition herein, and to contest the right of the petitioner either to the limitation of liability or exemption from liability, or to both of said reliefs, as prayed for in said petition.

FORM XXXIV.—MONITION.

SOUTHERN DISTRICT OF NEW YORK, ss.

The President of the United States of America to the United States Marshal for the Southern District of New York, GREETING:

Whereas a libel and petition was filed in the District Court of the United States for the Southern District of New York, on the 25th day of June, 1889, by the T. Steamship Company, as owner of the steamship D., praying for a limitation of its liability concerning the loss, destruction, damage, and injury occasioned by the disaster to and abandonment of said steamship on the 6th day of April, 1889, for the reasons and causes in said libel and petition mentioned, and praying a monition of the said court in

that behalf to be issued, and that all persons claiming damages for any such loss, destruction, damage, or injury may be thereby cited to appear before said court and make due proof of their respective claims, and, all proceedings being had, that if it shall appear that the said petitioner is not liable for any such loss, destruction, damage, or injury, it may be so finally decreed by this court:

[And whereas the interest of the said petitioner in the steamship D.] [1] and her freight then pending has been duly transferred to Samuel H. Lyman, Esquire, as trustee, in compliance with the order of this court, and the said court has ordered that a monition issue against all persons claiming damages for said loss, destruction, damage, or injury, citing them to appear and make due proof of their respective claims;

You are therefore commanded to cite all persons claiming damages for any loss, destruction, damage, or injury occasioned by said disaster to and abandonment of the said steamship, to appear before said court and make due proof of their respective claims before Samuel H. Lyman, Esquire, a commissioner of the United States [District] Court, at his office, in the United States Court and Post Office Building, on or before the 10th day of October, 1889, at 11 o'clock in the forenoon. And what you shall have done in the premises do you then make return thereof to this court, together with this writ.

Witness the Honorable ADDISON BROWN, Judge of the said court, at the city of New York, in the Southern District of New York, this 25th day of June, in the year of our Lord one thousand eight hundred and eighty-nine, and of our Independence the one hundred and thirteenth.

[SEAL] SAMUEL T. LYMAN, Clerk.

D. & F., Proctors for Libelant and Petitioner.

FORM XXXV.—FINAL DECREE IN PROCEEDINGS FOR LIMITATION OF LIABILITY IN ADMIRALTY.

At a stated term, &c. Present: The Honorable —— ——, District Judge.

IN THE MATTER OF THE LIBEL AND PETITION OF THE T. STEAMSHIP COMPANY, AS OWNER OF THE STEAMSHIP D., ETC., FOR LIMITATION OF LIABILITY.	Final Decree.

A libel and petition of said T. Steamship Company having been filed in this court, showing that it is the owner of the late steamship D., which broke its shaft and was abandoned on the high seas, on the 6th day

[1] Or, "And whereas the value of the interest of the said petitioner in said steamship has been duly appraised at the sum of —— dollars, and there was no freight pending on the voyage of said steamship on said —— day of ——, 18—, and a stipulation for the payment into court of the value of the interest of the said petitioner in said steamship has been given."

of April, 1889, resulting in the total loss of said vessel with the cargo laden thereon; and it further appearing therefrom that at the time of filing said libel and petition various actions were threatened by certain passengers thereon, and that one suit was pending against the petitioner by one X. Y. as plaintiff, in the Supreme Court of the State of New York, in the City and County of New York, within the Southern District of New York, to recover loss, damage, and destruction of baggage shipped or put on board said steamship, and it also appearing that such loss, damage, injury, and destruction of property were occasioned without the privity or knowledge of said petitioner, and that said petitioner desires to claim the benefit of the limitation of liability provided for in the Act of Congress of the United States entitled "An Act to limit the liability of shipowners, and for other purposes," passed March 3d, 1851, now embodied in §§ 4283 to 4825 of the Revised Statutes, and the several acts and statutes amendatory thereof and supplemental thereto; and said petitioner having contested any and all liability in respect to said loss, destruction, damage, and injury (independently of the limitation of liability claimed), and said libel and petition having stated the facts and circumstances by reason of which exemption from liability is claimed; and an order of this court having been made thereon dated the 25th day of June, 1889, whereby it was ordered that the said petitioner transfer its interest in said steamship and her freight for the voyage in said libel and petition mentioned to Samuel H. Lyman, Esquire, to act as trustee for the person or persons who may prove to be legally entitled thereto, pursuant to the provisions of the said Act of Congress of the United States, and the statutes amendatory thereof and supplemental thereto; and the petitioner having duly complied with said order, and having made said transfer to said trustee, as appears by the instrument of transfer duly executed by said petitioner to said trustee, bearing date the 25th day of June, 1889; and an order having been also made dated on said 25th day of June, 1889, directing a monition to issue out of and under the seal of this court, citing all persons claiming damages for the loss, destruction, damage, and injury, to appear before this court and make due proof of their respective claims, with liberty also upon making proof to answer said libel and petition; and a monition having been thereupon, and on the said twenty-fifth day of June, duly issued in pursuance of said last mentioned order, and the said monition having been duly returned by Martin T. McMahon, the marshal of the United States for the Southern District of New York, with proof of due personal service of said monition on the attorney of record for X. Y., the plaintiff in the suit brought and pending against said petitioner, and also due proof of the giving of due notice of said monition by publication in conformity with the directions in said last mentioned order. And on the return of said monition proclamation having been duly made for all persons claiming damages for any loss, destruction, damage, or injury occasioned by the disaster above referred to, appear and present their claims, and such answers or exceptions as they should be advised, and no person having appeared, and no answer or exceptions having been filed, and the default of all persons having been duly noted. And a report having been duly rendered and filed by

Samuel H. Lyman, Esquire, commissioner appointed in this proceeding as aforesaid, which report bears date the first day of November, 1889, from which it appears that no claims have been presented to him by any person or parties whatsoever, and it further appearing from said report and the testimony filed therewith that said steamship D. was lost and abandoned at sea on April 6th, 1889, and that the circumstances of said disaster have been correctly set forth in the libel and petition herein, and that said loss and disaster were done and occasioned without fault, privity, or knowledge of the petitioner herein, or of any of its servants, but were due solely to perils of the seas; and that at the time of starting upon said voyage from H., said steamship was in good condition, and was in every respect fully manned and equipped; and it being also reported by said commissioner that the petitioner herein is entitled to the benefit of the limitation of liability provided for in the Act of Congress of the United States, entitled "An Act to limit the liability of shipowners and for other purposes," passed March 3rd, 1851, now embodied in sections 4283 to 4285 of the Revised Statutes of the United States, and the several acts and statutes amendatory thereof and supplemental thereto; and the said Samuel H. Lyman, as trustee, having also made and filed his report as such trustee, wherein he finds and reports that said steamship D. has become a total loss, and that nothing has been received or recovered therefrom, and that no freight moneys have been earned, paid, or received therefrom, and that nothing has therefore come to him or is recoverable by him, as such trustee, and said reports coming on to be heard, now upon motion of D. & F., proctors for the petitioner.

It is ordered that said several reports of Samuel H. Lyman, Esquire, as commissioners and as trustees, be, and they each are hereby, in all things confirmed; and that the defaults of all and every persons and parties thereto be, and the same hereby are, entered herein, and that the allegations of said libel and petition stand as confessed and admitted.

It is further ordered, adjudged, and decreed that said petitioner, the T. Steamship Company, as owner of the late steamship D., is entitled to the benefit of the limitation of liability provided for in the Act of Congress of the United States, entitled "An Act to limit the liability of shipowners and for other purposes," passed March 3d, 1851, now embodied in sections 4283 and 4285, of the Revised Statutes of the United States, and the several acts and statutes amendatory thereof and supplemental thereto.

And it is further ordered, adjudged, and decreed that said libelant and petitioner be, and it hereby is, forever discharged from all and every claim or demand arising from or growing out of said disaster to the said steamship D., or out of the loss and abandonment of said vessel, and the loss or injury to any cargo, property, effects, and goods then laden thereon.

It is further ordered that said X. Y., his agents, attorneys, proctors, and counsel, refrain from the further prosecution of said action begun by him against the petitioner to recover for the loss, destruction, and injury as aforesaid.

It is further ordered that all other persons whomsoever claiming, or who may hereafter claim, for any loss, destruction, damage, or injury occasioned

by said disaster to the steamship D., or by her loss and abandonment, be, and the same hereby are, perpetually restrained and enjoined from bringing, commencing, or instituting, or further prosecuting any suit or suits or proceedings whatever, upon any cause of action whatsoever, against the F. steamship company, for any loss, damage, or injury done, suffered, or occasioned by reason of the loss and abandonment of said steamship D., as aforesaid.

And it is further ordered that this decree be served within the Southern District of New York, in the usual manner, and within any district or districts of the United States other than the Southern District of New York, by the United States marshal for such other district or districts respectively, by delivering a copy of such original decree and exhibiting a certified copy thereof to the party or person to be served.

ADDISON BROWN,
U. S. District Judge.

FORMS IN CONTEMPT PROCEEDINGS

CONTEMPT FORM I.—RULE TO SHOW CAUSE WHY DEFENDANTS AND THEIR ATTORNEYS SHOULD NOT BE COMMITTED FOR CIVIL CONTEMPT.

[Application denied, see record, Stevens v. Missouri, Kansas & Texas Ry. Co., 106 Fed. 771, in which the author was counsel for the defendant.]

[Title.]

On reading and considering the verified petition of the complainants, it is here ordered that the defendants and H. C. Rouse, President of the Missouri, Kansas & Texas Railway Company; Henry W. Poor, President of the Kansas City & Pacific Railroad Company; James Hagerman, general solicitor, and T. N. Sedgwick, general attorney of Kansas, for said defendants, be and appear in their own proper persons before this Court at Fort Scott, Kansas, on the 15th day of February, 1890, at 2 o'clock, P. M., of said day, then and there to show cause, if any they have, why they and each of them should not be punished for contempt for violating the injunction orders heretofore issued in this cause.

Service of this order may be made by the complainants upon the defendants by serving a copy thereof with a copy of the petition for this rule attached, on T. N. Sedgwick, general attorney for the Missouri, Kansas & Texas Railway Company and The Kansas City & Pacific Railroad Company; and by sending a copy of this order, with a copy of said petition attached thereto, by registered mail, to H. C. Rouse, president of the Missouri, Kansas & Texas Railway Company; Henry W. Poor, president of the Kansas City & Pacific Railroad Company, and James Hagerman, general solicitor of both defendants, at the usual post-office address of said Rouse, Poor and Hagerman.

Witness my hand and at my chambers at Leavenworth, Kansas, this 24th day of January, 1900.

WILLIAM C. HOOK,
Judge.

CONTEMPT FORM II.—NOTICE OF MOTION FOR AN ORDER COMMITTING THE DEFENDANTS AND OTHER PARTIES FOR A CIVIL CONTEMPT.

[Motion denied. Colliery Engineer Co. v. Ewald, 126 Fed. 843, in which the author was counsel for respondents.]

[Title.]

To the Defendants, F. W. Ewald and United Correspondence Schools Co. and their confederates Leonard L. Poates, Leonard W. Seelingsberg and Consolidated Schools Co. and each of you:

Take notice that on Friday, March 27th, 1903, at the United States Court Rooms in the City of New York, Borough of Manhattan, at the opening of Court on that day or as soon thereafter as counsel can be heard, we shall move this Honorable Court that you and each of you be adjudged in contempt of the injunction issued under and pursuant to the decree in the above entitled suit and for an attachment against you and each of you for such contempt and for such other and further relief as to this Court may seem just.

This motion will be founded upon the affidavits and other papers, with copies of which you are herewith served, and the exhibits therein referred to which are at our office subject to your inspection, and such other affidavits or papers as may be served upon you hereafter and upon the proceedings, records and documents heretofore had in this case and now on file with the Clerk of this Court.

Yours &c.,
GIFFORD & BULL
Complts Solrs.
141 Broadway
N. Y. City.

CONTEMPT FORM III.—PETITION FOR RULE TO SHOW CAUSE WHY DEFENDANTS AND THEIR ATTORNEYS SHOULD NOT BE COMMITTED FOR CIVIL CONTEMPT.

[Application denied. See record, Stevens v. Missouri, Kansas & Texas Ry. Co., 106 Fed. 771, in which the author was counsel for the defendant.]

[Title.]

The complainants respectfully show unto the Court, as follows:

That on or about the 7th day of April, 1898, they commenced the action above entitled against the defendants above named in the District Court of Bourbon County, State of Kansas.

That on the date aforesaid, the District Court of said Bourbon County, not being in session, and the Judge of said Bourbon County District Court being then absent from said county, the Probate Judge of said Bourbon

County made an order in said case, as prayed for in the petition of the plaintiffs, enjoining and restraining the Missouri, Kansas & Texas Railway Company, and The Kansas City & Pacific Railroad Company, defendants, and each and all of their officers, directors, servants and agents, from consolidating, and from taking any action towards the consolidation of the Kansas City & Pacific Railroad Company and the Missouri, Kansas & Texas Railway Company under the name of the latter company; and also enjoining and restraining said defendants, their officers, directors, servants and agents, from taking any action towards the cancellation of a lease dated May 13, 1890, under the terms of which the said Missouri, Kansas & Texas Railway Company has been, since August 1, 1890, operating the railroad of the Kansas City & Pacific Railroad Company, running from Paola, Kansas, to a point in the Indian Territory about six miles south of the town of Coffeyville, Kansas; and also enjoining said defendants, their officers, directors and agents, from cancelling, or exchanging for common stock of The Missouri, Kansas & Texas Railway Company, and from calling in the stock of the Kansas City & Pacific Railroad Company belonging to the estate of Robert S. Stevens, deceased.

And your petitioners further show that on or about the 7th day of April, 1898, after said petition and restraining order was filed in the office of the Clerk of the District Court of Bourbon County, Kansas, and after said plaintiffs had given security for costs, as required by law, and had given an injunction bond, as required by said restraining order, a summons was issued out of said District Court, endorsed "Injunction Allowed," and served in due form of law on said defendant, The Missouri, Kansas & Texas Railway Company, by the delivery by the Sheriff of said Bourbon County to the freight and ticket agent of said Missouri, Kansas & Texas Railway Company at Fort Scott, Kansas, of a duly certified copy of said summons, with all the endorsements thereon, which said service was duly returned by the Sheriff into the said Court; and that at the same time, and on said date, there was issued out of the said District Court of Bourbon County, Kansas, a summons endorsed "Injunction Allowed," for the defendant, Kansas City & Pacific Railroad Company, which last naméd summons was directed to the Sheriff of Labette County, Kansas, and by him served on the 7th day of April, 1898, at Parsons, Kansas, on Henry W. Poor, the president of said Kansas City & Pacific Railroad Company. That at the same time and place there was also served by said Sheriff on Henry W. Poor, president as aforesaid, a certified copy of said restraining order, of all of which doings the Sheriff of Labette County made return into said District Court of Bourbon County, Kansas.

And your petitioners further show that a special meeting of the stockholders of the Missouri, Kansas & Texas Railway Company, and also a special meeting of the stockholders of the Kansas City & Pacific Railroad Company, had been called to meet at Parsons, Kansas, on said 7th day of April, 1898, for the purpose of ratifying and approving a proposed consolidation of the defendants herein, under the name of the Missouri, Kansas & Texas Railway Company. But, as commanded by said restraining

order or temporary injunction, no action was then taken looking to the consolidation of said corporations, and no action was then taken by either of the defendants looking to the exchange of the stock of the Kansas City & Pacific Railway Company for an equal amount of the common stock of the Missouri, Kansas & Texas Railway Company, as it had been proposed to do at said stockholders' meetings.

And your petitioners further show that on or about the 4th day of May, 1898, the defendants jointly filed their petition in said District Court of Bourbon County, Kansas, wherein they asked the removal of said cause from the said District Court into this court, and with such petition for removal filed such a bond as is required by law in such cases; that thereafter, and on or about the 4th day of May, 1898, said District Court of Bourbon County made and entered of record an order removing said cause to this court as prayed for in said petition, and ever since said date said cause has been and now is pending in this court. Thereafter, and on the 26th day of July, 1898, on the application of complainants, an order was made by this court permitting said complainants to amend their bill of complaint and file an amendment thereto; that thereafter, on the 5th day of September, 1898, the complainants filed an amendment and supplement to their bill of complaint, and sent a copy of the same to T. N. Sedgwick, one of the attorneys for the defendants, as required by said order. And your petitioners further show that thereafter, to wit, on the 14th day of November, 1898, the Honorable C. G. Foster, then one of the judges of this court, made an order, which was entered of record in this cause, enjoining and restraining the defendants, their officers, servants and agents, in manner and form substantially as they had been theretofore enjoined and restrained, and were then enjoined and restrained by the order so as aforesaid made in the said cause. A copy of said last named order was mailed by the deputy clerk of the United States Circuit Court at Fort Scott, Kansas, to T. N. Sedgwick, one of the attorneys for said defendants, at Parsons, Kansas; that said last named temporary injunction or restraining order, so issued by Judge Foster, ever since its date has been and still is in full force and effect, and each of the defendants, and James Hagerman and T. N. Sedgwick, their attorneys, and H. C. Rouse, President of the Missouri, Kansas & Texas Railway Company, and Henry W. Poor, President of the Kansas City & Pacific Railroad Company, have at all times had personal knowledge and notice of each of said temporary injunctions or restraining orders.

And your petitioners further show that notwithstanding the premises, and in contempt of the injunction orders aforesaid, the defendant the Missouri, Kansas & Texas Railway Company, by H. C. Rouse, its president; James Hagerman, its general solicitor, and T. N. Sedgwick, its general attorney for Kansas; and the defendant the Kansas City & Pacific Railroad Company, by Henry W. Poor, its president; James Hagerman, its general solicitor, and T. N. Sedgwick, its general attorney in Kansas, met at Parsons on or about November 23, 1899, and then and there took such steps that on the 24th day of November, 1899, there was filed in the office

of the Secretary of State for the State of Kansas a certain so-called indenture of consolidation of the Missouri, Kansas & Texas Railway Company and the Kansas City and Pacific Railroad Company; that by said so-called indenture of consolidation the complainants are and were first advised that on the 10th day of May, 1898, at the adjourned special meeting of the stockholders of the Missouri, Kansas & Texas Railway Company, originally called for April 7, 1898, a so-called contract of consolidation between the defendants was pretended to be ratified and approved by parties representing more than two-thirds of the capital stock, preferred and common, of said Missouri, Kansas & Texas Railway Company; that at said meeting there were present and participating therein H. C. Rouse, president; James Hagerman, general solicitor, and T. N. Sedgwick, general attorney, aforesaid; that it also appears by said so-called indenture of consolidation that on the 19th day of July, 1899, H. C. Rouse, President of the Missouri, Kansas & Texas Railway Company, and Henry W. Poor, President of the Kansas City & Pacific Railroad Company, in defiance of said injunction orders, and in contempt of this Court, executed for said corporations a contract by which they undertook and pretended to consolidate the two defendant corporations under the name of the Missouri, Kansas & Texas Railway Company. Said contract also pretends to provide for an increase of the common capital stock of the Missouri, Kansas & Texas Railway Company to the amount of two million five hundred thousand ($2,500,000) dollars, which is to be exchanged, share for share, for the outstanding capital stock of the Kansas City & Pacific Railroad Company, in the City of New York. Said contract also pretends to provide for the cancellation of the lease hereinbefore described, except as to the guaranty in said lease contained, whereby the Missouri, Kansas & Texas Railway Company agrees to pay certain interest on the mortgage indebtedness of the Kansas City & Pacific Railroad Company; that said pretended indenture of consolidation also shows that the Southwestern Coal & Improvement Company, by Colgate Hoyt, its vice-president, pretending to own 16,715 shares of the capital stock of the Kansas City & Pacific Railroad Company; H. C. Rouse pretending to own five shares of said capital stock; Henry W. Poor pretending to own five shares of said capital stock, and Colgate Hoyt, pretending to own five shares of said capital stock, on or about the 19th day of July, 1899, undertook and pretended to ratify and approve said so-called indenture of consolidation; that said Southwestern Coal & Improvement Company is a corporation organized under the laws of West Virginia, and its capital stock is wholly owned by the Missouri, Kansas & Texas Railway Company; that Colgate Hoyt, vice-president of said Southwestern Coal & Improvement Company, is also a director and officer of the Missouri, Kansas & Texas Railway Company; that no other stockholder of the Kansas City & Pacific Railroad Company has consented to said so-called consolidation, and said consolidation proceedings have been carried on solely by and between persons in the employ of the Missouri, Kansas & Texas Railway Company; that by said pretended indenture of consolidation the defendants, their officers and agents aforesaid, are undertaking to compel the complainants

to exchange twelve hundred and seventy-three (1,273) shares of the stock of the Kansas City & Pacific Railroad Company, owned by the estate of Robert S. Stevens, for an equal number of shares of the common stock of the Missouri, Kansas & Texas Railway Company, and are also undertaking and pretending to cancel the lease, dated March 13, 1890, from the Kansas City & Pacific Railroad Company to the Missouri, Kansas & Texas Railway Company, a copy of which is attached to the bill of complaint.

And your petitioners further show that pursuant to the plan of the defendants, and officers of said defendants hereinbefore named, to consolidate said corporations; and in furtherance of their determination to compel complainants to exchange the stock of the Kansas City & Pacific Railroad Company now held by them as executors under the last will and testament of Robert S. Stevens, deceased, for an equal amount of the common stock of the Missouri, Kansas & Texas Railway Company; and also in pursuance of the scheme of said defendants, and of said officers of said defendants, to cancel the lease aforesaid from the Kansas City & Pacific Railroad Company to the Missouri, Kansas & Texas Railway Company, said Henry W. Poor, as president of the Kansas City & Pacific Railroad Company, acting by and through said T. N. Sedgwick, the general attorney in Kansas for said defendants, on the 27th day of December, 1899, caused to be published in the *Parsons Daily Sun*, of Parsons, Kansas, an advertisement in which said Poor, in substance, undertook to give notice to the stockholders of the Kansas City & Pacific Railroad Company that by authority of the board of directors of said corporation, and pursuant to the terms of the aforesaid so-called indenture of consolidation, there had been deposited with him (Poor) twenty-five thousand (25,000) shares of the common stock of said so-called consolidated company for exchange for the capital stock of the Kansas City & Pacific Railroad Company. Said advertisement also purported to notify all holders of shares of stock in said The Kansas City & Pacific Railroad Company to deliver their stock at the office of said corporation, 45 Wall street, in the City of New York, to the said Henry W. Poor, as president aforesaid, so that the said stock can be exchanged, share for share, for said stock of said so-called consolidated company, and so that said stock of The Kansas City & Pacific Railroad Company can be canceled by him; and said advertisement further pretended to notify the stockholders of The Kansas City & Pacific Railroad Company that such exchange of stock will be made between the hours of ten o'clock A. M. and three o'clock P. M., except Saturday, and on such day between the hours of ten o'clock A. M. and twelve o'clock noon, of the week beginning Tuesday, February 13, 1900.

And your petitioners further show that after the meeting between said Rouse, Poor, Hagerman and Sedgwick, at Parsons, Kansas, on November 23, 1899, hereinbefore set forth, the defendant, The Missouri, Kansas & Texas Railway Company on December 2, 1899, caused to be inserted in sundry financial papers, in the City of New York, notices that it proposed to increase its capital stock to the amount of two million, five hundred thousand ($2,500,000) dollars, for the purpose of absorbing by consolidation the

Kansas City & Pacific Railroad Company, and thereafter listed said so-called increase of stock on the New York Stock Exchange; and said Henry W. Poor, in his capacity of president of the Kansas City & Pacific Railroad Company, also gave notice in said financial papers of the exchange of stock set forth in the advertisement, hereinbefore referred to, appearing in the Parsons *Daily Sun*, of date December 27, 1899; that said Rouse and said Poor, the presidents of the defendants have no office in the State of Kansas, nor has The Kansas & Pacific Railroad Company any office in said State, nor does any one of its officers reside in or keep an office in said State, and all of the acts that have been performed, or will hereafter be performed in pursuance of said pretended consolidation, have taken place, and will take place, outside of said State and in the City of New York, except as hereinbefore stated.

That each and all of the acts aforesaid have been taken by said defendants at the instance of H. C. Rouse, president of the Missouri, Kansas & Texas Railway Company, and Henry W. Poor, president of the Kansas City & Pacific Railroad Company, and at the instance and under the advice and counsel of James Hagerman and T. N. Sedgwick, the attorneys and solicitors for said defendants aforesaid.

And your petitioners refer to the files and records in this cause, and make the same a part hereof, and they also attach hereto a certified copy of said so-called indenture of consolidation.

Wherefore, your petitioners pray the issuance and service on said defendants, and on said Rouse, Poor, Hagerman and Sedgwick, of a rule requiring them, on a day to be named therein, to appear before this Honorable Court to show cause why they, and each of them, should not be committed for contempt in violating said injunction orders in manner aforesaid; and your petitioners will ever pray, etc., etc.

HOLMES & PERRY,
KELSO & VAN TUYL,
Solicitors for Complainants.

W. C. PERRY,
Of Counsel.

[Annexed were affidavit and exhibits.]

CONTEMPT FORM IV.—INFORMATION FOR CRIMINAL CONTEMPT.

[Title.]

L. Ert Slack, United States Attorney for the District of Indiana, gives the Court to understand and be informed that heretofore, towit: on the 31st day of October, 1919, the United States of America filed in the District Court of the United States for the District of Indiana its bill of complaint against the following named defendants, towit: Frank J. Hayes, John L. Lewis [naming other persons against whom the information was filed], and others for the purpose of restraining said defendants and other

persons whose names are unknown from further engaging in and carrying out a conspiracy, combination, agreement and arrangement.

(a) To restrict the supply and distribution throughout the United States of a necessary, within the meaning of the Act of Congress of August 10, 1917, entitled

> "An Act to provide further for the National security and defense by encouraging the production, conserving the supply and controlling the distribution of food products and fuel"—namely: bituminous coal—

(b) To restrict the distribution of such coal in interstate commerce throughout the United States, and (c) To restrict the operation by the United States of the railroads of the country by means of the consumption of such coal. By the terms of said bill of complaint it was made to appear that bituminous coal is the most important fuel consumed in the United States; that it is used throughout the United States in the generation of steam and electricity for motive power in the operation of railroads, steamboat lines, power plants, street car lines, factories and industrial plants of all kinds, and in the generation of heat in hotels, office buildings, apartment houses and private dwellings for the purpose of protection against cold; that it is mined and produced from the ground to the extent of approximately five hundred million net tons annually in the States of Alabama, Arkansas, Colorado, Georgia, Illinois, Indiana, Iowa, Kansas, Kentucky, Maryland, Michigan, Missouri, Montana, New Mexico, North Dakota, Ohio, Oklahoma, Pennsylvania, Tennessee, Texas, Utah, Virginia, West Virginia and Wyoming, the largest production however, being in the States of Pennsylvania, Illinois and West Virginia; that it is mined from the ground by human labor, particularly in the three states last mentioned, and is shipped and distributed from the mines, in interstate commerce, into all the States of the United States, for the above described uses in the generation of heat and power, including the operation of the railroads of the country. By said bill it was further made to appear that approximately 615,000 miners and mine workers are engaged in the United States in the production of bituminous coal, of whom, upwards of 400,000 are members of local trade unions and district unions and of the International Union, United Mine Workers of America, an organization of all the members of the aforesaid union and of certain local and district unions of bituminous coal miners and mine workers in Canada. [Next were set forth the other allegations and prayers of the bill in equity to enjoin the strike.] and as follows:

> "Sec. 4. That it is hereby made unlawful for any person to conspire, combine, agree or arrange with any other person (a) to limit the facilities for transporting, producing, harvesting, manufacturing, supplying, storing or dealing in any necessaries; (b) to restrict the supply of any necessaries; (c) to restrict distribution of any necessaries," etc.,

and as follows:

> "Sec. 24. That the provisions of this act shall cease to be in effect when the existing state of war between the United States and Germany shall have terminated, and the fact and date of such termination shall be ascertained and proclaimed by the President."

That it was further made to appear by said bill, for the purpose of carrying out the provisions of the said Act of Congress, there was subsequently established by the President of the United States, and recognized by Presidential proclamation, an administrative body known as the United States Fuel Administration, at Washington in the District of Columbia, which body, pursuant to the authority of said proclamation, exercised a large measure of control and supervision over the production and distribution of bituminous coal throughout the United States; that with the official approval and sanction of the United States Fuel Administration there was entered into, at Washington in the District of Columbia, on October 6, 1917, a supplemental agreement (the so-called Washington Wage Agreement) between the operators and the union mine workers of the so-called central competitive fields, composed of Western Pennsylvania, Ohio, Indiana and Illinois, for an increase in the production of bituminous coal and an increase in wages to the miners and mine workers over the then existing scale of compensation; that said agreement provided for an advance of ten cents per ton to miners, and for advances ranging from 75 cents to $1.40 per day to laborers, and for an advance of 15 per cent for yardage and dead work, resulting in an increase to miners of 50 per cent, and to the best paid laborers of 78 per cent over the wages of April 1st, 1914; that said agreement also provided for the establishment of automatic penalties to be imposed upon miners for working less than eight hours per day, as stipulated in the then existing wage agreement, in order to avoid a shortage of coal, it being considered that no such shortage would develop if the miners then at work would work eight hours per day during five days of the week. The said agreement also contained the following provision:

> "Subject to the next biennial convention of the United Mine Workers of America, the mine workers' representatives agree that the present contract be extended during the continuation of war, and not to exceed two years from April 1, 1918;"

that subsequently the succeeding biennial convention of the International Union, United Mine Workers of America, duly ratified and approved said Washington Wage Agreement.

That by said bill it was further made to appear that in September, 1919, there was held at Cleveland, Ohio, the 27th successive constitutional and the 4th biennial convention of the International Union, United Mine Workers of America, at which session the principal subject considered and dealt with by the said convention was a formulation of new and further wage demands which the miners were to place before the operators of the central

competitive field at a joint conference with such operators at Buffalo, on September 25, 1919; that at said convention, the vice-president and acting president of said International Union, United Mine Workers of America, read a report in which he recommended that the convention take action declaring the Washington Wage Agreement officially terminated at a date not later than November 1st; that the automatic penalty clause of the Washington Wage Agreement be eliminated in the next contract, and that if a basic agreement for the central competitive field should not be negotiated by November 1st there should be a complete cessation of mining operations by all the members of the United Mine Workers of America; that upon September 22, 1919, the defendants constituting the so-called scale committee submitted a report to said convention recommending, among other things, that the convention demand a 60 per cent. increase applicable to all classifications of day labor, and to all tonnage, yardage and dead work rates throughout the central competitive fields; that all new wage agreements replacing existing agreements should be based on a six-hour work day, from bank to bank, five days per week, the abolition of all automatic penalty clauses; that all contracts in the bituminous fields should be declared to expire November 1, 1919; that no agreement for the central competitive field should be concluded until the convention should have been reconvened at Indianapolis, Indiana, on a date to be designated by the resident international officers, and until it should have ratified such contract; and that "in the event a satisfactory wage agreement is not secured for the central competitive field before November 1, 1919, to replace the one now in effect, that the international officers be authorized to and are hereby instructed to call a general strike of all bituminous miners and mine workers throughout the United States, the same to become effective November 1, 1919.

That the acting president thereupon explained to the convention that if the general strike should be called for November 1, 1919, the convention would not be reconvened, and that the international officials were clothed with full authority to handle the strike; whereupon, the report of the scale committee was adopted by the convention and the convention was declared closed.

That by said bill it was further made to appear that subsequently, at Buffalo, on September 25, 1919, certain of the delegates to the above mentioned convention who had been designated and the members of the said scale committee participated in a joint wage conference with the operators of the bituminous mines of the central field; that after prolonged negotiations a motion was made in behalf of the miners and mine workers that their demands be adopted as a whole, including the 60 per cent. wage increase, and a motion was made in behalf of the operators to continue the existing agreement in effect until March 31, 1920. Both motions were defeated. Thereupon, a sub-committee of representatives of both the miners and mine workers and of the operators was appointed to conduct negotiations, and adjourned to meet in Philadelphia on Thursday, October 9, 1919.

The representatives of the miners and mine workers were thereupon un-

successful in having their demands granted, and the sub-committee adjourned without having reached an agreement.

That by said bill it was further made to appear that subsequently, at Indianapolis within this district, the defendants, being officers of the International Union, United Mine Workers of America, and other persons whose names are unknown to the plaintiff, in an effort to enforce and coerce the operators of bituminous mines in the central competitive field to grant the above enumerated demands of the officers and delegates of said union, including the demand for a 60 per cent. increase in wages for the miners and mine workers in the central competitive field who are members of the said union, in violation of the aforesaid act of Congress of August 10, 1917, and against the public policy of the United States of America, unlawfully and knowingly conspired, combined, agreed and arranged together to restrict the supply and distribution and to limit the facilities for transporting and supplying bituminous coal from all the mines where such coal is produced, as herein before described, to and throughout all the States of the United States, for the various uses mentioned, by means of declaring, enforcing and maintaining the said general strike or cessation of labor on the part of all bituminous miners and mine workers who are members of the International Union, United Mine Workers of America.

That pursuant to said conspiracy, combination, agreement and arrangement, the defendants, at the city of Indianapolis, Indiana, within this district, on October 15th or 16th, 1919, under the authority conferred upon them as officers of the said International Union, United Mine Workers of America, issued so-called strike orders signed by defendants John L. Lewis and William Green, to the various unions and members of local unions who are members of the said International Union, to cease all work in the mining of bituminous coal at midnight on Friday, October 31, 1919, and until further orders, and that they had issued supplemental instructions and orders necessary to the fulfillment of such orders to cease work.

That further means of carrying out the said unlawful conspiracy, combination, agreement and arrangement agreed upon by the defendants as a part of such conspiracy, combination, agreement and arrangement, would therefter consist in the issuance of further and supplemental orders and instructions covering and arranging for all necessary details of a successful enforcement of the strike, and in the continuous and repeated issuance and promulgation by the defendants of messages of encouragement and exhortation to continue to abstain from work and not return to the mines, and in the issuance and distribution to the striking miners and mine workers of so-called strike benefits or sums of money previously accumulated and subsequently acquired for the purpose of assisting the striking miners and mine workers to subsist without their wages temporarily and long enough to produce a shortage of bituminous coal so acute as to cause widespread National distress, and thereby enforce compliance with the defendants' aforesaid demands.

By said bill it is further made to appear that at Washington in the District of Columbia, on or about October 15, 1919, and thereafter, there

was held, at the instance of the Secretary of Labor of the United States, a conference between the defendants and the operators of bituminous mines in the central competitive field, in the course of which the President of the United States proposed to the conference that the defendants' above stated demands should be submitted to negotiation and arbitration. The operators consented to such proposal of the President of the United States, but the defendants present at such conference refused to submit their demands to arbitration and declared that unless they were granted on or before October 31, 1919, the strike would take effect.

By said bill it was further made to appear that said strike and cessation of work ordered by the defendants to begin at midnight on Friday, October 31, 1919, will, as the defendants publicly and authoritatively declare as officials of the said International Union, United Mine Workers of America, be successful in reducing the production of bituminous coal in this country by at least 80 per cent. and will result in a widespread shutting down of factories and industrial operations, and consequently in enforced idleness and cessation of wages to vast numbers of workers throughout the country in the curtailment of production of many necessary articles and commodities, and of gas and electricity, and in widespread suffering from cold in large sections of the United States, so as to cause a National disaster in those respects.

By said bill it is further made to appear that pursuant to the Act of Congress of August 29, 1916, entitled

> "An Act making appropriations for the support of the Army for the fiscal year ending June 30, 1917, and for other purposes,"

providing as follows:

> "The President, in time of war, is empowered through the Secretary of War, to take possession and assume control of any system or systems of transportation, or any part thereof, and to utilize the same, to the exclusion as far as may be necessary of all other traffic thereon for the transfer or transportation of troops, war material and equipment, or for such other purposes connected with the emergency as may be needful or desirable,"

the President of the United States, acting through the Secretary of War and the Director General of Railroads, by Presidential proclamation of December 26, 1917, took possession and assumed control of the railroad systems of transportation and the appurtenances thereof within the United States and has continuously thereafter operated such railroads by virtue of such possession and control.

The Act of Congress of March 21, 1918, entitled

> "An Act to provide for the operation of transportation systems while under Federal control, for the just compensation of their owners, and for other purposes,"

provides as follows:

> "That the President, having in time of war taken over the possession, use, control and operation (called herein Federal control) of certain railroads and systems of transportation (called herein carriers), is hereby authorized to agree with and to guarantee to any such carrier making operating returns to the Interstate Commerce Commission, that during the period of such Federal control, it shall receive as just compensation an annual sum, payable from time to time in reasonable instalments, for each year and pro rata for any fractional year of such Federal control, not exceeding a sum equivalent as nearly as may be to its average annual railway operating income for the three years ending June 30, 1917."

A Presidential proclamation, dated March 29, 1918, authorized the Director General of Railroads, in the name of the President, or in the name of the Director General, or such agencies as he may designate, to agree with the owners of the railroads upon the amount of compensation to be paid pursuant to law. Pursuant to such authority the Director General of Railroads, at various dates, entered into contracts with the owners of the principal railroad systems of the country, guaranteeing to them annual compensation calculated upon the basis of and approximately equivalent to the average annual railway operating income for the three years ended June 30, 1917; which contracts are still in force and effect.

It is further made to appear by said bill that enormous and continuous supplies of bituminous coal are essential to the continuous operation of the railroads by the Director General of Railroads, the daily requirements for such purpose being approximately 387,000 tons. The Director General of Railroads has approximately 1,237 contracts with the operators of the bituminous mines for the furnishing of bituminous coal for the purpose of operation of the railroads, which contracts provide for the furnishing of approximately 387,000 tons of such coal per day, or approximately the aggregate actual daily requirements of the railroads. Approximately 60 per cent. of such contracts by volume are effective by their terms until March 31, 1920; the remainder, until later dates.

By said bill it was further made to appear that if the aforesaid strike, ordered by the defendants to begin at midnight of October 31, 1919, becomes and remains effective, as the defendants declare it will, it will be impossible for the operators of the bituminous mines to fulfill their aforesaid contracts for supplying coal to the Director General of Railroads for the operation of the railroads of the United States, and it will thereupon become impossible for the Government of the United States through the Director General of Railroads, to continue to operate the railroads of the country and the operation of freight and passenger trains and the transportation of persons and property by railroads throughout the country will have to be discontinued and abandoned. The operating revenues of the railroads for the present year will thus be enormously reduced below the average annual revenues earned during the three years ended June 30, 1917,

and the deficit this incurred will have to be made up and supplied by the Government of the United States under its aforesaid guaranties to the owners of the principal railroads of the country of annual revenues equivalent to the average operating annual revenues for the three years ended June 30, 1917, out of the public treasury and out of other revenues derived by the Government from taxation. In addition to this a suspension of the operation of the railroads will make it impossible for the Government to continue the transportation of the mail, the army of the United States, the food supplies of the people, the raw materials essential to the industries of the country, and the output of the factories, and will paralyze both intra and interstate commerce.

By said bill it was further made to appear that the aforesaid defendants, or many of them, and persons whose names are unknown to the plaintiff who are associated with the defendants in their said unlawful conspiracy, combination, agreement and arrangement on October 29, 1919, assembled at the principal offices of the International Union, United Mine Workers of America, at Indianapolis in this District, and considered a final message and appeal to them, made by the President of the United States on October 25, 1919, to refrain from enforcing the aforesaid strike order to begin at midnight on October 31, 1919.

Said defendants have publicly declared, however, that the said strike will not be cancelled and that the defendants will take further proceedings to render it effective. They have already determined, voted and resolved among themselves that the said strike shall become effective and that the preparations therefor by the defendants shall continue, and they are about to send out messages announcing and declaring to the members of the International Union, United Mine Workers of America, and to the local and district unions thereof, that the said strike shall be enforced and become effective, as previously announced, at midnight on October 31, 1919. The various members of the said union and the local and district unions thereof, are now awaiting the issuance of such messages by the defendants in order to determine whether or not the members of said union shall cease work at midnight on October 31, 1919. The issuance of such messages will render the strike effective at the time mentioned, and will render it much more difficult to terminate the strike by the return of the miners to work after having ceased work than it would be to prevent the effective operation of the strike if the message were not issued, in which event large numbers of the members of such union would, in all probability, not cease work.

The aforesaid messages will be issued forthwith by the defendants unless they are immediately restrained by the restraining order of this court. Unless so restrained the defendants will issue further orders essential to rendering effective and maintaining said strike and cessation from work, without which orders such strike would not continue effective and the men would return to work.

The defendants will also, unless so restrained, proceed to distribute strike benefits as aforesaid to the various miners and mine workers on strike, so

as to compensate them for their loss of wages while on strike; thus the defendants will render effective and maintain the said strike, and they will thus stop the production and distribution of bituminous coal throughout the country, so as to paralyze the industries of the country and throw large numbers of workmen into enforced idleness, and cause widespread suffering from cold, and disrupt the operation of the railroads of the country by the plaintiff, the United States of America, and require the plaintiff to meet the resultant deficiencies in railroad operating revenues by disbursements out of the public treasury as aforesaid.

The plaintiff is without adequate remedy in the premises to prevent the bringing about of such catastrophe by the unlawful acts and doings of the defendants, and the other persons associated with them in such acts, whose names are unknown to the plaintiff, except in a court of Equity, and by the immediate restraining orders and subsequent injunctions and decrees of the Court.

That upon the facts thus made to appear the plaintiff, the United States of America, prayed the following injunctive relief:

First: That writs of subpoena issue direct to each and every of the defendants, commanding them to appear herein and answer (but not under oath, answer under oath being hereby expressly waived) the allegations contained in this complaint, and to abide by and perform such orders and decrees as the court may make in the premises.

Second: That the Court issue forthwith its restraining order, directed to each of the said defendants, both as individuals and in their representative capacities, and to all other persons whose names are unknown to the petitioner, unlawfully combining, conspiring, agreeing and arranging with them, and to all other persons whomsoever, commanding and enjoining them not to issue any messages that the aforesaid strike is to be enforced, as previously announced, and to desist and refrain from doing any further act whatsoever to bring about or continue in effect the above described strike and cessation from work on the part of the miners and mine workers in the bituminous mines, from issuing any further strike orders to local unions and to members of local and district unions for the purpose of keeping such strike in effect, or for the purpose of supporting such strike by bringing about or maintaining any other strikes, from issuing any instructions, written or oral, covering or arranging for the details of enforcing such strike ordered to begin at midnight on October 31, 1919, from issuing any messages of encouragement or exhortation to striking miners or mine workers, or unions thereof, to abstain from work and not to return to the mines, in pursuance of such strike, and from issuing and distributing, or taking any steps to procure the issuance or distribution to miners and mine workers striking and abstaining from work, in pursuance of such strike, of so-called strike benefits or sums of money previously accumulated or subsequently acquired, to assist such striking miners and mine workers to subsist while striking, or to aid them in any way by reason of or with reference to such strike and abstaining from work, and from conspiring, combining, agreeing or arranging with each

other, or any other person, to limit the facilities for production of coal, or to restrict the supply or distribution of coal, or from aiding or abetting the doing of any such act or thing.

Third: That the Court, after notice to and hearing of the defendants, issue its temporary injunction *pendente lite*, enjoining the defendants and all other persons unlawfully conspiring, combining, agreeing and arranging with them, as hereinbefore alleged, during the continuance of this suit, in all respects as enumerated in the next preceding paragraph hereof, and further from permitting said strike order to remain in effect, and commanding them to desist from aiding such strike by permitting said strike order to remain in effect, and commanding them to issue a withdrawal and cancellation of said strike order.

Fourth: That the Court, upon final hearing of this suit, issue its permanent injunction against the defendants and all persons unlawfully conspiring, combining, agreeing and arranging with them, as hereinbefore alleged, in all respects as specified in Paragraphs 2 and 3 of this prayer.

That upon said 31st day of October, 1919, said cause came on to be heard upon said bill, and that such proceedings were had in said court as that a temporary restraining order was duly issued by said court; which temporary restraining order reads in the words and figures following, towit: [Here was set forth in full the restraining order printed, *supra*.]

It was thereupon ordered that said cause be set for hearing upon complainant's application for temporary injunction on the 8th day of November, 1919, at 10 o'clock A. M.

Your informant further shows and gives the Court to understand that said temporary restraining order, and each and every provision thereof, was and remained in full force and effect from 10 o'clock A. M. on said 31st day of October, 1919, until the 8th day of November, 1919, and until it was superseded by the temporary injunction hereinafter mentioned; that at 10 o'clock A. M., on November 8th, 1919, the complainant's said application for a temporary injunction in said cause came on to be heard before said court, the United States of America, plaintiff, appearing by counsel, and the above named defendants, Hugh McLeon [naming the rest], appearing by counsel, and such proceedings were had upon said hearing as that a temporary injunction was duly ordered, granted and issued by said court; which temporary injunction reads in the words and figures following, towit: [Here was set forth in full the temporary injunction.]

That by the express terms and provisions of said temporary injunction, the defendants and each of them, and all persons conspiring, agreeing or arranging with them, and all persons whomsoever to whom notice should come of its terms and provisions, were then and there ordered and commanded, both individually and in their respective characters or capacities.

[Next were repeated the specific prohibitions in the injunction.]

That said defendants were then and there by the said court allowed until 6 o'clock P. M. on the 11th day of November, 1919, within which to withdraw and cancel said strike order, and notify the membership, com-

mittees, local and district unions of the said International Union, United Mine Workers of America, of the withdrawal and cancellation thereof. Your informant further shows and gives the Court to understand that said temporary injunction has, since 10 o'clock A. M. on the 8th day of November, 1919, continuously been and is now in full force and effect, and that service thereof was had upon the 10th day of November, 1919, by delivery of a true copy thereof to the following named defendants: Thomas Davis [naming the rest].

Your informant further shows and gives the Court to understand that said strike order was issued by said defendants and transmitted through the mails to said district and local unions and the members of said Inter national Union, United Mine Workers of America, and that upon receipt of said order and pursuant to its mandate the miners and mine workers throughout the territory described in complainant's said bill, did, in concert, at midnight on October 31, 1919, cease the mining of coal and, in concert, said mine workers have continuously since said date remained on strike and have, in concert and collectively, at all times, refrained and are still refraining from mining coal, obedient to and in pursuance of the mandate of said strike order; and the results forecast in said bill have occurred. Said strike order purported to be written upon the stationery of the United Mine Workers of America, and reads in the words and figures following, towit:

JOHN L. LEWIS, President.

Telephone, Main 2140.

United Mine Workers of America.
One and Indissoluble.
Organized January 25, 1890.

UNITED MINE WORKERS OF AMERICA.

Affiliated with A. F. of L.

1109 Merchants Bank Building.

Indianapolis, Ind., October 15, 1919.

To the Officers and Members of the United Mine Workers of America:

The Joint Conference of Operators and Mine Workers, representing the Central Competitive Field, which reconvened in Philadelphia on October 9, came to a *sine die* adjournment on Saturday, October 11, without agreement. The Mine Workers' representatives made an earnest, sincere attempt to negotiate a new agreement to be effective November 1, 1919. We offered facts and data of a substantial nature to support our claim for consideration of our wage demands as outlined by the International convention at Cleveland. We were met by the blunt refusal of the operators to agree to any of our demands. No proposals of any character looking toward

the formation of a new agreement were offered by the operators. The only proposition presented by them was their oft-repeated offer to continue the Washington Wage Agreement until March 31, 1920. This proposition was rejected by your representatives because it meant the continuance of an intolerable situation and offered no relief to our membership from the present material hardships being endured by them. The arbitrary attitude of the operators, persistently maintained day after day in the joint conference, precluded any possibility of an agreement and resulted in a final adjournment. The responsibility for this action will accordingly lie with the operators.

The International convention at Cleveland on September 23, in considering the report of the Scale Committee, adopted the following:

> "We recommend that in event a satisfactory wage agreement is not secured for the Central Competitive Field before November 1, 1919, to replace the one now in effect, that the International officials be authorized and are hereby instructed to call a general strike of all bituminous miners and mine workers throughout the United States, the same to become effective November 1, 1919."

Acting in conformity with the authority vested by the International convention, as herein quoted, the undersigned executive officers of the United Mine Workers of America hereby direct all members of our organization employed in and around the mines of the bituminous coal-producing districts within the jurisdiction of our organization in the United States to cease the production of coal at midnight on Friday, October 31, 1919. The strike thus called will continue in full force and effect until officially terminated by order of the International Union.

Local Unions will permit a sufficient number of men to remain at work to insure the proper care and protection of all mining properties, in conformity with the provisions of the district agreements in the several fields. The fullest co-operation must be given the operator to prevent injury to property, and under no circumstances should this rule be violated or set aside by local unions.

There must be no suspension or stoppage of mining operations under this order until midnight on Friday, October 31. It is essential that there be a concert of action among all our membership in carrying into effect this most important policy. The United Mine Workers of America are now embarking upon the greatest enterprise ever undertaken in the history of the trade union movement, and each member of our organization must co-operate and assist in bringing success to our efforts. Orderly procedure must be followed throughout. You will be guided only by the policies of your union and the official orders emanating from its officers.

JOHN L. LEWIS,
President.

WM. GREEN,
Secretary-Treasurer.

Upon its upper left-hand corner it purported to bear the seal of the United Mine Workers of America, and the signatures of the president and secretary-treasurer purported to have been signed in ink.

Your informant further shows and gives the court to understand that the sole official authority for said miners and mine workers to cease mining coal and to go out and remain upon strike is derived from said strike order, and that said miners and mine workers so understand the fact to be. Your informant further shows and gives the Court to understand that pursuant to the provisions of said temporary injunction, requiring said defendants to withdraw and cancel said strike order and notify said membership, committees, local and district unions of such withdrawal and cancellation by 6 o'clock P. M. on the 11th day of November, 1919, and to submit to the Court for its approval the notice of said withdrawal and cancellation by 10 o'clock A. M. on said 11th day of November, 1919, said defendants did, at 10 o'clock A. M., November 11th, 1919, submit to said court the notice which they proposed to forward and communicate to said membership, committees and local and district unions of the said International Union, United Mine Workers of America; which notice purported to be written upon the stationery or letter head of the United Mine Workers of America, bearing upon the upper left-hand corner thereof what purported to be an imprint of its seal, and reading in the words and figures following, towit:

UNITED MINE WORKERS OF AMERICA.

Indianapolis, Ind., November 11, 1919.

To the Officers and Members of the United Mine Workers of America.

Dear Sirs and Brothers:

In obedience to the mandate issued on November 8th by the United States Court, District of Indiana, Judge A. B. Anderson presiding, the undersigned hereby advise you that the order of October 15th directing a cessation of mining operations in the bituminous coal fields of our jurisdiction is withdrawn and cancelled.

Yours fraternally,
JOHN L. LEWIS,
President.

WM. GREEN,
Secretary-Treasurer.

The signatures of said president and secretary-treasurer being written thereon by their respective hands in ink.

Your informant further shows and gives the Court to understand that said defendants proposed to cause said notice above described to be itself literally mimeographed and to be forwarded and communicated, through the medium of the mails, to said membership, committees and local and

district unions; but that, instead thereof, said defendants wrote said notice or letter of withdrawal and cancellation upon blank paper, omitting therefrom what purported to be the imprint of the seal of the said union and appending said signatures in print instead of in writing, and in such form and manner of execution forwarded and communicated the same to said membership, committees and local and district unions.

Your informant further shows and gives the court to understand that upon receipt of said notice of withdrawal and cancellation said membership, committees and district and local unions generally throughout the bituminous coal fields to which such notice was sent, took the position, and so stated in the daily press and by word of mouth, that said withdrawal and cancellation notice was defective, invalid and without authority, because it did not purport to bear the seal of the order or purport to actually have been signed by such president and secretary-treasurer, and that by reason thereof said notice was ineffective and invalid and did not operate to withdraw, cancel and officially terminate said strike.

Your informant further shows and gives the court to understand that said general objections and criticism of said notice by said membership, committees and district and local unions were promptly brought to the notice and knowledge of said defendants, and thereupon said complainant, by its attorneys, importuned, requested and urged the defendant, John L. Lewis, to immediately take steps to communicate to said membership, committees and district and local unions the fact that said notice of withdrawal and cancellation had been authoritatively issued and communicated in good faith, and that its purpose was to cancel and withdraw said strike order and terminate said strike; but said defendant, notwithstanding importunities and requests, failed and refused and still fails and refuses to comply therewith, or to notify, communicate with, counsel or advise said membership, committees and district and local unions that it was the intent and purpose of said notice of withdrawal and cancellation to officially cancel said strike order and terminate said strike.

Your informant further shows and gives the court to understand that said defendants have further jointly and severally, knowingly and wilfully ignored, violated and disobeyed said temporary injunction, and that they are now further jointly and severally, knowingly and wilfully ignoring, violating and disobeying said temporary injunction in each of the following further particulars, towit: (a) In passively consenting that said strike is to be continued and enforced as previously announced. (b) In assuming and maintaining an attitude toward said membership, committees and district and local unions, by announcements through the public press and by statements to and interviews with representatives of the associated press and newspapers that said membership and committees will not go back to work, but will remain on strike. (c) By assuming and maintaining an attitude toward the public and to said membership, committees and district and local unions, that is tantamount to the issuing of further strike orders and equivalent to instructions to said membership, committees and district and local unions to keep such strike in effect, and is in support

of such strike. (d) In encouraging said strikers to abstain from work, to continue on said strike, to remain out of and not return to the mines in pursuance of said strike order. (e) In countenancing, aiding, encouraging and abetting the taking of steps by local unions for the payment of strike benefits and the distribution among strikers of sums of money previously accumulated and subsequently acquired to assist such striking miners and mine workers to subsist while striking, and to thereby aid them during the pendency of such strike. (f) In conspiring, combining, agreeing or arranging with each other and among themselves, and with each other and other persons, to limit the facilities for the production of coal, and to restrict the supply or distribution of coal, and in aiding and abetting the doing of such acts. (g) In permitting the said strike order to remain in effect. (h) In aiding, by their general attitude, the continuance of said strike order in effect. (i) In communicating to said membership, committees and district and local unions a so-called withdrawal or cancellation of said strike order, irregular, unusual and different in form and manner of execution from orders regularly and usually sent out and communicated to withdraw and cancel a strike order and terminate a strike. (j) In communicating to said membership, committees and district and local unions a so-called withdrawal or cancellation of said strike order without the seal of the United Mine Workers of America purporting to be impressed or printed thereon. (k) In communicating to said membership, committees and district and local unions a so-called withdrawal or cancellation of said strike order written upon blank paper instead of being written or printed upon the letter heads or stationery of the United Mine Workers of America. (l) In communicating to said membership, committees and district and local unions a so-called cancellation of said strike order which did not purport to bear the written signatures of the president and secretary-treasurer of said United Mine Workers of America. (m) In communicating to said membership, committees and district and local unions a so-called withdrawal and cancellation, the authority and validity of which, on account of its form and manner of its execution, they knew would be questioned, ignored and disregarded. (n) In failing, neglecting and refusing, when advised and informed that the validity and authority of said so-called withdrawal and cancellation notice was being questioned, ignored and disobeyed by the membership, committees and district and local unions, because of its form and its manner of execution, to advise and notify said membership, committees and district and local unions that said so-called withdrawal and cancellation notice was genuine and valid and that it was issued by authority and in good faith for the purpose of withdrawing and cancelling said strike order and terminating said strike. (o) In failing, neglecting and refusing to issue a valid and authoritative withdrawal and cancellation of said strike order, and to communicate such withdrawal and cancellation to said membership, committees and district and local unions as fully and completely as the said strike order had been theretofore distributed and circulated to said membership, committees and district and local unions. (p) In receiving detailed

reports from the membership, committees and district and local unions throughout the jurisdiction of the United Mine Workers of America respecting the refusal of the miners and mine workers to return to work and, in turn, giving out the substance of said reports to the public press under and by their authority as officers of said union, and thereby officially approving the conduct of said membership, committees and district and local unions, and thereby aiding and encouraging them to remain on strike and to concertedly refuse to return to work in the mines. Your informant further shows and gives the court to understand that following the receipt by said membership, committees and district and local unions of said so-called withdrawal and cancellation of said strike order they generally throughout the bituminous coal field assumed the position and stated the fact to be that said so-called withdrawal and cancellation of said strike order was not only deficient, invalid and without authority to cancel and withdraw said strike order and to terminate said strike, but that if said membership, committees and district and local unions were to recognize it as valid, and return to work in pursuance of its terms, they would then and thereby be violating the rules of their order and would then and thereby subject themselves to penalties and punishment for such violation, and would then and thereby jeopardize their rights to membership, and would then and thereby jeopardize the rights of the district and local unions to retain their charters, and, for said reasons, they neglected and refused to return to work in the mines; that full knowledge of said position assumed by said membership, committees and district and local unions, and of the statements and contentions made respecting the invalidity of said so-called withdrawal and cancellation of said strike order, and of their obligations to disregard it, and of the consequences that would follow, as to membership and charters as aforesaid, came to each of said defendants; that they and each of them fully understood all and singular said position, statements and contentions so assumed and made by said membership, committees and district and local unions; but that, notwithstanding said facts, neither of said defendants criticised said position or statements or corrected said membership, committees and district and local unions with respect thereto, but have, at all times, remained silent, thereby approving said position and statements and supporting said membership, committees and district and local unions with reference thereto.

All and singular of which acts, attitude and conduct on the part of said defendants are contrary to the form of the statutes in such cases made and provided and against the peace and dignity of the United States of America.

L. ERT SLACK,
United States Attorney for the District of Indiana.

STATE OF INDIANA,
County of Marion.

L. Ert Slack, United States Attorney for the District of Indiana, being first duly sworn, on oath states that he has read the foregoing information

and knows the contents thereof, and that he verily believes that the things therein contained are true.

L. ERT SLACK.

Subscribed and sworn to before me this 3rd day of December, 1919.

NOBLE C. BUTLER,
Clerk of the United States District Court.

CONTEMPT FORM V.—ORDER ADJUDGING PARTY GUILTY OF CONTEMPT.

[Copied from Fischer v. Hayes, 6 Fed. 66.]

[TITLE.]

A motion for attachment for contempt herein having come on for further hearing on the question of punishment or terms, on this thirteenth day of February, 1880, and Charles F. Blake, Esq., having been heard for the motion, and J. H. Whitelegge, Esq., opposed; now, therefore, it is hereby ordered and decreed, that the defendant is adjudged to have committed the contempt alleged, and that he pay, as a fine therefor, the amount of all costs, charges and disbursements, whatsoever suffered, borne or incurred, by the complainant by reason of, or on account of, the said motion, and that the question of the amount of said fine be submitted to this court on affidavits, and without argument, as follows: The complainant to serve his affidavits on the solicitor for the defendant on or before Friday, February 20, 1880; that defendant serve his replying affidavits on counsel for complainant on or before Tuesday, February 24, 1880; and that complainant have the right to reply; and that all affidavits be filed on or before Friday, February 27, 1880.

CONTEMPT FORM VI.—ORDER FINING DEFENDANT FOR CONTEMPT.

[Copied from Fischer v. Hayes, 6 Fed. 67.]

[TITLE.]

This motion having been heard, on the first day of August, 1879, on affidavits and argument by counsel for the respective parties, and thereupon an order having been duly made that it be referred to John A. Shields to ascertain the fact of said infringement, if the same be so, and report his finding to this court, and upon the coming in of the report of said referee, and hearing counsel for the respective parties, in support thereof and in opposition thereto, said report was confirmed; and it was then further ordered that the complainant file with the court, and serve copies on defendant, affidavits showing the expenses incurred in the prosecution of this second attachment for contempt; that defendant file and serve answering affidavits, and that complainant may reply thereto;

and an amended order, and the affidavit of George Hayes, the defendant, executed on the twenty-sixth day of February, 1880, having been filed in reply to said complainant's affidavits, it is, upon consideration thereof, ordered that the defendant pay into court the sum of $522.49, as set forth in the affidavit of Baron Higham, executed herein on the sixteenth day of February, 1880, and the further sum of $867.50, as set forth in the affidavit of Valentine Fischer, executed herein on the twentieth day of February, 1880, amounting altogether to the sum of $1,389.99, as a fine for said second contempt, within thirty days from the date of the entry of this order, to wit, the twelfth day of April, 1880; and that if not paid, the defendant stand committed till it be paid, and that, when paid, it be paid over to the plaintiff in reimbursement.

CONTEMPT FORM VII.—ATTACHMENT FOR CONTEMPT.

DISTRICT COURT OF THE UNITED STATES,
—— District of ——.

The United States of America, to the Marshal of the —— District of ——,

GREETING:

We command you, that you attach —— ——, if they be found in your district, and them safely keep, so that you have them before us, the district court of the United States for the —— district of ——, at the term thereof now being holden at ——, in the district aforesaid, forthwith, to answer to the United States of America for certain trespasses and contempts brought against them in our court before us, and have you then and there this writ.

Witness, the Hon. —— ——, judge of our said court at ——, aforesaid, this —— day of ——, A. D. 19—, and of our Independence the ——.

[OFFICIAL SEAL.]

—— ——, Clerk.

CONTEMPT FORM VIII.—RETURN TO ATTACHMENT.

I have executed this writ by arresting —— —— at ——, and have them now here in court as I am herein commanded, this —— day of ——, A. D. 19—; the within named —— —— not found in my district.

—— ——, United States Marshal,
by —— ——, Deputy.

CONTEMPT FORM IX.—WRIT OF ATTACHMENT AGAINST WITNESS FOR DISOBEDIENCE OF SUBPOENA.

DISTRICT COURT OF THE UNITED STATES,
Southern District of New York. } ss.

The President of the United States of America to the Marshal of the Southern District of New York:

GREETING: We command you, that you attach Leslie Jones, if he be found within your district and him safely keep so that you bring his body before us, the District Court of the United States for the Southern District of New York, at the term thereof now being holden, at the Federal Building in the City, County and State of New York, forthwith, then and there to answer to the United States of America for certain trespasses and contempts lately committed by him in not obeying our writ of subpoena directed to him and duly served upon him commanding him to appear before our said District Court at the Federal Building in the City, County and State of New York on ——— day of ———, 19—, to testify all and singular those things which he knows in a certain cause pending in the said Court between Robert Brown, plaintiff, and Alexander Bowen, defendant; and you are further commanded, to detain him in your custody until he shall be discharged by the said Court and have you then and there this writ.

Witness, the Honorable Learned Hand, Judge of the District Court of the United States for the Southern District of New York, this ——— day of ———, A. D. 19—, and of our Independence the ———.

ALEX. GILCHRIST, JR., Clerk.

[Court Seal.]

FORMS UPON REMOVAL OF CAUSES

REMOVAL FORM I.—NOTICE OF APPLICATION FOR REMOVAL.

Supreme Court, County of New York.

JOHN STILES, Plaintiff,
against
JOHN ROE, Defendant.

Sirs: Please Take Notice, that on Monday, October 13th, 1913, at half past ten o'clock in the morning of that day, I shall file in the clerk's office of the Supreme Court in and for the County of New York, the petition of which a copy is hereto annexed, for a removal of the above-entitled cause to the District Court of the United States for the Southern District of New York; and that I shall also then and there file the bond, of which a copy is hereto annexed; and at the same time, or as soon thereafter as counsel can be heard, I shall request for the approval of the said bond at Special Term, Part I. of the said Court; and that I shall then ask for such other and further relief in the premises as may be just.

Dated, New York, October 8th, 1913.

Yours, &c.,
WHITE & BLACK,
Attorneys for Petitioner, Defendant,
206 Broadway,
Borough of Manhattan,
City, County and State of New York.

MESSRS. BROWN & JONES,
Attorneys for Plaintiff,
55 Liberty Street,
Borough of Manhattan,
City and County of New York.

REMOVAL FORM II.—PETITION FOR REMOVAL FOR DIFFERENCE OF CITIZENSHIP.

Supreme Court, County of New York.

JOHN STILES, Plaintiff,
against
ROBERT ROE, Defendant.

To the Honorable the Supreme Court of the State of New York, held in and for the County of New York:

Your petitioner respectfully shows to this Honorable Court that the matter and amount in dispute in the above entitled suit exceeds the sum

or value of [three thousand dollars], exclusive of interest and costs. That the controversy in said suit is, and at the time of the commencement of this suit was, between citizens of different States, and that your petitioner, the defendant in the above-entitled suit, was at the time of the commencement of the suit, and still is, a resident of and a citizen of the city of Boston, in the County of Middlesex, in the State of Massachusetts, and a non-resident of the State of New York, and that the plaintiff, John Stiles, was then, and still is, a resident and citizen of the city, county, and State of New York.

And your petitioner offers herewith a good and sufficient surety for his entering in the [District] Court of the United States for the Southern District of New York, thirty days from the date of filing this petition a certified copy of the record in this suit, and for paying all costs that may be awarded by said [District] Court, if said court shall hold that this suit was wrongfully or improperly removed thereto.

And he prays this Honorable Court to proceed no further herein except to make the order of removal required by law, and to accept the said surety and bond, and cause the record herein to be removed into said [District] Court of the United States in and for the Southern District of New York; and he will ever pray.

ROBERT ROE.

WHITE & BLACK, Petitioner's Attorneys,
206 Broadway, New York, N. Y.

City and County of New York.

Robert Roe deposes and says: I am the above-named petitioner. The foregoing petition is true to my own knowledge, except as to the matters therein stated to be alleged upon information and belief, and as to those matters I believe it to be true.

ROBERT ROE.

Sworn to before me, this 18th day of January, 1913.

SYLVANUS BROWN, Notary Public, [L. S.]
New York County.

On this 18th day of December, 1889, in the City and County of New York, before me, a notary public, in and for the City and County of New York, personally appeared Robert Roe, to me known to be the individual who executed the foregoing petition, and then and there acknowledged to me that he had executed the same.

SYLVANUS BROWN, Notary Public, [L. S.]
New York County.

REMOVAL FORM III.—PETITION FOR REMOVAL BECAUSE CASE ARISES UNDER CONSTITUTION OF THE UNITED STATES.

[This case in which the author was counsel for defendant was remanded. 106 Fed. 771.]

IN THE DISTRICT COURT OF BOURBON COUNTY, KANSAS.

MARY P. STEVENS and FREDERICK C. STEVENS, Executors under the Last Will and Testament of ROBERT S. STEVENS, deceased,
Plaintiffs,
vs.
THE MISSOURI, KANSAS & TEXAS RAILWAY COMPANY and THE KANSAS CITY & PACIFIC RAILROAD COMPANY,
Defendants.

PETITION FOR REMOVAL OF SUIT TO UNITED STATES CIRCUIT COURT FOR THE DISTRICT OF KANSAS.

To the Honorable, the District Court of Bourbon County, State of Kansas:

Your petitioners, the Missouri, Kansas & Texas Railway Company and The Kansas City & Pacific Railroad Company, specially appearing for the sole and single purpose of presenting this petition and for no other purpose, respectfully show that they are defendants in the above-entitled suit, and that the same was commenced on the 6th day of April, 1898, by Mary P. Stevens and Frederick C. Stevens, as executors of the last will and testament of Robert S. Stevens, deceased, as plaintiffs, against your petitioners as defendants; that at the time of the commencement of said action the plaintiffs were and still are residents and citizens of the State of New York; that your petitioners are each incorporated under the general laws of Kansas providing for the organization and incorporation of railroad companies, and were, at the time of the commencement of said action, and still are, residents and citizens of the State of Kansas.

Your petitioners further show that this action was brought for the purpose of permanently restraining and enjoining your petitioners from effecting and perfecting a consolidation under the laws of the State of Kansas, to wit: Article 3, of Chapter 70 of General Statutes of Kansas 1897.

And your petitioners further show that the matter in dispute exceeds the sum of two thousand dollars, exclusive of costs and interest.

And your petitioners further show that this is an action of a civil nature wherein the powers of a court of equity are invoked by the plaintiffs, and

is one arising under the constitution and laws of the United States as appears from plaintiffs' petition.

The petition of plaintiffs shows that plaintiffs claim that the consolidation of the defendants under the Kansas statute of consolidation will take their stock in the Kansas City & Pacific Railroad Company without due process of law, and will annul and impair the vested rights of the plaintiffs and other stockholders in each of the defendant companies, and will annul and impair the obligation of the lease between the railroad companies and deprive the stockholders of The Kansas City & Pacific Railroad Company and the company itself of the benefits and profits of such lease, and will relieve the Missouri, Kansas & Texas Railway Company of the observance of the lease and prevent The Kansas City and Pacific Company paying to its stockholders dividends out of moneys arising from the lease, and these results the plaintiffs claim cannot be effected by such consolidation pursuant to said statute, because the railroad companies were organized and their stock subscribed for before the passage of the act of consolidation as it now stands in the statutes of Kansas, thereby claiming and intending to claim that the statute of consolidation is void and in conflict with the constitution and laws of the United States, notably the 14th amendment to the constitution of the United States and Section 10, Article 1, of said constitution.

Your petitioner further states that they desire to remove the same to the Circuit of the United States for the District of Kansas, in pursuance of the acts of Congress in such cases made and provided.

And your petitioners further state that they offer herewith a good and sufficient surety for their entering in the Circuit Court of the United States for the District of Kansas, on the first day of its next session, a copy of the record in this suit and for paying all costs that may be awarded by said Circuit Court if said Court shall hold that this suit was wrongfully or improperly removed thereto.

And your petitioners pray this Honorable Court to proceed no further herein except to make the order of removal required by law and to accept the said surety and bond and to cause the record herein to be removed into said Circuit Court of the United States for the District of Kansas, and they will ever pray.

MISSOURI, KANSAS & TEXAS RAILWAY COMPANY,
and The
KANSAS CITY & PACIFIC RAILWAY COMPANY,
By JAMES HAGERMAN and
T. N. SEDGWICK,
their Attorneys.

STATE OF KANSAS, }
County of Bourbon. } ss:

T. N. SEDGWICK, of lawful age, being first duly sworn, upon oath, deposes and says that he is attorney for the defendants in the above-entitled

case; that he has read the above and foregoing petition for removal, and that the facts therein stated are true.

T. N. SEDGWICK.

Subscribed in my presence and sworn to before me, this 4th day of May, 1898.

HUBERT LARDNER,
[SEAL.] Clerk.

By H. E. CONFLANS,
Deputy.

Endorsements—6805. Stevens *vs.* M. K. & T. *et al.* Petition for removal. Filed May 4, 1898.

HUBERT LARDNER,
Clerk.
By H. E. CONFLANS,
Deputy.

REMOVAL FORM IV.—PETITION FOR REMOVAL FOR A SEPARATE CONTROVERSY.

[Held sufficient in 153 Fed. 941; reversed and case remanded C. C. A., 176 Fed. 333.]

Supreme Court of the State of New York, County of New York.

JAMES POLLITZ,
Plaintiff,
vs.
THE WABASH RAILROAD COMPANY, EDWARD T. JEFFERY, FREDERIC A. DELANO, EDGAR T. WELLES, JOHN C. OTTESON, ROBERT C. CLOWRY, ROBERT M. GALLAWAY, THOMAS H. HUBBARD, GEORGE J. GOULD, WINSLOW S. PIERCE, JOHN T. TERRY, JOSEPH J. SLOCUM, MERCANTILE TRUST COMPANY, UNITED STATES MORTGAGE AND TRUST COMPANY, HENRY EVANS, HENRY K. POMROY, GEORGE M. CUMMING, THE BOWLING GREEN TRUST COMPANY, J. C. VAN BLARCOM, JAMES B. FORGAN AND THE METROPOLITAN TRUST COMPANY OF THE CITY OF NEW YORK,
Defendants.

Petition of defendant, THE WABASH RAILROAD COMPANY, to remove this cause into the [District] Court of the United States for the Southern District of New York.

The petition of The Wabash Railroad Company, one of the defendants in the above entitled action, respectfully shows to this Honorable Court:

That this action was commenced against this petitioner by the service of summons and complaint therein on the 23d day of January, 1907, by

delivery of the same within the County of New York, to John C. Otteson, the secretary of this petitioner.

That said action is of a civil nature in equity and that the said James Pollitz is the sole plaintiff therein.

That said plaintiff was at the time of the commencement of said action in this court and still is a citizen of the State of New York; and that your petitioner was at the time of the commencement of said action in this court and still is a consolidated railroad corporation duly incorporated, organized and existing under and by virtue of the laws of the States of Ohio, Michigan, Indiana, Illinois and Missouri, and is a citizen of the State of Ohio, and is not a citizen or resident of the State of New York.

That said plaintiff in his complaint herein claims, in substance, that this petitioner, during the summer of the year 1906, entered into certain negotiations for the purpose of agreeing upon a plan for the retirement of the debenture mortgage bonds of this petitioner through the issue of other securities, both bonds and stock, and that the plan covered by such agreement was subsequently authorized and approved by the stockholders and debenture mortgage bondholders of this petitioned at a special meeting held at Toledo, Ohio, on October 22, 1906, in pursuance of published notice, at which meeting the issue of certain new bonds and preferred and common stock of this petitioner and the exchange of certain of said new bonds, preferred and common stock of this petitioner for its debenture mortgage bonds was authorized and approved.

That said plan of exchange was thereafter made public through the publication of the notice, copy of which is attached to the complaint herein and marked "Exhibit B."

That said plan of exchange is unlawful, unauthorized, contrary to the laws of the States in which this petitioner was organized, is *ultra vires* and unjust, inequitable and injurious to the plaintiff, who claims to be the owner of one thousand shares of the common capital stock of this petitioner.

That the new bonds and the preferred and common stock of this petitioner, or interim receipts therefor, in an amount sufficient to carry the said plan into effect, so far as the same has been assented to by debenture mortgage bondholders, have been delivered to the depositing bondholders in exchange for the debenture bonds deposited by them; and that by reason thereof there have been issued and will be placed upon the market, if the said plan be not declared and adjudged invalid, a large amount of unlawful and invalid bonds and preferred and common stock of this petitioner.

That the plaintiff, in his complaint herein, demands that the plan and scheme for the issue and delivery of the new bonds and the preferred and common stock of this petitioner in exchange for or retirement of its debenture mortgage bonds be decreed and adjudged to be *ultra vires*, illegal and void; and that all said bonds and preferred and common stock issued and used or applied by this petitioner for the purposes stated in said plan and scheme be decreed and adjudged illegal, void and of no

effect; and further, that pending this action and until the final determination thereof, this petitioner, its officers, agents, attorneys and servants, be enjoined and restrained from taking any further proceedings to carry into effect the said plan and from paying any interest upon any of its new bonds which have been issued thereunder, and from transferring upon its books any certificates representing any of its preferred or common stock issued under said plan and from paying any dividends upon any part of its preferred stock issued under said plan and from permitting to be received and counted any votes with reference to the shares of preferred and common stock so issued at any meeting of the stockholders of this petitioner.

That the plaintiff, in his complaint alleges that the defendants Edward T. Jeffrey, Frederic A. Delano, Edgar T. Welles, Robert C. Clowry, George J. Gould, Winslow S. Pierce, Robert M. Gallaway, Thomas H. Hubbard and John T. Terry are directors, and constitute a majority of the Board of Directors of this petitioner; that the defendant Edward T. Jeffrey is chairman of the Board of Directors of this petitioner; that the defendant Frederic A. Delano is president, the defendant Edgar T. Welles is vice-president, and the defendant John C. Otteson is secretary and assistant treasurer of this petitioner.

Said complaint also alleges that the defendant the Mercantile Trust Company is the registrar of the capital stock of this petitioner, and that said stock cannot be listed without registration or negotiated in the market; that said defendant is also the trustee under the mortgage securing the debenture bonds of this petitioner.

Said complaint also alleges that the defendant United States Mortgage and Trust Company was and acted as the depositary named in the plan set forth in the published notice, copy of which marked Exhibit B is annexed to said complaint.

Said complaint also alleges that the defendants, Henry Evans, Henry K. Pomroy and George M. Cumming, are members of and constitute a committee representing owners of debenture mortgage bonds of this petitioner, which committee has co-operated and confederated with this petitioner and with the defendant United States Mortgage and Trust Company in carrying out and accomplishing the said plan, and has published the notice set forth in Exhibit B annexed to said complaint.

That the defendants Bowling Green Trust Company, J. C. Van Blarcom and James B. Forgan, are the trustees named in the mortgage made to them by this petitioner to secure the new bonds issued in exchange for the debenture mortgage bonds under said plan.

Said complaint also alleges that the said plan for the exchange of said debenture mortgage bonds of this petitioner has been completed and carried into effect as to more than nine-tenths of said debenture mortgage bonds by this petitioner, its directors and officers, with the co-operation and confederation of the defendants Evans, Pomroy and Cumming, as a committee, and of the defendants United States Mortgage and Trust Company, Bowling Green Trust Company, J. C. Van Blarcom and Forgan,

and the Mercantile Trust Company; and that the new securities, or interim certificates therefor, have been issued and the exchange has been made by the co-operation and confederation of the defendants United States Mortgage and Trust Company, Bowling Green Trust Company, Van Blarcom and Forgan, with this petitioner and said committee.

Said complaint further alleges upon information and belief, that such exchanges have been made to the amount of more than ninety per cent. of said debenture bonds.

Said complaint also alleges on information and belief, that certain of the defendants, who are directors of this petitioner, were large holders of debenture mortgage bonds, and that The Metropolitan Trust Company was the owner and holder of $5,435,000 of said debenture mortgage bonds, and that said directors and said Metropolitan Trust Company will be unduly and inequitably benefited if the plan for the retirement of said debenture mortgage bonds be upheld and decreed valid.

That the plaintiff in his complaint herein demands, as an alternative relief to the main relief prayed for by him against this petitioner and in default of said main relief and in case the Court shall hold and decree that he is not entitled to said main relief, to have an accounting by the defendants who are officers and directors of The Wabash Railroad Company and by the defendant United States Mortgage and Trust Company and the defendant The Mercantile Trust Company in respect to the new bonds and common and preferred stock of this petitioner which have been issued under said plan of exchange.

That your petitioner disputes the claim against it as set forth by the plaintiff in his complaint, and denies that the plaintiff is entitled to the judgment and relief prayed for against this petitioner or to any judgment or relief against it; and this petitioner alleges that the fundamental and primary controversy, as set forth in said complaint, is whether or not the plan for the exchange of the debenture mortgage bonds by this petitioner, the authorization and creation by it of the new securities in the said complaint set forth and the issue of the same by it for the purpose of carrying said plan into effect is, as alleged in said complaint, illegal, unlawful, void and prohibited by the charter of this petitioner and the laws under which it is incorporated; and whether said new securities are, as alleged in said complaint, invalid and void; and that such controversy is a separable and distinct controversy between the plaintiff and this petitioner.

That a complete determination of said controversy can be had without the presence of any of the defendants in this action other than this petitioner; and that all of said other defendants are neither indispensable nor necessary parties to the complete determination of said controversy.

That the foregoing controversy, which is solely between the plaintiff and the petitioner, must be determined before any other controversy alleged in the complaint can be considered and determined; and that said controversy between the plaintiff and this petitioner, as above set forth, is separate and distinct from any other or further controversy.

That said fundamental and primary controversy herein between the plaintiff and this petitioner is a controversy wholly between citizens of different States—to wit: Between the plaintiff, a citizen of the State of New York and this petitioner, a citizen of the State of Ohio.

That the matter in dispute in this action exceeds the sum of [three] thousand dollars, exclusive of interest and costs.

Your petitioner further shows that this petition is made and filed before this petitioner is required by the laws of the State of New York or the rule of this Honorable Court to answer or plead to the complaint of the plaintiff herein, and that it desired by your petitioner, one of the defendants herein, to remove said cause from this Honorable Court to the [District] Court of the United States for the Southern District of New York in accordance with the provisions of the Acts of Congress of the United States in that behalf made and provided.

That no special bail was or is required in said action.

Your petitioner files and offers herein a bond with good and sufficient security in the penal sum of $500, conditioned as required by the Act of Congress in that behalf made and provided, for entry in the [District] Court of the United States for the Southern District of New York [within thirty days from the date of the filing of this petition], a copy of the record in this suit, and to pay all costs that may be awarded in said [District] Court of the United States if said Court shall hold that this suit was wrongfully or improperly removed thereto.

Your petitioner further prays that the said bond may be accepted as good and sufficient, and that this Honorable Court will make this order for the removal of this suit into the [District] Court of the United States, to be held in and for the Southern District of New York, in which district this suit is pending, pursuant to the Act of Congress in such case made and provided, and cause the record herein to be removed into the said [District] Court of the United States, and that no further or other proceedings may be had in said cause in this court.

And your petitioner will ever pray.

Dated New York, January 25, 1907.

PIERCE & GREER,
Attys. for the Deft. The Wabash Railroad Company.
Office and P. O. address,
120 Broadway,
Borough of Manhattan,
New York City.

STATE OF NEW YORK, }
County of New York. } ss.

John C. Otteson, being duly sworn, deposes and says that he is the secretary of the defendant The Wabash Railroad Company; that he has read the foregoing petition and knows the contents thereof; that the same is true of his own knowledge, except as to those matters therein said to

be alleged on information and belief, and that as to those matters he believes it to be true.

JOHN C. OTTESON.

Sworn to before me this 25th day of January, 1907.

CHARLES J. HOEHNLE,
Notary Public, Kings County.
Certificate filed in New York Co.

[SEAL.]

REMOVAL FORM V.—NOTICE AND PETITION FOR REMOVAL BECAUSE OF FRAUDULENT MISJOINDER AS WELL AS FOR A SEPARABLE CONTROVERSY AND A DIFFERENCE OF CITIZENSHIP BY A REALIGNMENT OF THE PARTIES.

IN CHANCERY OF NEW JERSEY.

E. LAWRENCE [DOWD], JOSEPHINE [DOWD], and E. LAWRENCE [DOWD], trustee under the last will and testament of THOMAS H. [DOWD], deceased.

Complainants,

against

MAY IRENE GOODMAN, EDWARD HARRIS GOODMAN, ELLIE [DOWD] TROTTER, CAMDEN SAFE DEPOSIT & TRUST COMPANY, trustee under the last will and testament of THOMAS H. [DOWD], deceased, for MARY [DOWD] TROTH, MARY [DOWD] TROTH, MARIE [DOWD], JOHN H. MANNING, RALPH HORNOR, GEORGE W. WAPLES, and EDWARD W. MAGEE.

Defendants.

SIRS: PLEASE TAKE NOTICE that on the 10th day of February, 1922, at half past ten o'clock in the morning of that day, I shall file in the office of the Chancellor of the State of New Jersey and of the Court of Chancery of said State in the State House of the City of Trenton, the petition of which a copy is hereto annexed, for a removal of the above entitled cause to the District Court of the United States for the District of New Jersey; and that I shall also then and there file the bond, of which a copy is hereto annexed; and at the same time, or as soon thereafter as counsel can be heard, I shall request for the approval of the said bond by said Chancellor and by said Court; and that I shall then ask for such other and further relief in the premises as may be just.

New York, February 2, 1922.

"MARIE [DOWD]"
Petitioner in person.

Yours, &c.,
"ROGER FOSTER,"
Attorney in fact for petitioner.
69 West 55th Street,
Borough of Manhattan,
New York, New York.

IN CHANCERY OF NEW JERSEY.

E. LAWRENCE [DOWD], JOSEPHINE [DOWD], and E. LAWRENCE [DOWD], trustee under the last will and testament of THOMAS H. [DOWD], deceased.

Complainants,

against

MAY IRENE GOODMAN, EDWARD HARRIS GOODMAN, ELLIE [DOWD] TROTTER, CAMDEN SAFE DEPOSIT & TRUST COMPANY, trustee under the last will and testament of THOMAS H. [DOWD], deceased, for MARY [DOWD] TROTH, MARY [DOWD] TROTH, MARIE [DOWD], JOHN H. MANNING, RALPH HORNOR, GEORGE W. WAPLES, and EDWARD W. MAGEE.

Defendants.

Petition for removal.

To the Honorable Edwin Robert Walker, Chancellor of the State of New Jersey, and To the Court of Chancery of the State of New Jersey.

The petition of Marie [Dowd], respectfully shows:

I. Your petitioner Marie [Dowd] is and at the time of the commencement of this suit was a citizen and resident of the Borough of Manhattan, City and County and State of New York, temporarily sojourning in the City of Kingston and County of Ulster in said State.

II. On or about December 3rd, 1921, E. Lawrence [Dowd] and Josephine Elliott [Dowd] his wife and E. Lawrence [Dowd], trustee under the last will and testament of Thomas H. [Dowd], deceased, began the suit above entitled by filing a bill in equity in the Court of Chancery for the State of New Jersey which named as defendants, May Irene Goodman, Edward Harris Goodman, her husband, Ellie [Dowd] Trotter, Camden Safe Deposit & Trust Company, trustee under the last will and testament of Thomas H. [Dowd], deceased for Mary [Dowd] Troth, Mary [Dowd] Troth, Marie [Dowd], John H. Manning, Ralph Hornor, George W. Waples and Edward W. Magee. The complainants and all of the said defendants except May Irene Goodman and Edward Harris Goodman then were and still are citizens and residents and each of them then were and still is a citizen and resident of the County of Camden, in the State of New Jersey. The said Camden Safe Deposit and Trust Company then was and still is incorporated under the laws of the State of New Jersey with its principal office in said City and County of Camden. The said defendants Goodman and each of them at the time of the commencement were and still are citizens and residents of the City of Philadelphia, State of Pennsylvania.

III. Said bill prayed a partition and division or in the alternative a sale of certain lands in the State of New Jersey including in such sale the

right of dower of your petitioner therein and the inchoate right of dower of the defendant Josephine; and a division of the proceeds of such sale after payment of costs and charges of the suit according to the respective rights of the several parties interested. The lands affected by such suit were therein charged to have been formerly the property of Thomas H. [Dowd], deceased. Said bill charged that said lands were at the time of the death of Edward [Dowd], who was the son of said Thomas, on or about September 13, 1920 owned in part in fee simple by said Edward, and that the remaining part thereof were then owned in fee simple by E. Lawrence [Dowd], the complainant as trustee for the defendant Ellie D. Trotter, daughter of said Thomas with a contingent remote interest in the other heirs of said Thomas, namely, said Edward [Dowd], whose sole heirs and devisees are his children, the complainant E. Lawrence [Dowd] and the defendant May Irene Goodman and the defendant Mary [Dowd] Troth, the daughter, and the other heir of said Thomas, only however and with no such remainder except in case said Ellie died intestate leaving no issue, in which case it was provided by the will of said Thomas, under which will his said descendants derived their title to said land that if the defendant Mary was living when said Ellie died, then her interest should be conveyed to the trustee named in said will, the successor of which is said Camden Safe Deposit and Trust Company. Said bill further alleged that the defendants John H. Manning, Ralph Hornor, George W. Waples, and Edward W. Magee were tenants of part of said land.

IV. Said bill further alleges that your petitioner is the widow of the said Edward [Dowd], deceased and claims a right of dower in that part or share of said lands of which said Edward [Dowd] died seized.

V. A distinct and separate controversy exists in said suit and therein existed when this suit was brought, in which our petitioner is the sole party upon one side, and the complainants [Dowd] in their respective individual and representative capacity together with the defendants Goodman are the sole persons upon the other interested and were the sole parties interested when said bill for partition was filed in said New Jersey Court of Chancery. This appears from the said bill in equity herein as well as from the allegations in this petition. A complete determination of said controversy can be had without the presence of any of the parties to this suit other than your petitioner, said complainants [Dowd], said complainants [Dowd], as trustee and said defendants Goodman. All of the other parties defendants to said suit are neither indispensable nor necessary parties to the complete determination of said controversy nor to the determination of said suit. Said controversy as above set forth is wholly between citizens of different States and is separate and distinct from any other or further controversy in said suit.

VI. Your oratrix is the widow of said Edward. Said bill does not show nor claim that the defendants Troth and Trotter and the defendant Camden Safe Deposit and Trust Company or either of them have or claim any interest in any of the parts of said lands in which your oratrix claims a right of dower as aforesaid. The defendants Manning, Hornor and

Waples have failed to answer said bill for partition in said New Jersey Court of Chancery, although they have been served with a subpoena issued thereunder. The said defendants Manning, Hornor and Waples are tenants of small portions of parts of the premises in said bill at a nominal rental, not exceeding $20 a year each under a tenancy terminable at will. They have no interest in any controversy in said suit. They were joined as defendants merely in order that they might be required after the partition sale to attorn to a purchaser of such land as was leased to them. They are not indispensable nor necessary parties to said suit. The right to join them as parties is doubtful. The defendants Troth and the Camden Safe Deposit and Trust Company neither have nor claim any interest in any land in which said Edward [Dowd] was seized of any interest at the time of his death, nor in any in which your petitioner claims a right of dower. The defendant Trotter has such a remote and contingent interest therein that she is not a necessary party to the controversy as to petitioner's right of dower nor to said suit between your petitioner and the complainants [Dowd] and defendant Goodman. The interests of said defendant Trotter therein is fully represented and protested by said Edward Lawrence [Dowd] as her trustee as aforesaid.

The defendant Magee was made a party by mistake. His tenancy of part of said premises ceased and he surrendered the same to the complainant [Dowd] as Trustee, before the bill herein was filed. The complainants herein propose and are about to move to strike out his name from the list of defendants.

VII. That said defendants Goodman and Trotter are fraudulently joined as defendants to said bill whereas in fact they are and each of them is actually a complainant and one of the parties for whose benefit said bill was filed. Said bill was filed by their consent and at their request. Said bill was filed in collusion with them. They were made defendants instead of complainants and the defendants Troth and the said Trust Company were also joined as defendants fraudulently for the purpose of preventing the removal of this suit to the District Court of United States for the District of New Jersey. Their object and intention and that of complainants in so doing was and is to procure a sale of said land by a special master who is a resident of Camden County without the intervention or aid of an auctioneer, and they and the complainants intend to combine in a bid at such sale and to buy said property at much less than its true value. The attorney for the complainants has been requested by your petitioner through your petitioner's counsel to agree upon an auctioneer, but he has refused so to do and has stated in substance that it may not be necessary to employ an auctioneer, and that such employment is not usual at judicial sales in such County. Your petitioner has no funds with which to bid or to purchase or to protect herself at such a sale. She is in absolute destitution. She is supporting herself precariously as a book agent and upon an allowance of no more than five ($5) dollars a week which is paid her irregularly by her son by a former husband born before her marriage to said Edward [Dowd]. The said descendants of Thomas [Dowd] are well

aware of these facts and the children of said Edward [Dowd] immediately after their father's death took possession of all the said land in which he had an interest and have since collected his share of the rents and profits thereof and have refused to pay any part thereof to your petitioner and have refused to give your petitioner her widow's right of quarantine and have endeavored to starve your petitioner into submission to them and into the surrender to them of her rights for an inadequate and insufficient consideration. The [Dowd] family to which said complainants and the defendants Goodman, Trotter and Troth belong is one of the oldest and most influential in Camden County. Your petitioner's said husband was a member of the Bar of said County. Said E. Lawrence [Dowd] is a member of such Bar. Prior to the death of said Edward [Dowd] a prolonged and bitter litigation took place between said Edward and your petitioner in which serious charges and counter-charges were made by both sides and in which the residents of said County were to a large extent in sympathy with said Edward [Dowd] who was their neighbor and became prejudiced against your petitioner. This and the said local influence of the said [Dowd] family will make it difficult for your petitioner to obtain justice and the value of her dower at a sale by a special master resident in said County.

All the relief prayed in said bill could have been obtained by their consent without litigation and without the interposition of any court, except the sale of the dower right of your petitioner in said land. By the will of said Thomas, it is expressly provided and directed that the trustees therein appointed shall have power to make partition or division of the real estate and personal property or any parts thereof with the said Edward [Dowd], the son of said Thomas, so that the shares or portions may be held in severalty instead of in common and to execute and make all necessary conveyances for affecting said division. Said will further empowers said trustees to sell all said Ellie's interest in such real estate either before or after division or any part thereof either at public or private sale and to convey the same to the purchaser or purchasers freed and discharged from the trusts created by said will and without any liability on the part of the purchaser for the purchase money and in case of such sale to re-invest the net proceeds in real estate or bonds secured by mortgage upon New Jersey real estate and to hold such investments upon the same trusts as the land was which was sold; provided however that no such sale be made without the written request and consent of said Ellie executed and acknowledged as is provided in case of a deed. By an order of the Orphans' Court of Camden County duly made and entered upon the petition of said Ellie [Dowd] Trotter on or about October 29, 1920, said complainant Edward Lawrence [Dowd] was duly appointed trustee to act in the place and stead of the said Edward [Dowd] to execute and complete the trusts created and declared in the said will of said Thomas. Both the trustees originally named in said will had previously died. The said Edward [Dowd] by an order of the same court made June 8, 1894, had been appointed trustee under the said will to act in the place and stead of one of the trustees therein named who had duly announced

his right so to act. Previously to the filing of said bill and on or about July 23, 1921, your oratrix filed in the District Court of the United States for the District of New Jersey a bill in equity the defendants to which were said Edward Lawrence [Dowd] individually and as executor of the last will and testament of Edward [Dowd] deceased, and Josephine K. [Dowd], wife of said defendant, May Irene Goodman, Edward H. Goodman, the husband of said May Irene, Ellie D. Trotter and Joseph Trotter, her husband, the latter having died before the said bill had been filed, although this was then unknown to your oratrix, when she filed her bill in said Federal Court. Said defendant Trotter appeared in said Federal suit by the same attorney that has appeared for the complainants herein and denied knowledge as to the lands of which the said Edward [Dowd] died seized. The complainants here also appeared and answered in said suit by the same attorney.

Said bill filed in this Honorable Court sets forth clearly and specifically the respective interests which each of said descendants of said Thomas [Dowd] has in each of said parcels of land. Said bill further alleges that the said tracts of land and premises cannot be divided among the owners thereof without great prejudice to their interests and prays for a sale thereof including the right of dower of your petitioner the inchoate right of dower of the complainant Josephine and that, the proceeds thereof be divided among the complainants and the respective parties interested according to their respective rights, shares and interests. In the partition suit in which this petition is filed the defendants, May Irene Goodman, Edward Harris Goodman and Ellie Trotter have appeared and answered joining in the same answer by Willard F. Loeb, Esq., as their solicitor and attorney. Said Willard has an office in the suite of offices occupied and leased by Hon. William D. Loeb, who is the solicitor for the complainants therein, and said William and Willard are associated together in practice. The defendant, the Camden Safe Deposit and Trust Company, as trustee, as aforesaid, and Mary W. Troth have appeared and answered therein through George Roberts, Esq., as attorney and solicitor for them. In each and all of the said answers filed by and in behalf of the said five defendants it is alleged in the same language that they and each of them respectively admit "that the rights and interests of the several tracts or parcels of land mentioned and described in said bill are truly set forth and stated in said bill;" and further that said defendants and each of them respectively submits "to such decree as this court may make in the premises either for a partition of the said several tracts or parcels of land, or for a sale of the whole or a part thereof, in case said tracts or parcels of land are so circumstanced that a partition thereof cannot be made without great prejudice to the owners of the same." Said answers were drafted and the originals thereof copied from a draft prepared by said Hon. William D. Loeb, the solicitor for the complainants. In or about the month of December, 1921, the said defendants Goodman filed a bill in equity in the Court of Common Pleas No. 1 of Philadelphia County and State of Pennsylvania, praying the partition or sale of certain land in said City

and State, in one-half of which said Edward Dudley died seized and in which your petitioner has a right of dower. All of the other parties to this suit including your petitioner excepting said tenants are made parties defendant to said Pennsylvania suit. There is no other party thereto except one Stella Hamilton who is a tenant of said Philadelphia property. None of the parties to said Pennsylvania suit has opposed the relief therein prayed. The said suit was brought at the request and instigation of the said complainants [Dowd] and said defendants Trotter.

VIII. The value of your petitioner's right of dower in the said lands described in said bill of partition in this Honorable Court exceeds the sum of $3,000 exclusive of interest and costs, and did so exceed at the time said bill was filed.

IX. This petition is made and filed before your petitioner is required by the Laws of the State of New Jersey or the rules of this Honorable Court to answer or plead to the bill in equity filed herein. It is desired by your petitioner to remove said cause from this Honorable Court to the District Court of the United States for the District of New Jersey in accordance with the Acts of Congress of the United States in that behalf made and provided. No special bail was or is required in said suit. Your petitioner files and offers herewith and herein a bond with good and sufficient security in the penal sum of $500, conditioned as required by the Acts of Congress of the United States in that behalf made and provided for entry in the District Court of the United States for the District of New Jersey within thirty days from the date of filing this petitioner a copy of the record of this suit and to pay all costs that may be awarded in said District Court of the United States if said Court shall hold that this suit was wrongfully or improperly removed thereto.

Your petitioner further prays that the said bond may be accepted as good and sufficient, and that this Honorable Court will pursuant to the Act of Congress in such case made and provided, cause the record herein to be removed into the said District Court of the United States, and that no further or other proceedings may be had in said causes in this court.

Dated, New York, January 28th, 1922.

"MARIE [DOWD],"
Petitioner in person.

MARIE [DOWD]
by
"Roger Foster"
her attorney in fact
69 West 55th Street,
New York, New York.

STATE OF NEW YORK,
COUNTY OF ULSTER,
SOUTHERN DISTRICT OF NEW YORK, } ss.

Marie [Dowd] being duly sworn, deposes and says: The foregoing petition is true to the best of my knowledge, information and belief. All of the

allegations therein are true to my own knowledge, except those which describe the papers filed in different courts and the conversations with Wm. D. Loeb, Esq., my information as to which is derived from my attorney Roger Foster herein, and except the allegations concerning the said defendant tenants the information concerning which is derived from the said William D. Loeb, Esq., and except the allegations as to intent instigation collusion request and copying answers which are charges made upon inferences drawn from the facts known by petitioner and from the information above set forth.

Sworn to before me this 28th day of January, 1922.

"N. H. FESSENDEN,"

"MARIE DOWD."

Notary Public.

Clerk's Ctf. hereto annexed.

STATE OF NEW YORK, }
COUNTY OF ULSTER. } ss.

On this 28th day of January, 1922, in the said State and County before me personally appeared Marie [Dowd] to me known and known to me to be the individual described in and who executed the instrument hereto annexed and acknowledged to me that she had executed the same.

"N. H. FESSENDEN,"
Notary Public.

REMOVAL FORM VI.—NOTICE OF APPLICATION FOR REMOVAL BECAUSE OF PREJUDICE OR LOCAL INFLUENCE.

[116 Fed. 986.]

CITY COURT OF MONTGOMERY COUNTY, THE COUNTY OF MONTGOMERY,
Plaintiff,
vs.
JOHN J. COCHRAN, as principal and the FIDELITY & DEPOSIT COMPANY, of Maryland, as surety,
Defendants.

To Messrs. Finley Stallings & Martin, Plaintiff's attorneys, ... Street, Montgomery, Alabama, and W. W. Hill, Esq., attorney for defendant Cochran, ... Street, Montgomery, Alabama.

Sirs: Please take notice that on the .... day of February, 1902, at half past ten o'clock in the morning of that day or as soon thereafter as counsel can be heard, in the Federal Building in the City and County of Montgomery, in the State of Alabama, we shall present the annexed petition to the District Court of the United States for the Middle District

of Alabama and shall then and there move for an order removing the above entitled cause from the City Court of Montgomery County, Alabama, to the said District Court of the United States on the ground of prejudice and local influence.

February 15, 1902.

Yours, &c.,
WATTS, GANS & WHELAN,
Attorneys for the defendant.
THE FIDELITY & DEPOSIT
COMPANY OF MARYLAND,
Street, Montgomery, Ala.

REMOVAL FORM VII.—PETITION FOR REMOVAL BECAUSE OF PREJUDICE AND LOCAL INFLUENCE.

[The following petition was held to be sufficient, in Montgomery County v. Cochran, 116 Fed. 985, 986 (reversed upon the ground of jurisdiction, without passing upon the sufficiency of the petition, in Cochran v. Montgomery County, 119 U. S. 260). See *Supra*, § 549.]

"The County of Montgomery, Plaintiff, versus John J. Cochran, as Principal, and the Fidelity & Deposit Company of Maryland, a Corporation under the Laws of the State of Maryland, as Surety, Defendants. In the [District] Court of the United States for the Middle District of Alabama. Petition for the Removal of Said Cause from the City Court of Montgomery, Alabama.

To the Honorable the Judges of the [District] Court of the United States for the Middle District of Alabama: Your petitioner, the above-named Fidelity & Deposit Company of Maryland, a corporation existing under the laws of the State of Maryland, respectfully shows to this honorable court that the county of Montgomery, as plaintiff, brought suit of a civil nature, in the city court of Montgomery County, Alabama, on the 21st day of January, 1902, against your petitioner, the Fidelity & Deposit Company of Maryland, and one John J. Cochran, and that the matter or amount in dispute exceeds the sum or value of three thousand ($3,000.00) dollars, exclusive of interest and costs; that service of process in said case was made on your petitioner on the 24th day of January, 1902, and that the time for pleading or demurring to said complaint is within thirty days after the said service, and that your petitioner has heretofore, viz., on the fifteenth day of February, 1902, appeared in said city court of Montgomery and demurred to said complaint, and a copy of said complaint and the demurrer thereto is hereto attached and made a part hereof, and the first trial term for said case is the month of April, 1902; that the said controversy is between citizens of different States, in that the plaintiff was at the time of the commencement of said suit, and still is, a citizen of the State of Alabama; and that your petitioner, the Fidelity & Deposit Company of Maryland, was at the time of the commencement of this suit, and still is, a citizen of the State of Maryland, and of no other

State, having its principal office in the city of Baltimore in the said State of Maryland; and that the other defendant in said suit is a citizen of the said State of Alabama; and that your petitioner desires to remove this suit, which is now pending and undetermined in said State court, before the trial thereof, into the [District] Court of the United States, to be held in the Middle district of Alabama. Your petitioner further shows unto this honorable court that from prejudice and local influence in favor of the plaintiff, and adverse to this defendant, it will not be able to obtain justice in said court, or in any other State court, to which the defendant may, under the laws of this State, have a right to remove said cause, on account of such prejudice or local influence. And, in this connection, your petitioner further shows unto your honors that said above-mentioned suit is a suit instituted by a political subdivision of the State of Alabama, to wit, Montgomery County, against the said John J. Cochran, the treasurer of said Montgomery County, and your petitioner, a surety company, as surety on the official bond of said John J. Cochran, as treasurer of said Montgomery County, and that said suit is instituted by said County of Montgomery to recover the sum of $120,000.00 (one hundred and twenty thousand dollars), which last-mentioned sum is the penalty of said bond, alleged to have been deposited by the said John J. Cochran, as such county treasurer, in the banking house of Josiah Morris & Co., of Montgomery, Alabama, whereby the said sum is alleged to have been lost to the said County of Montgomery by reason of the failure and insolvency of the said Josiah Morris & Co., and that by reason of the nature of said suit all the residents and citizens of said Montgomery County have a direct interest in the recovery by the said plaintiff of the amount claimed. And in this connection your petitioner further shows unto your honors that the other defendant in this suit, John J. Cochran, is practically financially irresponsible, in that his assets, your petitioner is informed and believes and so states, are less than five thousand dollars, and that the said Cochran is therefore practically only a nominal party to the said suit, and that your petitioner, the said Fidelity & Deposit Company of Maryland, would be obliged practically to meet the whole claim should judgment be recovered against the defendants; and your petitioner further shows that from time to time heretofore there have been statements made in the public press to the effect that your petitioner is and will be held liable for the amount claimed in said suit, and will have to pay the same, and that said publications as made in papers published in the City of Montgomery, and in other cities in the State of Alabama, have been circulated throughout all the counties in the said State of Alabama, whereby a local prejudice against your petitioner, and influence in favor of the plaintiff in said suit, has been created throughout the whole State of Alabama. Petitioner further avers that the amount sought to be recovered in said suit was, at the time of the failure of said Josiah Morris & Co., substantially all the funds of the plaintiff and the inconvenience to said plaintiff from its inability to use said money for public purposes has caused a feeling of prejudice against your petitioner, not only in the County of Montgomery, but in other parts of the

State of Alabama. Petitioner further avers that the matter of a change of venue in said case is one of discretion on the part of the Judge of said City Court, and not one of right belonging to said petitioner, and, even if said discretion should be exercised in favor of the removal of said cause to some other county, yet petitioner is informed and believes, and upon said information and belief states, that the wide publicity and notoriety given to this cause and the issues involved therein would operate in any county or court of the State of Alabama to prejudice the right of this petitioner. And petitioner further avers that the said petitioner is now the surety on bonds of many State and county officers throughout the whole State of Alabama, and that the decision in the present case will be regarded as probably constituting a precedent in any future case or cases which may be brought against your petitioner on said bonds, by reason of which there will necessarily exist a local prejudice against your petitioner in this case in any county of the State of Alabama in which said case should be tried. Petitioner further avers that the said banking house of Josiah Morris & Co. at the time of its failure was largely indebted, viz., about nine hundred thousand dollars, and this indebtedness was due, and much the larger part of it is still due, to various persons residing in different parts of the State of Alabama, including the City Council of Montgomery; that the said Josiah Morris & Co. secured an agreement with its respective creditors for an extension of time within which to pay the amount due to them, respectively, and the said Josiah Morris & Co. has failed to make the second of the payments thus agreed on, and there seems to be no present prospect of any further payments by the said Josiah Morris & Co. to its creditors, by reason of which, as petitioner is informed and believes, and on such information and belief states, that the suit brought against petitioner has been in some way identified or intermingled with the affairs of said Josiah Morris & Co. in the minds of the people, and in the supposed identity of the interests of the said Josiah Morris & Co. and petitioner in the matters referred to there will exist in any court of the said State of Alabama in which said case could be tried a local prejudice against your petitioner. Wherefore your petitioner prays that an order or decree may be made and entered directing and commanding that the trial of said cause be removed from said City Court of Montgomery into this Honorable Court, and petitioner will ever pray, etc.

"WATTS, TROY & CAFFEY, Attorneys for Petitioner."

Attached to this petition was an affidavit, which, omitting caption, etc., reads as follows:

"Before me, Thomas G. Jones, Judge of said Court, personally appeared Thomas A. Whelan, who is known to me, and who, being duly sworn, on oath deposes and says that he is the vice-president of the Fidelity & Deposit Company of Maryland, the above-named petitioner, in the above-entitled cause, which is now pending in the City Court of the County of Montgomery and State of Alabama, and authorized to make this affidavit and act in this matter for petitioner, and that from prejudice and local

influence the said petitioner will not be able to obtain justice in said State court, or in any other State court to which it may, under the laws of said State, have the right, on account of said prejudice and local influence, to remove said cause; and, further, that all the matters and facts stated in the above petition to be true, are true; and that all matters stated on information and belief are true to the best of his knowledge, information, and belief.

"THOMAS A. WHELAN.

"Subscribed and sworn to before me on this the 15th day of February, 1902.

"THOMAS G. JONES, Judge."

REMOVAL FORM VIII.—PETITION FOR REMOVAL OF CRIMINAL CASE FROM STATE COURT UNDER SECTION 643, UNITED STATES REVISED STATUTES, JUDICIAL CODE, § 33.

[From Roe's Criminal Procedure in United States Courts.]

THE PEOPLE
vs.
—— ——. } Indictment for murder.

To the District Court of the United States for the —— District of ——:

Your petitioner, ---- ——, defendant in the above-entitled cause, respectfully represents: That on the day —— of ——, A. D. 19—, at the —— term of the —— court, at the instance of —— ——, as prosecutor, your petitioner was indicted for wilfully, premeditatedly and of malice aforethought killing one —— ——, which indictment and criminal prosecution so instituted is still pending in said court against your petitioner.

Your petitioner further represents that no murder was committed by the killing aforesaid, but in fact the killing was committed in the necessary self-defense of the defendant, your petitioner, and to save his own life: that at the time the alleged offense was committed your petitioner was an officer of the United States, to wit, a deputy collector of internal revenue, and the act for which he was indicted was done in his own necessary self-defense, while engaged in the discharge of the duties of his office as said deputy collector of internal revenue; that he was at the time acting by and under the authority of the internal revenue laws of the United States, and under and by right of his office as deputy collector of internal revenue of the United States, that it became, and was, then and there his duty, under said internal revenue laws, to seize illicit distilleries and the apparatus that was used for the illicit and unlawful distillation of spirits, and while so attempting to enforce said revenue laws as deputy collector aforesaid, he was assaulted and resisted, and fired upon by a number of armed men, and in defense of his life returned fire, which is the act for which he was indicted.

Your petitioner therefore prays that said cause may be removed from the —— court of —— county, in the state of ——, to the district court

of the United States for the —— district of ——, and that *certiorari* may issue therefor.

—— ——, Attorney for Petitioner.

Affidavit to Petition.

UNITED STATES OF AMERICA,
—— District of ——. } ss.

I, —— ——, being duly sworn, on oath say that I am the petitioner in the foregoing petition, that I have read the same, and that the matters and things therein contained are true of my own knowledge.

—— ——, Petitioner.

Subscribed and sworn to before me this —— day of ——, A. D. 19—.

—— ——.

[OFFICIAL SEAL] United States Commissioner for the —— District of ——.

Certificate of Counsel.

UNITED STATES OF AMERICA,
—— District of ——. } ss.

I, —— ——, being an attorney at law, of the —— court of the state of ——, the same being a court of record, do hereby certify that as counsel for the petitioner in the foregoing petition named, I have examined the proceedings against him mentioned therein, and carefully inquired into the matters therein set forth, and that I believe them to be true.

—— ——, Attorney for Petitioner.

[NOTE.—If petitioner is in custody under process of state court the petition should so state and ask for a writ of *habeas corpus*.]

REMOVAL FORM X.—PETITION BY AN OFFICER, CIVIL OR CRIMINAL, OR A SOLDIER OF THE UNITED STATES, FOR REMOVAL OF A CIVIL CASE FROM A STATE COURT.

DISTRICT COURT OF THE UNITED STATES,
for the SOUTHERN DISTRICT OF NEW YORK.
JOHN ABER
against
WILLIAM H. EDWARDS.

To the Honorable the District Court of the United States for the Southern District of New York.

I. Your petitioner, William H. Edwards respectfully shows: Heretofore to wit on or about the second day of January, 1921, the above named John Aber by the service of a summons and complaint upon your petitioner

in the County of New York in said District began a civil action against him in the Supreme Court of the State of New York for the County of New York, a Court of Records in the State of New York. The said case is numbered ————, in the office of the Clerk of the County of New York, and is on the trial calendar of said court numbered ————. Said action has not yet been tried and said cause is still pending in said State Court. The ground of action and the prayer of said complaint are in substance as follows: [Set forth in substance the allegations of complaint and the prayer for relief.]

II. At the time said action was begun and at the time the said acts charged in said petition are alleged to have been committed your petitioner was and he still is an officer [or soldier] of the United States, namely Collector of Internal Revenue for the ———— District of the State of New York, as is stated and is set forth in said complaint, [or describe other office of soldiership held by petitioner] and all his acts in connection with the matters charged in said complaint were committed by him under color of his said office. Wherefore your petitioner prays that cause may be removed from the Supreme Court of the State of New York in and for and the County of New York to the District Court of the United States for the Southern District of New York and that certiorari may issue therefor.

WILLIAM H. EDWARDS, Petitioner.
BROWN & JONES,
Attorneys for petitioner,
20 Nassau Street, New York.

UNITED STATES OF AMERICA,
Southern District of New York, } ss.
State of New York
County of New York.

William H. Edwards, being duly sworn deposes and says, I am the petitioner in the foregoing petition. The same is true to my own knowledge.

Sworn to before me this 5th day of April, 1921.

WILLIAM GREEN,
Notary Public, New York County.

I, Philo Brown being an attorney at law of the Supreme Court of the State of New York the same being a Court of Record, do hereby certify that as counsel for the petitioner in the foregoing petition made I have examined the proceedings against him mentioned therein and carefully inquired into the matters therein set forth and that I believe them to be true.

PHILO BROWN,
Attorney for petitioner.

REMOVAL FORM XI.—BOND ON REMOVAL.

[198 U. S. 95.]

Supreme Court of the State of New York, County of Jefferson.

HIRAM REMINGTON, Plaintiff,
AGAINST
CENTRAL PACIFIC RAILROAD COMPANY,
Defendant.

Know all men by these presents: That the Fidelity and Deposit Company of Maryland, a corporation duly authorized and existing under the laws of the State of Maryland, having an office at No. 35 Wall street, New York City, and having authority to transact business, pursuant to the act of Congress, August 13th, 1894, entitled, "An act relative to the cognizances, stipulations, bonds and undertakings, and to allow certain corporations to be accepted as surety therein," is held and firmly bound unto Hiram Remington, in the sum of five hundred dollars ($500.00), for the payment of which well and truly to be made unto the said Hiram Remington, his heirs, executors, administrators and assigns, the said Fidelity and Deposit Company of Maryland binds itself, its successors and assigns, jointly and firmly by these presents; upon condition nevertheless, that

Whereas, the above named Hiram Remington has heretofore brought a suit of a civil nature in the supreme court of the State of New York, in and for the county of Jefferson, against the said Central Pacific Railroad Company, and

Whereas, the said Central Pacific Railroad Company simultaneously with the filing of this bond intends to file its petition in said suit in such State court for the removal of such suit into the [District] Court of the United States in the district where such suit is pending, to-wit: the [District] Court of the United States in and for the northern district of New York, according to the provisions of the act of Congress in such case made and provided.

Now, therefore, the condition of this obligation is such that if the said petitioner, The Central Pacific Railroad Company, shall enter in the [District] Court of the United States for the northern district of New York thirty days from the date of filing said petition a certified copy of the record in such suit and shall well and truly pay all costs that may be awarded by the said [District] Court if said court shall hold that such suit was wrongfully or improperly removed thereto and shall also appear and enter special bail in such suit if special bail was originally requisite therein, then the above obligation shall be void but shall otherwise remain in full force and virtue.

In witness whereof, the said Fidelity and Deposit Company of Maryland has caused these presents to be signed by its vice-president and attested by

its attorney-in-fact and its corporate seal to be hereunto affixed this 22nd day of October, in the year nineteen hundred and three.

FIDELITY & DEPOSIT COMPANY OF MARYLAND,
By HENRY B. PLATT, Vice-President.
JAMES R. KINGSLEY,
Attorney-in-fact.

Attest:
State of New York, }
County of New York, } ss:

On the 22nd day of October, in the year 1903, before me personally came Henry B. Platt, to me known, who, being by me duly sworn, did depose and say, that he resided in the city of New York; that he was the vice-president of the Fidelity and Deposit Company of Maryland, the corporation described in, and which executed the within instrument; that he knew the seal of said corporation; that the seal affixed to said instrument was such corporate seal; that it was so affixed by order of the board of directors of said corporation, and that he signed his name thereto by like order; and that the liabilities of said company do not exceed its assets as ascertained in the manner provided in section 3, of chapter 720, of the Session Laws of the State of New York for the year 1893. And the said Henry B. Platt further said that he was acquainted with James R. Kingsley, and knew him to be the attorney-in-fact of said company; that the signature of the said James R. Kingsley, subscribed to the within instrument, was in the genuine handwriting of the said James R. Kingsley, and was subscribed thereto by like order of the board of directors, and in the presence of him the said Henry B. Platt.

JAMES T. CRANE,
Notary Public, New York County.

At a regular and lawful meeting of the board of directors of the Fidelity and Deposit Company of Maryland, at which a quorum was present, held at the office of the company, in the city of Baltimore, State of Maryland, on the sixth day of March, 1901, on motion, it was unanimously.

"Resolved, That in pursuance of section eight hundred and eleven of the Code of Civil Procedure of the State of New York, Henry B. Platt, vice-president, or George Sewell Bonner, attorney, or Frank H. Platt, Edward T. Platt, Joseph A. Flynn, Hugh M. Allwood and James R. Kingsley, attorney-in-fact of this company, in the State of New York, be and each of them is, hereby authorized and empowered to sign, execute and deliver any and all bonds or undertakings for or on behalf of this company, and to attach thereto the seal of the corporation, the same to be attested by the said George Sewell Bonner, attorney of the company, or by either one of the other persons above named, as occasion may require."
County of New York, ss:

I, James R. Kingsley, attorney-in-fact, of the Fidelity and Deposit Company of Maryland, have compared the foregoing resolution with the original thereof, as recorded in the minute book of said company, and do hereby certify that the same is a true and correct transcript therefrom, and of the whole of the said original resolution.

Given under my hand and the seal of the company, at the city of New York, this 22nd day of October, 1903.

JAMES R. KINGSLEY.
Attorney-in-fact.

(Next followed summary statement of assets and liabilities.)

State of New York, }
County of New York, } ss.

James R. Kingsley, being duly sworn, says that he is the attorney-in-fact of the Fidelity and Deposit Company of Maryland; that the foregoing is a true and correct statement of the financial condition of said company, as of December 31st, 1902, to the best of his knowledge and belief, and that the financial condition of said company is as favorable now as it was when such statement was made.

JAMES R. KINGSLEY.

Subscribed and sworn to before me, this 22nd day of October, 1903.

JAMES T. CRANE,
Notary Public, New York County.

State of New York, }
County of New York, } ss.

I, Thomas L. Hamilton, clerk of the county of New York, and also clerk of the supreme court for the said county, the same being a court of record, do hereby certify, that James T. Crane, whose name is subscribed to the certificate of the proof or acknowledgment of the annexed instrument, and thereon written, was, at the time of taking such proof or acknowledgment, a notary public in and for the county of New York, dwelling in the said county, commissioned and sworn, and duly authorized to take the same. And further that I am well acquainted with the handwriting of such notary and verily believe that the signature to the said certificate of proof or acknowledgment is genuine.

In testimony whereof, I have hereunto set my hand and affixed the seal of the said court and country, the 22d day of Oct., 1903.

(Seal.) THOS. L. HAMILTON, Clerk.

(Endorsed:) New York supreme court, Jefferson county. Hiram Remington, plaintiff, against Central Pacific Railroad Co., defendant. Bond. I hereby approve of the within bond as to form and sufficiency of surety. Dated Oct. 26, 1903. Watson M. Rogers, J. S. C. Fidelity and Deposit Company of Maryland, 35 Wall street, New York.

REMOVAL FORM XII.—CERTIFICATE TO THE RECORD BY THE CLERK OF THE STATE COURT.

[144 U. S. 465.]

SUPREME COURT, COUNTY OF NEW YORK.

DOMINICK AMATO
vs.
NORTHERN PACIFIC RAILROAD COMPANY.

STATE OF NEW YORK,
City and County of New York, } ss.

I, Edward F. Reilly, clerk of said city and county and clerk of the supreme court of said State for said county, do certify that I have compared the preceding with the original record on removal to United States court, Dominick Amato *vs.* Northern Pacific Railroad Company, on file in my office, and that the same is a correct transcript, filed March 13th, 1890, therefrom, and the whole of such original.

In witness whereof I have hereunto subscribed my name and affixed my official seal this 24th day of March, 1890.

[SEAL.] EDWARD F. REILLY, Clerk.

Endorsed: Filed March 24, 1890. (Sig.) John A. Shields, clerk.

REMOVAL FORM XIII.—MOTION FOR REMAND.

[106 Fed. 771.]

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF KANSAS.

SOUTHERN DIVISION.

MARY P. STEVENS and FREDERICK C. STEVENS, Executors under the Last Will and Testament of ROBERT S. STEVENS, deceased,
Plaintiffs,
vs.
THE MISSOURI, KANSAS & TEXAS RAILWAY COMPANY and THE KANSAS CITY & PACIFIC RAILROAD COMPANY,
Defendants.

Now come the plaintiffs and move this Court to remand the above-entitled cause to the District Court of Bourbon County, State of Kansas, for the reasons following, to wit:

1. The defendants and each of them, as shown by the bill and by the petition to remove, are corporations organized under the laws of Kansas, and were sued in a Court of that State, and hence cannot remove this cause on the ground of diverse citizenship.

2. It is not true as complained in the petition for removal that a federal question is made or presented by the bill so as to entitle the defendants, or either of them, to remove this cause to this Court.

3. This court is without jurisdiction to hear and determine this cause.

Holmes & Perry
Attorneys for Plaintiffs.

REMOVAL FORM XIV.—ORDER FOR REMAND.

IN THE [DISTRICT] COURT OF THE UNITED STATES FOR THE DISTRICT OF KANSAS.

[In which the author was counsel, 106 Fed. 771.]

MARY P. STEVENS *et al.*, Executors, &c.,
vs.
MISSOURI, KANSAS & TEXAS RY. CO., *et al.*

It is now ordered that the motion of the plaintiffs to remand this cause to the District Court of Bourbon County, Kansas, be and the same hereby is sustained.

It is, therefore, ordered that this cause be remanded to said State Court, and that this cause was not properly removable to this Court.

JNO. A. WILLIAMS, Judge.

REMOVAL FORM XV.—ORDER DENYING REMAND.

[106 Fed. 551.]

At a Stated Term of the [District] Court of the United States, of the Second Judicial District, held in and for the Southern District of New York, at the Post Office Building, in the Borough of Manhattan, in the City and County of New York, on the 4th day of January, 1901.

Present: Hon. E. Henry Lacombe, Circuit Judge.

CHRISTIAN DANCEL and MARY DANCEL, Administrators of the Goods, Chattels and Credits of Christian Dancel, deceased,

against

GOODYEAR SHOE MACHINERY COMPANY OF PORTLAND, MAINE.

This cause having been commenced in the Supreme Court of the State of New York, in the County of New York, on the 15th day of October, 1900, and having been removed into this Court by the defendant on the 10th day of December, 1900, and the plaintiffs having moved to remand the same to the State court on the ground that the said removal was not in time, by an order to show cause made herein on the 19th day of December, 1900, and the said motion having come on to be heard on the 28th day of December;

Now, on reading and filing the said order to show cause, dated the 19th day of December, 1900, and the affidavit of J. Philip Berg, on which the said order was granted, sworn to the 18th day of December, 1900, and on reading the record on removal filed herein on the 10th day of December, 1900, and on all the papers and proceedings heretofore had herein; and after hearing Roger Foster, Esq., of counsel for the plaintiffs in support of said motion, and Edwards H. Childs, Esq., of counsel for the defendant in opposition thereto, and due deliberation being thereupon had, it is

Ordered, that the said motion to remand be and the same hereby is denied.

E. H. LACOMBE,
U. S. Circuit Judge.

(Endorsed:)—Circuit Court of the United States, Southern District of New York, Second Judicial Circuit.—Christian Dancel and ano., against Goodyear Shoe Machinery Company. Order denying motion to remand. Edwards H. Childs, 59 Wall Street, New York City, Attorney for Defendant.—U. S. Circuit Court.—Filed Jan. 4, 1901.—John A. Shields, Clerk.

REMOVAL FORM XVI.—ORDER FOR REPLEADER AFTER REMOVAL.

[106 Fed. 771 in which the author was counsel.]

IN THE CIRCUIT COURT OF THE UNITED STATES.

FOR THE DISTRICT OF KANSAS—THIRD DIVISION.

MARY P. STEVENS and FREDERICK C. STEVENS, Executors under the last Will and Testament of ROBERT S. EVANS, deceased,
Plaintiffs,
vs.
THE MISSOURI, KANSAS & TEXAS RAILWAY COMPANY *and* THE KANSAS CITY & PACIFIC RAILROAD COMPANY,
Defendants.

It appearing that this suit was commenced in the State Court and that the bill was drawn under the State practice, and that the defendants have removed said suit into this Court by special appearance, it is therefore, on the application of the complainants, and for good cause shown, hereby

ORDERED

That said complainants be and they hereby are given leave to recast their bill of complaint, and to amend said bill of complaint or to file an amendment thereto by or before the September rule day. But said complainants shall serve a copy of said bill of complaint as recast or amended upon the solicitors of the defendants, and this order nor the service of said copy shall in any way be construed as the entry of any general appearance by the defendants or either of them.

Witness my hands at chambers this 26th day of July, A. D., 1898.

JNO. A. WILLIAMS, Judge.

FORMS FOR USE UPON APPLICATIONS FOR THE WRIT OF HABEAS CORPUS

HABEAS CORPUS FORM I.—PETITION FOR WRIT OF HABEAS CORPUS TO PREVENT EXTRADITION.

[Granted in 196 Fed. 168.]

To the honorable the district court of the United States in and for the southern district of New York in the second judicial circuit:

The petition of Walter Konrad Geissler respectfully shows:

I. Your petitioner is a resident of the City, County and State of New York, in this circuit and district.

II. Your petitioner is now actually imprisoned and restrained of his liberty and detained by color of the authority of the United States in the custody of William Henkel, Esq., United States marshal in and for the southern district of New York, to wit., at the Borough of Manhattan of the City of New York in the said district.

III. The sole claim and sole authority by virtue of which the said William Henkel, marshal as aforesaid, so restrains and detains your petitioner, is a certain paper which purports to be a commitment in writing, a copy of which is hereunto annexed marked "A."

IV. Upon information and belief, the said commitment was issued by Thomas Alexander, Esq., a United States Commissioner, in certain proceedings instituted on behalf of the Empire of Germany under color of the treaty between the United States and the Kingdom of Prussia and other states of the Germanic Federation, upon a charge that your petitioner had committed the crime of forgery within the jurisdiction of the Kingdom of Saxony.

V. Your petitioner did not commit the crime of forgery within the jurisdiction of the Kingdom of Saxony and your petitioner has not committed the crime of forgery anywhere.

VI. Upon information and belief, the warrant which was the foundation of said extradition proceedings before said Commissioner did not state any facts which constituted the crime of forgery within the meaning of said treaty, nor within the common law definition of said crime, nor within the statutes of the State of New York defining said crime, nor within the definition of said crime by the statutes in force in the Kingdom of Saxony at the time when said crime of forgery was alleged in said warrant to have been committed.

VII. Upon information and belief, the evidence before said Commis-

sioner did not show any facts which constituted the crime of forgery within the meaning of said treaty, nor within the common law definition of said crime, nor within the statutes of the State of New York defining said crime, nor within the definition of said crime by the statutes in force in the Kingdom of Saxony at the time when said crime of forgery was alleged to have been committed.

VIII. Upon information and belief, in the said proceedings before said commissioner and said commissioner permitted to be offered before him and admitted in evidence against your petitioner, certain documents and exhibits and other papers, which, and each of which, under the provisions of said treaty, were not admissible in evidence against your petitioner, and which, and each of which, under the statutes of the State of New York, were not admissible in evidence against your petitioner, and which, and each of which, under the statutes of the United States, were not admissible in evidence against your petitioner, and the admission in evidence of which, and each of which, was in violation of the Constitution of the United States and did not constitute due process of law. Amongst other exhibits thus admitted in evidence by said commissioner was and were a certain exhibit which purported to be a photograph, and certain exhibits which purported to be copies of checks, and certain exhibits which purported to be copies of papers, the originals of which alleged checks and papers were not produced before said commissioner and the originals of which documents were not produced before said commissioner.

IX. Upon information and belief, in the said proceedings before said commissioner the said commissioner allowed to be offered in evidence against your petitioner and admitted in evidence against your petitioner, certain papers purporting to be depositions, taken in the Empire of Germany, which papers were not properly nor legally authenticated in pursuance of the said treaty, and which papers were not properly and legally authenticated in pursuance of the statutes of the United States, and which papers were not properly and legally authenticated in pursuance of the statutes of the State of New York, and which papers did not show that the proceedings that resulted in the taking of said alleged depositions were valid and in accordance with the statutes in force in the Empire of Germany under color of which said proceedings took place.

X. Upon information and belief, in the said extradition proceedings the said commissioner denied to your petitioner a due hearing and denied to your petitioner due process of law in the said respects and in many other respects, and your petitioner was denied the right to be confronted with the witnesses against him, which was secured to your petitioner by the Sixth Amendment of the Constitution of the United States, and your petitioner was denied either rights under the Constitution of the United States, and your petitioner was denied the rights secured by the said treaty, and the construction of the said treaty was drawn in question in the course of said proceedings.

XI. Upon information and belief, the said proceedings before said commissioner were for these and other reasons absolutely void, and the said

commitment is absolutely void, and your petitioner is now confined and deprived of his liberty in violation of the Constitution of the United States and in violation of the statutes of the United States and in violation of the rights secured to your petitioner by said treaty.

WHEREFORE your petitioner prays that a writ of habeas corpus may issue directed to the said William Henkel, marshal of the United States, and to each and all of his deputies, requiring him and them to bring and have your petitioner before this court at a time to be by this court determined, together with the true cause of the detention of your petitioner, to the end that due inquiry may be had in the premises; and that a writ of certiorari may at the same time issue directed to the said Thomas Alexander, Esq., United States commissioner for the southern district of New York and commissioner under the laws of the United States concerning the extradition of fugitives from the justice of a foreign country under a treaty between the United States and a foreign country, directing him to certify to this court all the proceedings that took place before him and all the evidence that was offered before him in the said proceedings which resulted in the issue of the said commitment; and that this court may proceed in the summary way to determine the facts of this case in that regard and the legality of your petitioner's impairment, restraint and detention, and thereupon to dispose of your petitioner as law and justice may require. And your petitioner will ever pray, etc.

Dated, at the City of New York, the 9th day of March, 1912.

ROGER FOSTER,
Attorney for the Petitioner,
55 Liberty Street,
New York.

CITY, COUNTY AND STATE OF NEW YORK,
UNITED STATES OF AMERICA,
SOUTHERN DISTRICT OF NEW YORK. } ss.:

WALTER KONRAD GEISSLER, being duly sworn, deposes and says: I am the petitioner above-named. I have read the foreging petition and I know the contents thereof. The same is true to my own knowledge, except as to the matters therein stated to be alleged upon information and belief, and as to these matters I believe the same to be true. The said petition and each part thereof is true to the best of my knowledge, information and belief. No previous application for the writ of habeas corpus and no previous application for the writ of certiorari has been made.

WALTER KONRAD GEISSLER.

Sworn to before me this 9th day of March, 1912.

CHARLES J. VOLPE,
Notary Public,
[Notarial Seal.] New York County.

HABEAS CORPUS FORM II.—WRIT OF HABEAS CORPUS AD TESTIFICANDUM.

[166 Fed. 73.]

In the District Court of the United States for the Western District of Pennsylvania.

In the Matter of Henry Kendall Thaw, Bankrupt.
No. 4,290, in Bankruptcy.
Western District of Pennsylvania, United States of America—ss:

The President of the United States of America, to Dr. Robert B. Lamb, Superintendent of Matteawan State Hospital, New York, or Dr. Baker, His Assistant—Greeting:

We command that you have the body of Henry Kendall Thaw, detained in the Matteawan State Hospital under your custody as it is said, under safe and secure conduct before the judges of our District Court within and for the Western District of Pennsylvania, at Pittsburgh, Pennsylvania, forthwith, there to testify the truth according to his knowledge in a certain cause now pending in said court, and then and there to be tried in the matter of the said Henry Kendall Thaw, Bankrupt, at No. 4,290, in Bankruptcy, before the said court, and immediately after the said Henry Kendall Thaw shall have given his testimony in the above entitled matter that you return him to the said Matteawan State Hospital of New York under safe and secure conduct, and have you then and there this writ.

Witness, the Honorable R. W. Archbald, Judge of the District Court of the United States for the Western District of Pennsylvania, by special assignment, at Pittsburgh, Pennsylvania, and the seal of the said court, this 13th day of October, A. D. 1908.

WM. T. LINDSAY, Clerk.

(Seal of the U. S. District Court for the Western District of Penna.)

HABEAS CORPUS FORM III.—ORDER QUASHING WRIT OF HABEAS CORPUS AD TESTIFICANDUM.

[166 Fed. 73.]

In the District Court of the United States for the Western District of Pennsylvania.

In the Matter of Henry Kendall Thaw, Bankrupt, No. 4,290, in Bankruptcy. At the City of Pittsburgh, in Said District, This 20th day of October, 1908.

Western District of Pennsylvania—ss.:

And now, 20th October, 1908, this matter came on to be heard upon the petition for a writ of habeas corpus ad testificandum, the reply thereto of the respondent, and the answer to the reply by the trustee in bankruptcy of

said Henry Kendall Thaw, and after argument by counsel and consideration by the court,

It is ordered that the writ of habeas corpus ad testificandum heretofore issued, directed to said Dr. Robert B. Lamb, Superintendent of the Matteawan State Hospital, in the state of New York, be quashed, and the petition for said writ be dismissed, with costs. Per Curiam.

HABEAS CORPUS FORM IV.—ORDER DISCHARGING PRISONER.

[196 Fed. 168.]

[Title.]

Upon the return of the writs of habeas corpus and certiorari herein; upon reading and filing the same; and upon reading the petition of Walter Konrad Geissler, sworn to March 9th, 1912, filed in the office of this Court on the 11th day of March, 1912; and upon the return to the said writs of habeas corpus and certiorari; after hearing Roger Foster, Esq., of counsel for the petitioner, Walter Konrad Geissler, in support of the prayer of said petition and in support of a motion for the discharge of said prisoner Geissler, and after hearing Carl L. Schurz, Esq., of counsel for the demanding government, in opposition thereto; it is hereby

ORDERED that the petitioner, Walter Konrad Geissler, be, and that he hereby is, discharged from imprisonment, and that the Marshal of the United States for the Southern District of New York is hereby ordered and directed to release said Geissler.

HABEAS CORPUS FORM V.—WRIT OF HABEAS CORPUS TO MARSHAL.

The President of the United States to William Henkel, Esq., United States marshal for the southern district of New York, GREETING:

We command you that you have the body of Walter Konrad Geissler, by you imprisoned and detained, as it is said, together with the time and cause of such imprisonment and detention, by whatsoever name he shall be called or charged, before the District Court of the United States in and for the Southern District of New York in the Second Circuit, at a stated term thereof, to be held on the 15th day of March, 1912, at 10:30 o'clock in the morning of that day or as soon thereafter as counsel can be heard, to do and receive what shall then and there be considered concern-

ing the said Walter Konrad Geissler, and have you then and there this writ.

Witness, the Hon. GEORGE C. HOLT,
U. S. District Judge, Southern District of New York.
The 9th day of March, 1912.

THOMAS ALEXANDER,
[Seal.] Clerk of the District Court of the United States for the Southern District of New York.

The foregoing writ is hereby allowed.
New York, March 9th, 1912.

LEARNED HAND,
United States District Judge.

FORMS FOR APPLICATION FOR WRITS OF MANDAMUS

MANDAMUS FORM I.—MOTION FOR LEAVE TO FILE PETITION FOR MANDAMUS.

[Permission granted, 247 U. S. 231.]

IN THE SUPREME COURT OF THE UNITED STATES.

In the Matter
of
The Application of Annie S. Simons, for a Writ of Mandamus against the Honorable Charles M. Hough, Circuit Judge of the United States for the Second Circuit, and against the District Court of the United States for the Southern District of New York, sitting at common law; or in the alternative for a Writ of Prohibition against the District Court of the United States for the Southern District of New York sitting in Equity; or in the alternative for the Writ of Certiorari addressed to the District Court of the United States for the Southern District of New York.

And now comes the petitioner, Annie S. Simons, by Roger Foster, her attorney, and she moves for leave to file the petition hereto annexed for a Writ of Mandamus, or in the alternative, for a Writ of Prohibition, or in the alternative for a Writ of Certiorari, and she further moves that a rule be entered and issued directing the Honorable Charles M. Hough, Circuit Judge of the United States for the Second Circuit who has been designated to hear motions in the District Court of the United States for the Southern District of New York, and directing the District Court of the United States for the Southern District of New York, sitting at Common Law, to show cause why a Writ of Mandamus should not issue against them; and directing said Court to show cause why, in the alternative a Writ of Prohibition or a Writ of Certiorari should not issue against said Court; in accordance with the prayer

of the said petition; and why said petitioner should not have such other and further relief in the premises as may be just and meet.

ROGER FOSTER,
Attorney and Counsel for petitioner
ANNIE S. SIMONS,
55 Liberty Street,
Borough of Manhattan,
City and State of New York.

MANDAMUS FORM II.—PETITION TO SUPREME COURT.

[Granted 247 U. S. 231.]

To the Honorable Edward Douglass White, Chief Justice of the United States, and to the Associate Justices of the Supreme Court of the United States.

The petition of Annie S. Simons, respectfully shows:

I. Your petitioner is a resident of the City of Charleston in the State of South Carolina. On or about the 16th day of May, 1917 an action was begun in the District Court of the United States for the Southern District of New York by your petitioner, as plaintiff, against William Nelson Cromwell and Louis H. Cramer, as executors under the last will and testament of Frank Leslie, deceased, defendants by the service of the summons therein upon the defendant Cramer. Both the defendants subsequently appeared in said action. The defendant Cramer, by Honorable Edgar T. Brackett of Saratoga, New York; the defendant Cromwell, by Messrs. Sullivan & Cromwell of 49 Wall Street, New York City. The complaint herein was served on the attorneys of said defendants on or about June 15th, 1917. A copy thereof of hereunto annexed marked "A." Issue has been duly joined by the service of the answers of the defendants, copies of which are hereunto annexed marked "B" and "C." That of defendant Cramer was served June 27, 1917; that of defendant Cromwell July 5, 1917. Upon the demand of the defendant Cromwell an undertaking as security for costs was filed on behalf of the plaintiff. On July 10th, 1917 notice of trial at a jury term of the issues raised by said answers was duly served. On or about July 11th, 1917, the case was placed upon the jury calendar of said Court.

II. The complaint therein sets forth two causes of action. The allegations as to the first cause of action set forth: the rendition of certain services by plaintiff as nurse and companion to the defendants' testator, Mrs. Frank Leslie, during a period of fourteen years, in three different States, at the request of said testator. The promise by Mrs. Leslie to compensate plaintiff for said services by bequeathing to her a legacy of the sum of $50,000. The failure of said Mr. Leslie to bequeath to the plaintiff more than the sum of $10,000 and the breach of the contract by said testator in this respect. The consequent damage to plaintiff in the sum of $40,000 for which judgment is prayed with interest from the

date of the death of said Mrs. Frank Leslie, who bequeathed the greater part of her property to one Mrs. Catt, in order that the same might be used for the purpose of promoting the cause of Woman's Suffrage. The allegations as to the second cause of action in said complaint set forth the same services. They allege: that Mrs. Leslie promised to pay this plaintiff the reasonable value thereof. That the reasonable value thereof was the sum of $50,000. The failure of Mrs. Leslie to pay any part thereof except the sum of $10,000 bequeathed as aforesaid. The consequent damage to plaintiff in the sum of $40,000 with interest from September 17th, 1915. The complaint concludes with a demand for judgment against defendants for the sum of $40,000 with interest as aforesaid and general relief with costs.

III. On or about July 20th, 1917 the defendant served upon petitioner's attorney a notice of a motion "for an order remanding the first cause of action alleged herein to the equity side of the Court and for such other and further relief as may be just, together with the costs of this motion." Said motion came on for argument on September 27th, 1917 before the Honorable Charles M. Hough, U. S. Circuit Judge who upon information and belief, had then been duly designated to hear motions in the District Court of the United States for the Southern District of New York. Said motion was argued by counsel for the two defendants in support of said motion and by petitioner's counsel, in opposition thereto. The said petitioner's counsel then specifically, orally and subsequently in writing in a brief submitted by him, made as one of the objections to said motion that granting the same would deny to the plaintiff the right to a trial by jury of the issues raised upon the first cause of action, which right was secured petitioner and plaintiff by the Seventh Amendment to the Constitution of the United States; and as another objection thereto, that neither said Court nor said Judge had any jurisdiction or power to grant such a motion or to make such an order as was made thereupon. The said Honorable Judge and the said Honorable Court granted said motion by an order entered on or about October 26, 1917. Said order directed as follows:

"Ordered that the said motion be and the same hereby is granted, and the first cause of action set forth in the complaint herein be and the same hereby is transferred to the equity side of this Court; and further

"Ordered that the said first cause of action be and the same is hereby stricken out of the complaint in this action at law (but only for the purpose of transfer as aforesaid) and that plaintiff have (and she is hereby given) twenty days after the service of this order wherein to make such amendment to the complaint herein (after the said striking out and transfer aforesaid) as she may be advised; and further

"Ordered that the Clerk of this court do forthwith and as of the date of this order docket as an equity cause the said first cause of action set forth in the said complaint, and the plaintiff is hereby given twenty days from the service of this order wherein to amend or replace on the equity side of this Court, and defendants are hereby given twenty days

from the expiration of said twenty days hereinabove given to plaintiff for the filing and service of an amended bill in equity (as the case may be) wherein to answer without prejudice to any motion that said defendants may be advised to make under and pursuant to the rules of the Supreme Court of the United States in equity; and further

"Ordered that the trial of this action at law be and the same hereby is stayed until (at the earliest) the term of December, 1917, without prejudice to any application that plaintiff may be advised to make for a stay of proceedings or further deferment of trial, when and if said plaintiff takes an appeal or sues out a writ of error or otherwise lawfully seeks to review this order or any part thereof."

IV. The opinion rendered by Judge Hough upon said motion was as follows: "I think the law of New York is clear that plaintiff cannot sustain the first cause of action at law. The use of section 274 to sever an action is new but seems to me proper. Motion granted."

V. In the opinion of your petitioner's counsel, the law of New York does not forbid the bringing of such an action as is described in the first cause of action in said complaint in an action at common law. On the contrary, the law of New York, as stated in the cases of Lisk against Sherman, which is reported in 25 Barbour, 433, and Lenox against Lenox, which is reported in 126 App. Div., 109, and in other cases, recognizes that such an action could have been sustained at common law and is now triable in the Courts of that State before a jury. By the law of New York there is no longer any distinction between law and equity except in so far as the Constitution of the State of New York in Article I, Section 2, ordains "The trial by jury in all cases in which it has been heretofore used shall remain inviolate forever; but a jury trial may be waived by the parties in all civil cases in the manner prescribed by law."

VI. In the opinion of your petitioner's counsel said order denies to your petitioner the right to a trial by jury of the issues raised upon her said first cause of action, which right is guaranteed to your petitioner by the Seventh Amendment to the Constitution of the United States, and such order is not authorized by § 274 of the Federal Judicial Code, to which said Judge refers, nor by § 274a thereof, nor by any Section of said Code, and neither said Judge nor said District Court had any power to make such an order.

VII. The result of the said motion is to split and sever an action brought at common law, in which the plaintiff demanded the same relief upon two different counts into two separate and independent cases and proceedings, an action at law and a suit in equity. If said order is enforced the termination of the litigation will result in a decree in equity upon the issues raised on the first cause of action and a judgment at common law upon the issues raised upon the second cause of action. Your petitioner, the plaintiff, will be denied her constitutional right to a trial by jury upon the issues raised upon the first cause of action. Inasmuch as no judgment has been at the present time entered in the action brought by the plaintiff at common law since the proceedings upon the second

cause of action are directed to be continued at common law, it seems highly probable that your petitioner cannot now review the said order of Judge Hough by a writ of error. Should your petitioner, the plaintiff herein, continue the first cause of action in equity, and file a bill in equity as directed by said order, undoubtedly the defendants wll raise the contention that by so doing she has consented to the severance and has waived her right to insist that she is entitled to continue this suit upon the first cause of action at common law. Moreover, in such a case, it is not impossible that a motion will be made to compel her to elect between the relief which she seeks in equity and the relief which she seeks at common law. When this action is finally determined if the said order of said District Court and of Judge Hough is not set aside, the final decison of the said District Court upon plaintiff's claims will be made in two separate papers, in two separate dockets upon two separate records, a decree in equity and a judgment at common law. The decree in equity can only be reviewed by an appeal. The judgment at common law can only be reviewed by a writ of error. Inasmuch as the order of severance will then become a part of the record in equity, there will be a serious obstacle to the review thereof by a writ of error to bring up the proceedings upon the second cause of action. Objection will, in all probability, be made to a review of the same upon an appeal from the decree in equity upon the ground that upon such an appeal an order in an action at common law cannot be reviewed. If said order is not set aside, the record will be complicated and the time of the District Court will be needlessly occupied by two distinct trials, one at common law and one in equity. The time of this Court, or of the Circuit Court of Appeals, as the case may be, will be needlessly occupied by two distinct proceedings for review, one at common law and the other in equity.

The effect of said order of said District Court and of said Judge Hough is to stay the proceedings of the District Court sitting at common law upon the first cause of action set forth in the complaint herein and to enjoin perpetually the trial at common law of the issues raised upon plaintiff's first cause of action.

Wherefore your petitioner prays that a rule be made and issued from this Honorable Court directed to the said Honorable Charles M. Hough, Circuit Judge of the United States for the Second Circuit who has been designated to hear motions in the District Court of the United States for the Southern District of New York and directing the said District Court of the United States for the Southern District of New York sitting at common law to show cause why a Writ of Mandamus should not issue commanding the said Judge and the said Court and each of them to proceed to the trial before a jury of the issues raised by said defendants' answers to the said allegations concerning plaintiff's first cause of action and to set aside and vacate the said order and to continue to proceed at common law in the said suit upon both causes of action set forth in the complaint therein and to compel the said Judge and the said District Court to proceed and to try before a jury and to proceed to judgment upon both causes of action

set forth in the complaint in the suit hereinbefore described; and directing said District Court of the United States for the Southern District of New York sitting in equity to show cause why in the alternative a Writ of Prohibition should not issue forbidding the said Judge and the said District Court of the United States when sitting in equity from continuing to take cognizance in equity of any of the proceedings in said action hereinbefore described; and directing the District Court of the United States for the Southern District of New York, sitting at common law to show cause why in the alternative a Writ of Certiorari should not issue from this Honorable Court directing said District Court of the United States sitting at common law to send up to this Honorable Court all the proceedings in said action hereinbefore set forth; and why your petitioner should not have such other and further relief in the premises as may be just and meet; and your petitioner further prays that said writs may issue accordingly, and your petitioner will ever pray, &c.

ANNIE S. SIMONS, Petitioner,
By ROGER FOSTER,
Attorney for Petitioner,
55 Liberty Street,
Borough of Manhattan,
New York City.

ROGER FOSTER,
of Counsel.

State of New York, ss:

ROGER FOSTER, being duly sworn, deposes and says: I am the attorney and counsel for the above named petitioner. The statements in the foregoing petition are true to my own knowledge except as to the matters therein stated to be alleged upon information and belief, and as to those matters I believe the same to be true. The reason why this petition is not sworn to by the petitioner is that said petitioner resides in the City of Charleston, and State of South Carolina, and is not within the State of New York, in which this deponent resides.

ROGER FOSTER.

Sworn to before me this 5th day of Nov., 1917.
GERTRUDE GIBBONS,
Comm. of Deeds, City of N. Y., Res. Brooklyn,
Cert. filed N. Y. Co. Cl. 136,
N. Y. Reg. 18053, Term, May 2nd, 1918.

MANDAMUS FORM III.—MOTION FOR LEAVE TO FILE PETITION FOR MANDAMUS TO SET ASIDE RECEIVERSHIP. [MOTION GRANTED BUT WRIT SUBSEQUENTLY DENIED.]

[*Re* Metropolitan Railway Receivership, 208 U. S. 90.]

IN THE SUPREME COURT OF THE UNITED STATES.

IN THE MATTER
OF
The Application of JOSEPH KONRAD individually and as administrator of Paul Planovsky, deceased, for a Writ of Mandamus against the Honorable E. Henry Lacombe, Circuit Judge of the United States for the Second Circuit, and against the Circuit Court of the United States for the Southern District of New York.

And now comes the petitioner, Joseph Konrad, individually and as administrator of Paul Planovsky, deceased, by Roger Foster, his attorney and counsel; and moves for leave to file the petition for a writ of mandamus, hereto annexed; and he further moves that a rule be entered and issue directing the Honorable E. Henry Lacombe, Circuit Judge of the United States for the Second Circuit and for the Southern District of New York, and directing the Circuit Court of the United States for the Southern District of New York to show cause why a writ of mandamus should not issue against them and each of them in accordance with the prayer of the same petition, and why said petitioner should not have such other and further relief in the premises as may be just and meet.

ROGER FOSTER,
Attorney and Counsel for Petitioner.

MANDAMUS FORM IV.—PETITION TO SUPREME COURT FOR MANDAMUS TO SET ASIDE RECEIVERSHIP.

[*Re* Metropolitan Railway Receivership, 208 U. S. 90.]

TO THE HONORABLE MELVILLE W. FULLER, CHIEF JUSTICE OF THE UNITED STATES, AND TO THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES.

The petition of JOSEPH KONRAD, individually and as administrator of the estate of Paul Planovsky, deceased, respectfully shows:

I.—Your petitioner is a resident of the City, County and State of New York. On or about the 9th day of October, 1906, your petitioner was duly appointed by the Surrogate's Court of the City and County of New York, a court of competent jurisdiction, administrator of the goods, chattels and

credits of Paul Planovsky, who had previously died in said City, County and State, of which said Paul Planovsky was then a resident. On or about the 13th day of October, 1906, your petitioner duly qualified as such administrator, and your petitioner still is such administrator. On or about the 22d day of June, 1907, your petitioner as administrator as aforesaid filed, in the Supreme Court of the State of New York, a judgment for the sum of $8,538.94, against the New York City Railway Company, defendant, which judgment was then duly filed and entered in the office of the Clerk of the County of New York. Said judgment is still unpaid. Said defendant subsequently appealed from the said judgment to the Appellate Division of the Supreme Court of the State of New York for the First Department. Said appeal is still pending and undetermined. An undertaking to secure the payment of said judgment, in case said judgment is affirmed upon said appeal, has been filed by said defendant in the said Clerk's office with the American Surety Company to said undertaking.

Said defendant and the Metropolitan Street Railway Company are insolvent; the sufficiency of said surety is doubtful. The said defendant has contended and still contends, that the said judgment was erroneously rendered, and the said defendant relies in support of said appeal upon numerous technical objections and exceptions taken during the trial of said action, including certain objections and exceptions to the admission of evidence, and to the charge and to the refusal to charge of the trial Judge, which objections and exceptions do not affect the merits of plaintiff's cause of action in the suit in which said judgment was rendered. And should the said judgment be reversed, it is unlikely that said reversal will be a decision against the merits of plaintiff's said claim. Said defendant has given no security for the payment of said claim in case said judgment is reversed and in case a new trial is ordered and in case a subsequent judgment is recovered against said defendant. The action which resulted in judgment was an action brought to recover damages for the death of the said decedent because of the negligence of said defendant. Your petitioner is also, individually, a creditor of said defendant to an amount equal to at least two hundred ($200) dollars, because of the arbitrary and illegal exaction by said defendant from your petitioner, at divers times during the past four (4) years, of additional fares upon his transfer from one car to another of said defendant at and near the junctions of Fourteenth street and Ninth avenue, and Twenty-third street and Broadway, and Eighth street and Second avenue, in the Borough of Manhattan, City, County and State of New York; and because of the liability of said defendant to him under the Statutes of the State of New York for penalties because of said action; and because of the refusal of said defendant to give him tickets entitling him to transfers at said junctions without the payment of additional fares; and because of the refusal of said defendant to give him such transfers free. Your petitioner is obliged, in the transaction of his business, daily to take transportation upon one or more of the street railroads which were in the possession of the said defendant at the time of the appointment of the receivers herein described. For several years he has suffered and he still suffers great inconvenience and danger to his life, body

and health, because of insufficient transportation facilities; including an insufficient number of cars furnished by the defendant, and because of the reckless and dangerous manner in which said cars are and have been operated.

II.—Said New York City Railway Company is, and at all the times herein mentioned was, a corporation organized under the laws of the State of New York, and engaged in the operation of a street railway system embracing all the surface street railways upon Manhattan Island in the City of New York, the possession of all of which it acquired under a lease from the Metropolitan Street Railway Company; and is not and never has been engaged in interstate nor in international commerce. Said Metropolitan Street Railway Company is and at all the times herein mentioned was, a corporation organized under the laws of the State of New York; and is not and never has been engaged in interstate nor in international commerce.

III.—On or about September 24, 1907, a bill in equity was filed in the Clerk's office of the [District] Court of the United States for the Southern District of New York, in which the Pennsylvania Steel Company, a corporation claiming to be organized under the laws of the State of Pennsylvania, and the Degnon Contracting Company, a corporation claiming to be organized under the laws of the State of New Jersey, were named as complainants, and in which the said New York City Railway Company was named as defendant. The said bill in equity alleged: That the said New York City Railway Company was a citizen of the State of New York; That said defendant was indebted to the said Steel Company in the sum of $36,831.38 for rails and track material furnished; and that said defendant was indebted to the said Degnon Contracting Company in the sum of $11,173.27 for work and labor. But said bill did not allege that any judgments had been recovered by either of said complainants against said defendant; and in fact neither of said complainants had then obtained, nor has since obtained, any judgment against said defendant. Your petitioner disputes the validity and the amount of said alleged indebtedness; and he wishes and prays a hearing thereupon. Said bill further alleged: That the said defendant was insolvent. "That in the course of the operation of its lines, numerous accidents have occurred, in respect of which suits have been brought and are now pending, and that said suits to the number of several thousand are now upon the calendars of the courts awaiting trial, and that the defendant will be without means to meet judgments recovered in said suits." Said bill further alleged: "that the railways operated by the defendant are so numerous and extensive as to constitute practically the entire street railroad system in the County of New York." "That it is of vital importance to the people of said County of New York that said system shall continue to be operated as a whole." Said bill prayed for the following and for no other relief: (1) That the rights of the orators and of the other creditors of the defendant may be ascertained and decreed; and that the assets of said defendant be administered and marshalled, and that the rights, liens and equities of said creditors be ascertained and decreed upon

respective interventions or applications of each creditor and lienor; (2) that a receiver of the property of said defendant be appointed with certain powers, which said bill specified; (3) that an injunction issue against the defendant and all persons claiming and acting by, through, or under it, and all other persons to restrain them from interfering with said receiver taking possession of said property; (4) a prayer for general relief with a prayer for an answer and the writ of subpœna. The said bill alleged that it was filed by said complainants "on their behalf and on behalf of all other creditors of New York City Railway Company, defendant, who may hereafter join in the prosecution of this suit." The said bill did not pray payment of any of the said alleged indebtedness by said defendant to either of said complainants. The allegations of said bill concerning the indebtedness of said defendant and the insolvency of said defendant, and all the allegations of facts in said bill, except the existence of said indebtedness to complainants, and the incorporation, residence and citizenship of the parties were made upon information and belief, the only persons named in said bill, as giving information to either of complainants concerning any of the facts herein alleged, were unnamed officers of said defendant. The said bill was prepared at the request of the said New York City Railway Company for the purpose of procuring the appointment of a receiver of the property of said New York City Railway Company by said [District] Court of the United States, and for the purpose of withdrawing the administration of the assets of said corporation and of its said lessor from the jurisdiction of the courts of the State of New York, and for the purpose of impeding your petitioner and the other creditors of said two railway companies in the collection of their claims, and for stock jobbing purposes, and for the purpose of preventing the Attorney General of the State of New York from interfering with and taking part in the administration of said assets, and for the purpose of impeding and preventing the Public Service Commission of the State of New York or the City of New York from making and enforcing orders compelling said defendant to improve its service and to make the same more adequate for the means of the residents of the City of New York and less dangerous to the life and health of the residents of said City of New York, and for the further purpose of impeding actions which were expected to be brought by stockholders of the said Metropolitan Street Railway Company and creditors of said Metropolitan Street Railway Company, and by said Attorney General against certain persons who had been directors and in control of said Metropolitan Street Railway Company, because of wrongful acts by them, which had depleted the treasury and wasted the funds of said Metropolitan Street Railway Company.

IV.—On the same day that said bill in equity was filed, the said New York City Railway Company filed in said clerk's office an answer. Said answer admitted all the allegations of said bill of complaint and joined in all the prayers of said complaint and specifically prayed the appointment of a receiver on the assets of said defendant. Said answer was verified by the secretary of the said New York City Railway Company. On the same

day, upon said bill and answer, without affidavits in support of the same, except the formal affidavits of officers of the said complainants to said bill, which merely averred that they believed the allegations therein, which were made upon information and belief, and that they knew the truth of the further allegations therein contained; the Honorable E. Henry Lacombe, United States Circuit Judge for the Second Circuit, signed an order and decree, which stated that the cause came on to be heard upon the bill of complaint and on the answer therein filed, and appointed Messrs. Adrian H. Joline and Douglas Robinson temporary Receivers of the property of said defendant. Said order and decree contained the following provisions, among others: "And the defendant, said New York City Railway Company and its officers, directors, agents and employees, and all other persons claiming to act by, through or under the defendant and all other persons whomsoever are hereby enjoined from interfering in any way whatever with the possession or management of any part of the property over which the Receivers are hereby appointed or interfering in any way to prevent the discharge of their duties or their operating the same, and any other party in interest may apply for further direction.

And it is further ordered that the parties hereto show cause before this Court at the United States Post Office Building, in the City of New York, on the 7th day of October, 1907, at two o'clock in the afternoon why the said receivership should not be continued during the pendency of this suit, and upon the hearing thereon any other creditor of the defendant or other party in interest may be heard."

The said suit did not really nor substantially involve a dispute or controversy properly within the jurisdiction of the said [District] Court. There was no controversy between citizens of different States in said suit. There was no controversy of any sort therein. Said suit did not arise under the Constitution, nor under the laws, nor under a treaty of the United States. The parties to said suit were improperly and collusively made and joined as plaintiffs and defendants, for the purpose of creating a case cognizable under the Judiciary Act of 1875 and for the purpose of creating a case cognizable by the said [District] Court of the United States. The said suit was instituted and the said appointment of said Receivers was procured by collusion between the parties to the same.

Subsequently thereto and on or about October 1, 1907, a petition in the name of the said Metropolitan Street Railway Company was presented to said United States Circuit Judge by the persons who controlled said defendant, in which said petitioner prayed that it might become a party defendant to said suit for the protection of its interests and those of its creditors; that the receivership under the bill of complaint be extended so as to embrace the interests of said petitioner in said property, and that said Receivers be directed to keep separate accounts of the lines owned by said defendant, and of such of the leased lines embraced in the petitioner's lease, as might be deemed practicable; that the rents, issues, profits and income be pledged under the orders or decrees of said court to the end that said system might be protected and preserved; with a prayer for general relief. Notice of the presentment of said petition was given by said peti-

tioner, upon the same day that the same was presented to, and due service of a copy of said notice and petition was admitted on the same day by, the solicitors for the complainants and by the solicitor for the defendant to said suit. Upon the same day with the consent of the parties to said suit the said United States Circuit Judge made an order permitting the said petitioner, Metropolitan Street Railway Company, to be made a party defendant to said cause, extending said receivership to the properties of said petitioner railway company, appointing said Receivers receivers of the property of said petitioner, with the powers and duty prescribed by the order previously appointing them Receivers, and ordering that all persons whomsoever be enjoined from interfering in any way whatsoever with the possession or management of any part of said property for which said Receivers had been appointed or interfering in any way to prevent the discharge of their duties of their operating the same. At that time the Attorney-General of the State of New York had prepared papers for the appointment of a Receiver of said Metropolitan Street Railway Company in the Supreme Court of the State of New York. Said petitioner, Metropolitan Street Railway Company, knew of said application, although the papers had not yet been formally served upon it. Said application was made, amongst other reasons, for the purpose of defeating the application of said Attorney-General and also to further the objects of said suit, which are hereinabove set forth. Said Metropolitan Street Railway Company then had causes of action to an amount exceeding $1,000,000 against said New York City Railway Company because of the waste and misappropriation by said lessee of said leased properties.

VI.—Subsequently, on or about October 7, 1907, the said order to show cause, contained in the said order of September 24, 1907, was returned before said Judge. Your petitioner then appeared by his counsel, Roger Foster, Esq., and then and there opposed the continuance of said receivership. The said Judge then refused to hear your petitioner's counsel except as *amicus curiæ*. The attorney for said Metropolitan Street Railway Company and the attorneys for said complainants then moved for a continuance of said receivership. Your petitioner's said counsel then charged, and complainants' counsel did not deny, that said suit was brought at the request of said defendant. The counsel for said defendant were then present in court; but neither of them opposed the motion to continue said receivership. Subsequently, on or about October 8, 1907, the said Circuit Judge handed down an opinion granting the motion to continue said receivership. In said opinion, he stated, amongst other things, as follows: "It is of course manifest that complainants and defendant were entirely in accord and arranged together that the suit should be brought to the Federal Court; and that the averments of the bill should be admitted by the answer." Subsequently, on or about October 9, 1907, a bill of equity in the name of the Morton Trust Company, which is and then was a corporation organized under the laws of the State of New York and a citizen of said State by the persons who controlled said two railway companies and said trust company. Said bill alleged that said Morton Trust Company was a

mortgagee of the property of said Metropolitan Street Railway Company under a mortgage not yet due or the payments secured by which there had been no default. Said bill prayed the appointment of a receiver of said property, which was then in the hands of said receivers previously appointed as aforesaid. The said bill did not pray a foreclosure of said mortgage.

The defendants named in said bill were the said two railway companies and their said Receivers, both of which Receivers then were and still are citizens of the State of New York, and the two complainants to said original bill. Said bill correctly alleged the citizenship of said parties.

Upon the same day, October 9, 1907, an order and decree was signed by said United States Circuit Judge and filed in the Clerk's office of said Court, which order and decree continued said Receivers pending said suit and modified in certain respects, which are immaterial to this application, the original order appointing said Receivers, but continued said injunction.

Upon the same day an order was signed by said Judge, which extended said receivership for the benefit of said Morton Trust Company.

VII.—Subsequently thereto, your petitioner duly presented to said United States Circuit Judge, his joint and several petition, duly verified on October 15, 1907, which petition prayed that leave to intervene in said suit, and that the orders granting said receiverships and injunctions, be set aside, and for general relief. Subsequently thereto, on or about November 6, 1907, an order was made by said United States Circuit Judge and filed in said Clerk's office, which order denied the prayer of said petition. No final decree has been entered in said suit and the complainants and defendant to the same have postponed the entry of a final decree therein indefinitely. No decree for the administration of the assets of said defendant nor for any of the relief prayed in said bill, except a receiver and an injunction, has been made in said suit, although all allegations in said bill have been confessed, and although the said cause is ripe for such decree. But said complainants and defendant have postponed the entry thereof indefinitely. The object of said postponement is to prevent the payment of the creditors of said defendant and to prevent the distribution of its assets and to keep the same for an indefinite length of time in the custody of said United States [District] Court, in order that the creditors, stockholders and other persons interested in the assets of said two defendants may be thus compelled and coerced into consenting to a sacrifice of their rights and to a reorganization of the said defendants, and of the property and respective claims upon the property of the said defendants, which reorganization is desired by the persons in control of said defendants, who are the same persons that have wrecked and injured the property of the same.

VIII.—The said receivers and the parties to said suit threaten and are about to obtain order from the said Court and from the Judges thereof, for the purpose of making large expenditures out of the assets of the said two defendants, which will diminish the amount payable to creditors of each of the same, and they are about to make such expenditures to the amount of about $3,000,000. The said receivers threaten and are about,

under the advice of the persons in control of the said two defendants, to stop payment of the rental due under a lease of a valuable portion of the property of the said two defendants, namely; the so-called Third Avenue Street Railway; and to separate the said Third Avenue Street Railway from the rest of the system of said defendants. Said action will be in direct opposition to the professed object of said suit.

IX.—Your petitioner is informed and believes and avers: That it has been established by the decisions of this Court and of the United States Circuit Courts of Appeals, amongst others, by the following decisions: *Ex parte* Cutting, 94 U. S. 14; Jones & Laughlin's L'd v. Sands, 79 Fed. 913; Credits Commutation Co. v. U. S. 91 Fed. 570, 573; S. C. 177 U. S. 311; Toledo, St. L. & C. R. Co. v. Continental Tr. Co., 95 Fed. 497, 536, that your petitioner has no right to appeal from any of the said orders. Your petitioner, consequently, is enjoined from interfering with the assets and property of his said debtor, the Metropolitan Street Railway Company. He can take no proceedings to collect any judgment or judgments, which he may recover in said actions, except in the said Circuit Court of the United States. In the meantime, the said assets may be depleted by proceedings on the part of said complainants and of said defendant and of said receivership, of which he will have no notice, and with which he will have no right to interfere. He has no remedy unless this Court interferes by the writ of mandamus.

Wherefore your petitioner prays, that a rule be made and issue from this Honorable Court, directed to the said Honorable E. Henry Lacombe, Circuit Judge of the United States for the Second Circuit, and directing the said Circuit Court of the United States for the Southern District of New York to show cause why a writ of mandamus should not issue, commanding the said Judge and the said Court, and each of them, to dismiss the bill of complainant in said suit, and all proceedings therein, and to vacate said orders appointing said Receivers, and to vacate said injunctions, and to desist from exercising any further jurisdiction in said suit, except the entry of an order dismissing said suit; or, in the alternative, such a writ commanding him to allow the intervention of your petitioner in said suit; or, in the alternative, that a writ of prohibition may issue from this Honorable Court forbidding the said Honorable Circuit Judge of the United States for the Second Circuit, and forbidding the said [District] Court of the United States for the Southern District of New York from taking any further proceedings in connection with said receiverships; and for such other and further relief in the premises as shall seem just and meet, and your petitioner will ever pray, &c.

JOSEPH KONRAD,
Individually, and as Administrator of Paul Planovsky, deceased,
by ROGER FOSTER,
Attorney for Petitioner,
35 Wall Street,
New York.

ROGER FOSTER,
Of Counsel.

STATE OF NEW YORK,
County of New York, } ss.:
Southern District of New York,

JOSEPH KONRAD, being duly sworn, deposes and says: I am the petitioner above named. The foregoing petition is true to the best of my knowledge, information and belief.

JOSEPH KONRAD.

Sworn to before me this 5th day of November, 1907.
[NOTARIAL SEAL.] Notary Public, N. Y. Co.

MANDAMUS FORM V.—PETITION TO SUPREME COURT OF DISTRICT OF COLUMBIA FOR MANDAMUS.

IN THE SUPREME COURT, DISTRICT OF COLUMBIA

AT LAW. No. 63,933.

THE UNITED STATES OF AMERICA EX RELATIONE HARRY S. MECARTNEY, Petitioner,
vs.
BAINBRIDGE COLBY, SECRETARY OF STATE, AND HENRY J. BRYAN, EDITOR OF LAWS, Respondents.

To the Supreme Court of the District of Columbia:

Your petitioner, Harry S. MeCartney, respectfully shows to this Honorable Court:—

1. That the petitioner is a citizen of the United States, born and ever residing therein, and is now a resident of the village of Hinsdale, County of Du Page, and State of Illinois.

Petitioner is by profession an attorney-at-law, is now in active practice, and has practiced that profession continuously for over thirty-eight years, with his office headquarters during all that time (with the exception of a couple of months) in the City of Chicago in said State.

That petitioner has also been for over a third of a century a duly qualified voter at public elections in the various communities in which he has resided during such period; and has also been for that length of time a taxpayer of the various villages, or cities, counties and States in which he has so resided; and he has also regularly paid Federal income taxes for a number of years last past.

2. Petitioner has been advised and believes that there is no seriously controverted question of fact involved in this suit but that the same seriously involves only questions of law; and that hence he is qualified to commence this suit as petitioner and to represent—at least in the first instance—the

public interests involved herein and that his duty so to do is as great or as definite and urgent as that of any other citizen, that is, in the absence of any similar petition seeking the same writ and the same relief having been filed prior hereto. That he does not know of and has not heard of any similar petition or suit as having been filed or commenced.

3. Petitioner further avers: That on April 9, 1920, a joint resolution of the Congress of the United States was passed by the House of Representatives by virtue of which the state of war declared by the Congress in the resolution of April 6, 1917, to exist between the Imperial German Government and the United States, and that the state of war declared by the Congress on December 7, 1917, to exist between the United States and the Imperial and Royal Austro-Hungarian Government, was at an end.

4. That on May 15, 1920, the Senate of the United States passed said joint resolution with several amendments, the vote on such resolution being as follows: 43 members voting for, 38 members voting against, and 15 not voting.

5. That on May 21, 1920, the House of Representatives of the United States passed the said joint resolution as amended by the Senate, the vote thereon being as follows: 228 members voting for, 139 voting against, and 59 not voting.

6. That although the Court, as petitioner is advised, will take judicial notice of such proceedings and of the terms and import of said joint resolution, petitioner—for convenience—annexes a true copy thereof as "Exhibit A" to this petition.

7. Petitioner avers that the passage of said joint resolution by the Congress aforesaid and by a majority vote of each house thereof, was a valid exercise of power on the part of Congress to declare peace between the nations as aforesaid, and that the said joint resolution is today in full force and legal effect, unmodified and unrepealed.

8. That Bainbridge Colby was at the time of the passage of said joint resolution, has been since, and now is the Secretary of State of the United States. That Henry J. Bryan was at the time of the passage of said joint resolution, has been since, and now is the Editor of Laws of the United States.

That it is the express and legally prescribed duty of said Bryan, as such Editor, to promptly publish and promulgate the laws of the United States; and it is the express and legally prescribed duty of said Bainbridge Colby, as such Secretary of State, to see that the said laws are so promulgated and published.

9. That although said joint resolution of Congress has been in force for almost two months last past, said Bryan has neglected and still does neglect, and, as petitioner is informed and believes, has refused and still does refuse to publicly promulgate or publish the said joint resolution as an existing law of the United States, and so far as your petitioner is informed and believes he has taken no tangible steps whatever so to do; and that said Colby has neglected to cause said joint resolution to be so promulgated and published, and so far as petitioner is informed and be-

lieves he has refused and still refuses so to do, and has made no demand upon said Bryan to so promulgate and publish said resolution, nor has he taken any other tangible steps whatever so to do or given directions for having the same done.

10. Your petitioner further alleges that from the fact that the said joint resolution had not been formally promulgated and published as an existing law of the United States it results that the existence of peace between the United States and the late adversary nations of the Republic of Germany, and of the "Governments and Peoples of Austria and Hungary" is not fully recognized and in fact is not even ordinarily recognized by either the officials or the people at large of the United States, nor is it so recognized by the officials or the people at large of said adversary nations.

11. That from the same fact of non-promulgation and non-publication of said joint resolution there has arisen grave doubt in such official circles and in the minds of the people at large of each and all of said nations involved in the late war as to whether or not a state of war still actually and legally exists between them. That such a situation confused as it is and legally undefined by the courts of the United States is inherently potent with national peril and with peril to the public comfort, morale and moral régimé and the normal pursuit of patriotic ideals by the people of the United States as a nation and by its entire citizenship as such. That to a very definite degree such situation affects the lives, liberties, privileges and rights of property of the citizens at large and their inherent right of a normal pursuit of happiness, and if much longer continued is apt to embarrass the United States and its citizenship at large in their claims that ours is primarily a nation of peace and our flag primarily a symbol of peace; and the same will tend to give rise to misunderstandings and embarrassments to the nation at large in the due prosecution of its acknowledged aims to practically and efficiently aid in the cause of a permanent world peace.

12. Your petitioner further avers that prior to the late war the aggregate volume of trade between the people of the United States and the said adversary nations was colossal in extent and that the loss thereof has, to at least some definite extent, affected financially every locality in the United States if not in fact nearly every household therein or in fact nearly every citizen thereof; and that domestic and internal economy throughout the entire domain of the United States has been definitely affected by such loss of trade and is still heavily affected by the non-resumption of full trading privileges between said nations. That, as is evident, such trade is not apt to be restored to its full or natural proportions until the existence of peace between the nations affected by said peace resolution shall be openly, formally and authoritatively recognized by the United States, and its officials and courts. That many public food regulations and restrictions are in existence today in various localities throughout the country, solely by reason of the late war, and many remain unrepealed and unchanged because of the fact that a state of peace has not been so openly, formally and authoritatively recognized.

13. Wherefore petitioner files this petition on behalf of himself as such citizen of the United States and on behalf of its citizenship at large so far as he is able so to do and so far as he appropriately can do so; hereby inviting this Court and any other court to which this case may be appealed to exercise its power and discretion to allow any other citizen or citizens to become co-petitioner herein which citizen or citizens it may find to be the better qualified to represent the public interests endeavored to be represented in this suit; and also to appoint any counsel whom said court may judge the better able to prosecute such petition in the public interest and to the better direct the course of this proceeding, to the end: That all questions of law and all questions of jurisdiction and official duty to act in the premises by the said Colby and Bryan, or other public officials may be thoroughly and judicially found, tested and determined in this proceeding; and that the demands, privileges and interests of the citizenship at large of this nation may be properly, formally and exhaustively marshalled and fairly and fully represented for consideration by this court and for ultimate action and relief in the premises.

14. Wherefore your petitioner, Harry S. Mecartney, the aid of this Honorable Court thus requesting, prays that a writ of mandamus may issue to said Bainbridge Colby, Secretary of State of the United States, directing and commanding said Colby, as such Secretary, to cause to be publicly promulgated and published said joint resolution of Congress, and directing said Henry J. Bryan, Editor of Laws, to publicly promulgate and publish said joint resolution of Congress as a duly passed and legally existing law and declaration of peace; or that upon their failure so respectively to do, or upon the failure of either of them respectively so to do, that they and each of them show cause to this Court why said promulgation and publication should not be caused to be made and made as aforesaid.

And petitioner prays for such other and further relief in the premises as may be legally and justly called for or warranted by the facts and the situation shown hereinabove.

HARRY S. MECARTNEY.

Address: c/o W. C. Sullivan, 410 5th St., Northwest, Washington, D. C.

UNITED STATES OF AMERICA,
City of Washington,
District of Columbia, } *ss:*

Harry S. Mecartney being duly sworn on his oath states that he is the petitioner in the above and foregoing cause; that the matters and things stated in the above and foregoing petition are true.

HARRY S. MECARTNEY.

Subscribed and sworn to before me this 17th day of July, 1920.

MORGAN H. BEACH,
Clerk.
By FRED C. O'CONNELL,
Assistant Clerk.

MANDAMUS FORM VI.—RULE TO SHOW CAUSE WHY MANDAMUS SHOULD NOT ISSUE.

[6 Peters, 774.]

Ex parte MARTHA BRADSTREET IN THE MATTER OF MARTHA BRADSTREET,
Demandant,
against
APOLLOS COOPER, *et al.*,
Tenants.

Mr. Jones, of counsel for the demandant in the above named cases, moved the court for a rule to be granted, to be served on the district judge of the District Court of the United States for the Northern District of New York, commanding him to be and appear before this court, either in person or by an attorney of this court, on the first day of the next January Term of this court, to wit, on the second Monday of January, Anno Domini 1833, to show cause, if any he have, why a mandamus should not be awarded to the said district judge of the Northern District of New York, commanding him,

1. To reinstate, and proceed to try and adjudge according to the law and right of the case, the several writs of right and mises thereon joined, lately pending in said court, and said to have been dismissed by order of said court, between Martha Bradstreet, demandant, and Appollos Cooper *et al.*, tenants.

2. Requiring said court to admit such amendments in the form of pleading, or such evidence as may be necessary to aver or to ascertain the jurisdiction of said court in the several suits aforesaid.

3. Or if sufficient cause shall be shown by the said judge on the return of this rule, or should otherwise appear to this court, against a writ of mandamus requiring the matters and things aforesaid to be done by the said judge, then to show cause why a writ of mandamus should not issue from this court, requiring the said judge to direct and cause full records of the judgments or orders of dismission in the several suits aforesaid, and of the processes of the same, to be duly made up and filed, so as to enable this court to re-examine and decide the grounds and merits of such judgments or orders upon writs of error, such records showing upon the face of each what judgments or final orders dismissing, or otherwise definitely disposing of said suits, were rendered by the said Dstrict Court, at whose instance, upon what grounds, and what exceptions or objections were reserved or taken by said demandant, or on her behalf, to the judgments or decisions of the said District Court in the premises, or to the motions whereon such judgments or decisions were found; and what motion or motions, application or applications, were made to said court by the demandant, or on her behalf; and either granted or overruled by said District Court, both before and after said judgments or decisions dismissing or otherwise finally disposing of said suits; especially what motions or applications were made by said demandant or on her behalf to the said

District Court, to be admitted to amend her counts in the said suits, or to produce evidence to establish the value of the lands, etc., demanded in such counts, together with all the papers filed, and proceedings had in said suits respectively.

On consideration whereof, it is now here considered and ordered by this court that the rule prayed for be, and the same is hereby granted, returnable to the first day of the next January Term of this court, to wit, on the second Monday of January, in the year of our Lord one thousand eight hundred and thirty-three. *Per* Mr. Chief Justice MARSHALL.

MANDAMUS FORM VII.—RETURN TO ORDER TO SHOW CAUSE AGAINST ISSUE OF MANDAMUS.

[Application granted, 247 U. S. 231, in which the author was counsel.]

IN THE SUPREME COURT OF THE UNITED STATES.

IN THE MATTER

OF

The Application of ANNIE S. SIMONS for a Writ of Mandamus against the Honorable Charles M. Hough, Circuit Judge of the United States for the Second Circuit, and against the District Court of the United States for the Southern District of New York, sitting at common law; or, in the alternative, for a Writ of Prohibition against the District Court of the United States for the Southern District of New York, sitting in Equity; or, in the alternative, for a Writ of Certiorari addressed to the District Court of the United States for the Southern District of New York.

RETURN OF CHARLES M. HOUGH, CIRCUIT JUDGE OF THE UNITED STATES FOR THE SECOND CIRCUIT, AND THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

To the Honorable Edward Douglass White, Chief Justice of the United States, and the Associate Justices of the Supreme Court of the United States:

In compliance with the rule to show cause why the prayer of petitioner should not be granted, issued by this Honorable Court on November 12th,

1917, and served November 20th, 1917, the above named respondents do hereby respectfully present that

On the 16th day of May, 1917, a complaint was filed in the District Court of the United States for the Southern District of New York by Annie S. Simons, alleging herself to be a citizen and resident of the State of South Carolina, against William Nelson Cromwell, described in the summons as "Thomas Nelson Cromwell," and Louis H. Cramer, as executors under the Last Will and Testament of Frank Leslie, deceased, alleged in said complaint to be citizens and residents of the State of New York. Said complaint set out two causes of action, the first cause of action alleging the breach by defendants' testatrix of a contract made with petitioner to leave petitioner a legacy of fifty thousand dollars, the second alleging the breach by said testatrix of a contract with petitioner to pay her the reasonable value of services rendered by her to testatrix, the reasonable value of said services being alleged to be fifty thousand dollars, and said complaint claimed damages for the breach of said contracts in the sum of forty thousand dollars. Thereafter, and on the 27th day of June, 1917, an answer to said complaint was filed in said Court by Louis H. Cramer, as executor under the Last Will and Testament of said Frank Leslie, deceased, and thereafter, and on the 7th day of July, 1917, an answer to said complaint was filed in said Court by William Nelson Cromwell, as executor of the Last Will and Testament of Frank Leslie, deceased. Copies of the said complaint and the answers thereto are attached to the petition of petitioner herein as Exhibits A, B and C, respectively, but for greater certainly copies thereof are hereunto annexed and made a part of this return and are marked Exhibits A, B and C respectively.

On July 20, 1917, said defendants William Nelson Cromwell and Louis H. Cramer served upon petitioner's attorney an affidavit and notice of motion "for an order remanding the first cause of action alleged herein to the Equity side of the Court and for such other and further relief as may be just, together with the costs of this motion," a copy of which motion papers is hereto annexed and made a part hereof and marked Exhibit D.

On September 27th, 1917, the said motion came on for argument before respondent, Charles M. Hough, United States Circuit Judge, who, having then been duly designated to hear motions in the District Court of the United States for the Southern District of New York, was then and there sitting in that capacity and for that purpose and had jurisdiction to hear and determine said motion and to make and enter an order thereon. The said respondent Charles M. Hough heard the counsel of the respective parties fully on all questions raised thereby. Thereafter, and on or about October 25, 1917, said Charles M. Hough, in the exercise of his jurisdiction and official discretion, granted said motion by an order made by him and entered on or about October 25, 1917, a copy of which is hereto annexed and made a part hereof, and marked Exhibit E. Said respondent Charles M. Hough rendered an opinion upon the said motion, a copy of which is hereto annexed and made a part hereof and marked Exhibit F.

Said order granting said motion was made upon due notice or upon the appearance of the parties and in the exercise of the jurisdiction and official discretion of said respondent Charles M. Hough, acting in the capacity hereinbefore stated.

In entering said order respondent Charles M. Hough acted under the authority and power conferred upon him by Section 274(a) of the Judicial Code; and, under said Section, respondent transferred the first cause of action set out in petitioner's complaint to the Equity side of the District Court because, after hearing the argument of counsel on both sides and on consideration of the question and examination of the authorities, respondent was of the opinion that said first cause of action did not state a cause of action at law, but that if any relief could be afforded petitioner on the facts alleged in said first cause of action, such relief must be had in a Court of Equity.

This return includes all papers in the case relative to the said motion of William Nelson Cromwell and said Louis H. Cramer, as executors under the Last Will and Testament of Frank Leslie, deceased, and to the proceedings had thereon and the order entered thereon, and includes all parts of the record in said case of Simons vs. Cramer and Cromwell, which respondents are advised and believe are material for this Court to be advised of under the rule to show cause herein.

Clarke M. Rosecrants, Esq., a member of the firm of Sullivan & Cromwell, attorneys for said William Nelson Cromwell, and Edgar T. Brackett, Esq., attorney for said Louis H. Cramer, having desired to be heard, in order to secure them such opportunity, the respondents hereby designate them, or such associate counsel as they may select, to present this return and to file such brief and make such argument as may be required on this rule to show cause.

Dated December 8, 1917.

CHARLES M. HOUGH,
Respondent,
THE DISTRICT COURT OF THE UNITED STATES
FOR THE SOUTHERN DISTRICT OF NEW YORK,
Respondent,
EDGAR T. BRACKETT,
Saratoga Springs, New York,
CLARKE M. ROSECRANTZ,
49 Wall St., New York, N. Y.,
Attorneys for Respondents.

[The exhibits specified were thereto annexed.]

MANDAMUS FORM VIII.—RETURN TO ORDER TO SHOW CAUSE AGAINST ISSUE OF MANDAMUS TO SET ASIDE RECEIVERSHIP.

[*Re* Metropolitan Railway Receivership, 208 U. S. 90.]

SUPREME COURT OF THE UNITED STATES.

IN THE MATTER
OF
The application of JOSEPH KONRAD, individually and as Administrator of Paul Planovsky, Deceased, for a Writ of Mandamus against the Honorable E. Henry Lacombe, Circuit Judge of the United States for the Second Circuit, and against the Circuit Court of the United States for the Southern District of New York.

RETURN OF E. HENRY LACOMBE, CIRCUIT JUDGE OF THE UNITED STATES FOR THE SECOND CIRCUIT, AND THE [DISTRICT] COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

TO THE HONORABLE MELVILLE W. FULLER, CHIEF JUSTICE OF THE UNITED STATES, AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

In compliance with the order to show cause why the prayer of petitioners should not be granted, issued by this Honorable Court on November 18, 1907, and served November 21, 1907, the above named Respondents do hereby respectfully present that:

On September 24, 1907, a bill in equity was filed in the United States [District] Court, Southern District of New York, by The Pennsylvania Steel Company and The Degnon Contracting Company, citizens and residents respectively of the States of Pennsylvania and New Jersey, against the New York City Railway Company, a citizen and resident of the State of New York, alleging the insolvency of the defendant and praying for the marshaling and administration of its assets; a subpœna was issued thereupon and service was made upon the defendant. An answer to the bill, admitting its allegations, was thereafter on the same day filed in said court and the bill and answer were presented to the respondent E. HENRY LACOMBE then holding said court. Copies of the bill, the subpœna, the Marshal's return, and the answer thereto are hereto annexed marked Exhibits A, A-2, A-3, and B. Counsel for the respective parties appeared and upon motion by complainants, not opposed but assented to by defendant, a decree appointing temporary receivers of the New York City Railway Company was signed and entered, a copy of which is hereto annexed marked Exhibit C. The receivers, Adrian H. Joline and Douglas Robinson, immediately

qualified and entered upon the performance of their duties as receivers in accordance with the terms of said decree Exhibit C. Subsequently, on October 1, 1907, a petition was presented by the Metropolitan Street Railway Company, a copy of which petition is hereunto annexed marked Exhibit D. Attached to this petition, as Schedule A, was a copy of a lease between the Metropolitan Street Railway Company, as lessor, and the New York City Railway Company, which then bore the name of Interurban Street Railway Company, as lessee; and attached to said petition as Schedule B, was a copy of the mortgage of the Metropolitan Street Railway Company dated March 21, 1902, executed to the Morton Trust Company as trustee. On the same day (October 1), on notice to all the parties in said action, an order was made and entered granting the prayer of said petition, a copy of which is hereto annexed marked Exhibit E.

On October 8, the Morton Trust Company, trustee under the mortgage of the Metropolitan Street Railway Company dated March 21, 1902, filed a petition for leave to make the receivers parties to the suit it was about to begin, which petition was granted. (Exhibits F and G.) Thereupon, on October 9, a bill of complaint was filed by said Morton Trust Company. Said bill and the exhibits herein referred to are collectively marked Exhibit H. A subpœna was issued in said suit, and service of the same was made on October 9. Copies of the subpœna and the Marshal's return are hereto annexed, marked Exhibits H-2 and H-3. A decretal order was made on said bill (Exhibit J) appointing said Joline and Robinson as receivers of the property covered by said mortgage.

On October 7 upon return of the order to show cause (contained in the decree appointing temporary receivers dated September 24, 1907) why the receivership should not be continued during the pendency of the suit, a public hearing was had and thereafter on October 9, 1907, a decree continuing said Joline and Robinson as receivers during the pendency of the suit was made and entered (Exhibit K) which was subsequently, on October 15, 1907, amended as to its recitals by an order (Exhibit L.).

On October 25 a decretal order adjudicating the insolvency of the New York City Railway Company and appointing a Special Master to take proof of claims and directing public notice to be given of the time within which claims should be presented was made and filed (Exhibit M).

Petitions for leave to intervene, etc., were presented and argument had upon them on October 14. Copies of the petitions, marked Exhibits N-2 and N-3 and N-4 and of certain affidavits filed in opposition, marked Exhibits N-5, N-6 and N-7 are annexed.

The Court heard the counsel of the parties fully on all the questions raised thereby and decided the same and on November 6, in the exercise of its jurisdiction and official discretion made orders denying such petitions (Exhibits N and O).

On November 9 a decretal order adjudicating the insolvency of the Metropolitan Street Railway Company, appointing a Special Master to take proof of claims, and directing public notice to be given of the time within which claims should be presented was made and filed. (Exhibit P.)

On November 9 the Morton Trust Company presented to the Court a

petition (Exhibit Q) stating that it was about to file a bill for the foreclosure of the mortgage made by the Metropolitan Street Railway Company to the petitioner dated March 21, 1902, and praying leave to make Adrian H. Joline and Douglas Robinson as receivers of the New York City Railway Company and as receivers of the Metropolitan Street Railway Company, then in possession of the property embraced in the mortgage, parties defendant to said suit. On the same day the prayer of said petition was granted (Exhibit Q-2). Pursuant to said leave on the same day a bill of foreclosure was filed by the Morton Trust Company. Said bill and the exhibits therein referred to are hereto annexed, collectively marked Exhibit R. A subpœna was issued on said bill and service made thereof. Copies of the subpœna and the Marshal's return are annexed as Exhibit R-2 and R-3, respectively.

On November 19, upon motion, a decretal order (Exhibit S) was made appointing said Joline and Robinson under the bill of complaint to foreclose the mortgage dated March 21, 1902, receivers of the mortgaged premises and consolidating the two suits in which the Morton Trust Company is complainant.

Reasons for the making of the decrees or orders Exhibits C, E, K, N, and O appear in the three memoranda filed respectively on October 8, October 1, and October 28. Copies are annexed, marked Exhibits T, U and V. The other orders and decrees were entered because in the opinion of the Court the papers on which they were based, together with the earlier proceedings in the cause, indicated that such orders and decrees should be entered.

All orders and decrees were made upon due notice or upon the appearance of the parties, and in the exercise of the jurisdiction and official discretion of the respondents.

This return includes all papers in the case relating to any motion, petition, or application of Joseph Konrad, Daniel Gallagher, or Francis S. Reisenberg, and is confined to the record, in accordance with the respondent's construction of the purpose and intention of the order to show cause.

The receivers have duly qualified in accordance with the different orders appointing them or extending their receivership.

Since the appointment of the receivers they have incurred many obligations under contracts for necessary work, labor and materials, for supplies, repairs, replacements of property destroyed by fire, and for improvements necessary to enable them to comply with requirements of the State and local authorities as to the operation of the road. Annexed hereto is a petition of the receivers for authority to make expenditures, marked Exhibit W, and an order granting the prayer of the petition, marked Exhibit X. They have also incurred liabilities by reason of the fact that accidents have occurred during operation of the cars, in many instances through some negligence of their employees, which have resulted in personal injuries for which claims for damages have been or will be made.

Messrs. Byrne & Cutcheon, solicitors for the complainants in the original suit, and J. Parker Kirlin, Esq., solicitor for the Metropolitan Street Railway Company, having desired to be heard, in order to secure them such

opportunity, the respondents hereby designate them or such associate counsel as they may select, to present this return and to file such brief and make such argument as may be required on the order to show cause.

Nov. 30th, 1907.

E. HENRY LACOMBE,
U. S. Circuit Judge.

[Seal U. S. Circuit Court.]

MANDAMUS FORM IX.—WRIT OF MANDAMUS.

[7 Peters, 634, 648.]

Ex parte BRADSTREET, IN THE MATTER OF MARTHA BRADSTREET, Demandant.

Mr. Chief Justice MARSHALL.

UNITED STATES OF AMERICA, ss.

To the Honorable Alfred Conkling, Judge of the District Court of the United States for the Northern District of New York, GREETING:

Whereas, one Martha Bradstreet hath heretofore commenced and prosecuted in your court several certain real actions, or writs of right, in your court lately pending between the said Martha Bradstreet, demandant, and the following named tenants severally and respectively, to wit, Apollos Cooper and others (naming them). And whereas, heretofore, to wit, at a session of the Supreme Court of the United States, held at Washington on the second Monday of January, in the year 1832, it appeared, upon the complaint of the said Martha Bradstreet, among other things, that at a session of your said court, lately before holden by you, according to law, all and singular the said writs of right then and there pending before your said court, upon the several motions of the tenants aforesaid, were dismissed for the reason that there was no averment of the pecuniary value of the lands demanded by the said demandant in the several counts filed and exhibited by the said demandant against the several tenants aforesaid; which orders of your said court, so dismissing the said actions, were against the will and consent of said demandant; whereupon the said Supreme Court, at the instance of said demandant, granted a rule requiring you to show cause, if any you had, among other things, why a writ of mandamus from the said Supreme court should not be awarded and issued to you, commanding you to reinstate and proceed to try and adjudge, according to the law and right of the case, the several writs of right aforesaid and the mises therein joined. And whereas, at the late session of the said Supreme Court held at Washington on the second Monday of January in the year 1833, you certified and returned to the said Supreme Court, together with the said rule, that after the mises had been joined in the several causes mentioned in the said rule, motions were made therein, on the part of the tenants, that the same should be

dismissed upon the ground that the counts respectively contained no allegation of the value of the matter in dispute, and that it did not therefore appear, by the pleadings, that the causes were within the jurisdiction of the court: that, in conformity with what appeared to have been the uniform language of the national courts upon the question, and your own views of the law, and in accordance especially with several decisions in the [District] Court for the third circuit (see 4 Wash. C. C. Rep. 482, 624), you granted their motions; and assuming that the causes were rightly dismissed, it follows of course that you ought not to be required to reinstate them unless leave ought also to be granted to the demandant to amend her counts: and whereas, afterwards, to wit, at the same session of the said Supreme Court last aforesaid, upon consideration of your said return and of the cause shown by you therein against the said rule's being made absolute, and against the awarding and issuing of the said writ of mandamus, and upon consideration of the arguments of counsel, as well on your behalf, showing cause aforesaid, as on behalf of the said demandant in support of the said rule, it was considered by the said Supreme Court, that you had certified and returned to the said court an insufficient cause for having dismissed the said actions, and against the awarding and issuing of the said writ of mandamus, pursuant to the rule aforesaid; the said Supreme Court being of the opinion, and having determined and adjudged upon the matter aforesaid, that in cases where the demand is not made for money, and the nature of the action does not require the value of the thing demanded to be stated in the declaration, the practice of the said Supreme Court and of the courts of the United States, is to allow the value to be given in evidence; that in pursuance of this practice, the demandant in the suits dismissed by order of the judge of the District Court had a right to give the value of the property demanded in evidence, either at or before the trial of the cause, and would have a right to give it in evidence in the said Supreme Court; consequently that she cannot be legally prevented from bringing her cases before the said Supreme Court; and it was also then and there considered by the said Supreme Court that the peremptory writ of the United States issue, requiring and commanding you, the said judge of the District Court, to reinstate and proceed to try and adjudge, according to the law and right of the case, the several writs of right and mises therein joined, lately pending in your said court between the said Martha Bradstreet, demandant, and Apollos Cooper and others, the tenants aforesaid; therefore you are hereby commanded and enjoined that immediately after the receipt of this writ, and without delay, you reinstate and proceed to try and adjudge, according to the law and right of the case, the several writs of right and the mises therein joined, lately pending in your said court between the said Martha Bradstreet, demandant, and the said Apollos Cooper and others, the tenants herein above named, so that the complaint be not again made to the said Supreme Court; and that you certify perfect obedience and due execution of this writ to the said Supreme Court, to be held on the first Monday in August next. Hereof fail not at your peril, and have then there this writ.

Witness the Honorable John Marshall, Chief Justice of said Supreme Court, the second Monday of January, in the year of our Lord one thousand eight hundred and thirty-three.

[SEAL.] W. T. CAROL,
Clerk of the Supreme Court of the United States.

MANDAMUS FORM X.—ORDER IN OBEDIENCE TO DECISION GRANTING MANDAMUS.

[247 U. S. 231.]

At a Stated Term of the District Court of the United States, for the Southern District of New York, held in the Post Office Building, Borough of Manhattan, City and County of New York, on the 21st day of June, 1918.

Present—HON. CHARLES M. HOUGH, United States Circuit Judge.

ANNIE S. SIMONS,
Plaintiff,
against
WILLIAM NELSON CROMWELL, described in the summons as "Thomas" Nelson Cromwell, and LOUIS H. CRAMER, as executors under the Last Will and Testament of Frank Leslie, deceased,
Defendants.

An order having been made herein on or about October 25, 1917, at the direction of the Honorable Charles M. Hough, United States Circuit Judge which order, amongst other things directed, that the first cause of action set forth in the complaint herein be transferred to the equity side of this Court and stricken out of the complaint in this action at law and that the Clerk of this Court do forthwith and as of the date of said order docket as an equity cause the said first cause of action set forth in said complaint; and the above named plaintiff, Annie S. Simons, having duly presented her petition to the Supreme Court of the United States praying for a writ of mandamus against said Honorable Circuit Judge and against the District Court of the United States, for the Southern District of New York, commanding the said Judge and the said Court and each of them to vacate the said order and to continue to proceed at common law in the above entitled action upon both causes of action set forth in the complaint herein, or in the alternative for other appropriate relief, and a rule having been duly made and issued by said Supreme Court directing said Honorable Judge to show cause at a time therein specified, why the prayer of said petition should not be granted and such rule and such petition having duly come on for a hearing before the Supreme Court of the United States and having been duly argued by Roger Foster, Esq., of counsel for

the said plaintiff and petitioner, and by Honorable Edgar T. Brackett, of counsel for the Honorable Charles M. Hough, Circuit Judge of the United States, in opposition thereto, and due deliberation having been had and the Supreme Court of the United States having on or about June 3rd, 1918, made and handed down its opinion that the said rule be made absolute and that a writ of mandamus issue as prayed, but no writ of mandamus having yet been issued, now on reading and filing a certified copy of said opinion and on motion of Roger Foster, attorney for said plaintiff, it is hereby

ORDERED that the said order of the said District Court of the United States entered at the direction of the said Honorable Circuit Judge be and that the same hereby is set aside and vacated and that the District Court of the United States for the Southern District of New York proceed with said action and give to the plaintiff her right to a trial at common law upon both causes of action set forth in the complaint herein and that either party to this action may amend his or her pleading within twenty days after the service of a copy of this order upon the attorneys of him or her.

C. M. HOUGH,
U. S. C. J.

FORMS UPON APPLICATIONS FOR WRITS OF PROHIBITION

PROHIBITION FORM I.—SUGGESTION FOR WRIT OF PROHIBITION AGAINST ADMIRALTY PROCEEDINGS.

[Writ granted. 3 Dallas 121, 1 L. ed. 535, 539.]

That on the 21st day of August, in the year of our Lord one thousand seven hundred and ninety-five, Before the Honorable John Rutledge, Esquire, Chief Justice, and his associate Justices of the Supreme Court of the United States, at Philadelphia, comes Samuel B. Davis, by Benjamin R. Morgan, his attorney, and gives this honorable court, now here, to understand, and be informed, That whereas, by the laws of nations, and the treaties, subsisting between the United States, and the Republic of France, the trial of prizes taken on the high seas, without the territorial limits and jurisdiction of the United States, and brought within the dominions and jurisdiction of the said Republic, for legal adjudication, by vessels of war belonging to the sovereignty of the said Republic, acting under the authority of the same, and of all questions incidental thereto, does of right, and exclusively belong to the tribunals and judiciary establishments of the said Republic, and to no other tribunal or tribunals, court or courts whatsoever:—And whereas, by the said laws of nations and treaties aforesaid, the vessels of war belonging to the said French Republic, and the officers commanding the same, cannot, and ought not to be arrested, seized, attached, or detained, in the ports of the United States, by process of law, at the suit or instance of individuals, to answer for any capture or captures, seizure or seizures, made on the high seas, and brought for legal adjudication into the ports of the French Republic, by the said vessels of war, while belonging to, and acting under, the authority, and in the immediate service of the said Republic:—And whereas, by the laws and treaties aforesaid, the District Courts of the United States, have not and ought not to entertain jurisdiction, or hold plea of such captures, made as aforesaid, under the above circumstances. And whereas, by the laws of nations, the vessels of war of Belligerent powers, duly by them authorized to cruise against their enemies, and to make prize of their ships and goods, may in time of war arrest and seize the vessels belonging to the subjects or citizens of neutral nations, and bring them into the ports of the sovereign under whose commission and authority they act, there to answer for any breaches of the laws of nations, concerning the navigation of neutral vessels in time of war; and the said vessels of war, their commanders, officers, and

crews, are not amenable before the tribunals of neutral powers, for their conduct therein, but are only answerable to the sovereign in whose immediate service they were, and from whom they derived their authority: And whereas, on and before the twentieth day of May, now last past, the said Samuel B. Davis, was, and now is, a lieutenant of ships in the navy of the said French Republic, and commander of a certain corvette or vessel of war, called the Cassius, then, and now, the property of the said Republic, and in her immediate service, and on the said twentieth day of May, was duly commissioned by, and under the authority of the said, Republic, to cruise against her enemies, and make prize of their ships and goods (as by his commission, and the certificate of the Minister Plenipotentiary of the said Republic, to the United States, to the court now here, shewn, fully appears). Nevertheless, a certain James Yard, of the City of Philadelphia, merchant, not ignorant of the premises, but contriving and intending to disturb the peace and harmony subsisting between the United States and the French Republic, and him the said Samuel B. Davis, wrongfully to aggrieve and oppress and draw to another proof, him the said Samuel B. Davis, and the said corvette or vessel of war of the French Republic, the Cassius, in the port of Philadelphia, under the protection of the laws of nations and of the faith of treaties, has, by process out of the District Court of the United States, in and for the District of Pennsylvania, attached and arrested him, the said Samuel B. Davis, and the said corvette or vessel of war, the Cassius, and before the Judge of the said District Court, contrary to the said law of nations and treaties, and against the form of the laws of the United States, hath unjustly drawn in plea, to answer to a certain libel, by him, the said James Yard, against him the said Samuel B. Davis, and the said corvette or vessel of war, the Cassius, her tackle, apparel and furniture, exhibited and promoted, craftily and subtilly there alledging, articulating and objecting, that on the said twentieth day of May, now last past, the said Samuel B. Davis, then commanding the said corvette or vessel, the Cassius, did forcibly, violently, and tortiously take on the high seas, a certain schooner or vessel, belonging to the said James Yard, called the William Lindsey, and brought her into Port de Paix (in the dominions of the French Republic), where she still remains, and also alledging and articulating, that the said corvette or vessel, called the Cassius, was originally equipped and fitted for war, in the port of Philadelphia, in the United States, and that the said Samuel B. Davis, was, at the time of the said capture, and now is, a citizen of the United States, without this, however, and the said James Yard, not in any manner alledging or articulating, that the said capture was made within the territory, rivers or bays of the United States, or within a marine league of the coast thereof, or that the said corvette or vessel, the Cassius, was so fitted or equipped for war, in the United States, by the said French Republic, her agent or agents, with their knowledge, or by their means or procurement, or by the said Samuel B. Davis, or that at the time of her being so equipped, or fitted for war in the United States (if ever there, she was so, in any manner fitted or equipped), she was the property of the said French Republic, or that the

said Samuel B. Davis was, in any manner, in the said equipment or fitting for war, concerned; and without this also, and the said James Yard, not in any manner alledging, that the said Samuel B. Davis was retained, or engaged in the service of the French Republic, within the territory or jurisdiction of the United States—And the said James Yard, him, the said Samuel B. Davis, and the said corvette or vessel of war, called the Cassius, by force of the process aforesaid, out of the said District Court, had and obtained, as aforesaid, still wrongfully detains, and the said Samuel B. Davis, and the French Republic, owner of the said corvette or vessel of war, thereupon, in the said District Court to answer, and in the premises cause to be condemned, with all his power endeavours, and daily contrives, in contempt of the government of the United States, against the laws of nations, the treaties subsisting between the United States and the French Republic, and against the laws and customs of the United States, to the manifest violation of the said laws of nations, and treaties, and to the manifest disturbance of the peace and harmony, happily subsisting between the United States and the said French Republic—and this he is ready to verify. Wherefore, the said Samuel B. Davis, the aid of this honorable court most respectfully requesting, prays remedy, by a writ of prohibition, to be issued out of this honorable court, to the said Judge of the District Court of the United States, in and for the District of Pennsylvania, to be directed to prohibit him from holding the plea aforesaid, the premises aforesaid any wise concerning, farther before him.

BENJAMIN R. MORGAN,
Proctor for Samuel B. Davis.

Samuel B. Davis, being duly sworn, on his oath, doth say, that all and singular, the facts, by him in this suggestion stated, are true.

S. B. DAVIS.

Sworn in open Court, August 22d, 1795.
I. WAGNER, D. C. Sup. Ct. U. S.

PROHIBITION FORM II.—SUGGESTION FOR WRIT OF PROHIBITION AGAINST ADMIRALTY PROCEEDINGS.

[Copied from record *In re* Cooper, 138 U. S. 404. A motion to file suggestion granted; writ denied, 143 U. S. 472.]

In the Supreme Court of the United States.

Ex parte SIR JOHN THOMPSON, K. C. M. G., HER BRITANIC MAJESTY'S ATTORNEY-GENERAL OF CANADA.	No. —. Original.

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Comes now, Sir John Thompson, K. C. M. G., Her Britanic Majesty's Attorney-General of Canada, and gives this Honorable Court to understand and be informed—

That whereas, by the law of nations, the municipal laws of a country have no extra-territorial force and cannot operate on foreign vessels on the high seas, and it is legally impossible, under the public law, for a foreign vessel to commit a breach of municipal law beyond the limits of the territorial jurisdiction of the law-making state;

And whereas the seizure of a foreign vessel beyond the limits of the municipal territorial jurisdiction for breach of municipal regulations is not warranted by the law of nations, and such seizure cannot give jurisdiction to the courts of the offended country, least of all where the alleged act was committed by the foreign vessel at the place of seizure beyond the municipal territorial jurisdiction;

And whereas, by the laws of nations, a British vessel sailing on the high seas is not subject to any municipal law except that of Great Britain; and by the said law of nations a British ship so sailing on the high seas ought not to be arrested, seized, attached, or detained under color of any law of the United States;

And whereas, by the laws of the United States as well as by the law of nations, the District Courts of the United States have not, and ought not to entertain, jurisdiction or hold plea of an alleged breach upon the high seas of the municipal laws of the United States by the captain and crew of a British vessel, and can acquire no jurisdiction by a seizure of such vessel on the high seas, though she be afterwards brought by force within the territorial limits of the jurisdiction of said courts;

And whereas, on the ninth day of July, 1887, there was between the Governments and peoples of Great Britain and the United States profound peace and friendship, which relations of peace and friendship had happily subsided for nearly three-quarters of a century before said ninth day of July, 1887, and still endure to the great comfort and happiness of two kindred peoples;

And whereas, on the said ninth day of July, 1887, the schooner "W. P. Sayward," a British vessel, duly registered and documented as such, and having her home port at Victoria in the Province of British Columbia, Dominion of Canada, and commanded by one George R. Ferry, a British subject, as Captain and Master thereof, was lawfully and peaceably sailing on the high seas, to wit: in latitude 54° 43′ North, longitude 167° 51′ West, fifty-nine miles from any land whatsoever, and then being fifty-nine miles northwest from Cape Cheerful, Oonalaska Island, upon waters between Oonalaska and Prybyloff Islands in Behring's Sea, as more fully appears by the chart in the record of the proceedings of the District Court of the United States in and for the Territory of Alaska hereinafter referred to;

And whereas, said schooner was at said time and place unlawfully and forcibly seized and arrested by an armed vessel of the United States Revenue Marine, to wit, the U. S. Rev. Cutter "Rush," cruising under instructions of the Secretary of the Treasury of the United States for the sole purpose of enforcing the municipal law of the United States, and the said British Schooner was thereupon unlawfully, wrongfully, and forcibly de-

tained and seized, and was by force taken by the said "Rush" to the port of Sitka, in the territory of Alaska, United States of America, and within the Territory of Alaska and the waters thereof, and within the dominion of the United States in Behring's Sea;

And whereas the said British schooner, being as aforesaid so unlawfully, wrongfully and forcibly seized on the high seas and without the limits of Alaska Territory or the waters thereof, and being so unlawfully, wrongfully and forcibly brought within the limits of Alaska Territory, and the waters thereof; nevertheless a certain M. D. Ball, an attorney of the United States for the District of Alaska, not ignorant of the premises, but unmindful of the danger of disturbing the peace and harmony subsisting between the United States and Great Britain, did, by process out of the District Court of the United States in and for the District of Alaska, attach and arrest the said schooner "W. P. Sayward," so as aforesaid wrongfully seized while lawfully sailing on the high seas under the protection of the law of nations, and so as aforesaid wrongfully and forcibly brought within the said port of Sitka in the Territory of Alaska, and before the judge of the said District Court, contrary to the said laws of nations, and the laws of the United States, did unjustly draw in plea to answer a certain libel by him, the said M. D. Ball, against the said schooner, her tackle, apparel, boats, cargo, and furniture exhibited and promoted, craftily and subtilely therein alleging and articulating that the said schooner "W. P. Sayward," her tackle, apparel, boats, cargo, and furniture were seized *on the ninth day of July*, 1887, within the limits of Alaska Territory, and in the waters thereof, and within the civil and judicial District of Alaska, to wit, within the waters of that portion of Behring's Sea belonging to the United States and said District, and that all said property was *then and there* seized as forfeited to the United States for the following causes: That the said vessel and her captain, officers and crew were *then and there* found engaged in killing fur seal within the limits of Alaska Territory and in the said waters thereof, in violation of section nineteen hundred and fifty-six of the Revised Statutes of the United States, and that on said ninth day of July, 1887, George R. Ferry and certain other persons whose names were to said attorney unknown, who were *then and there* engaged on board said schooner "W. P. Sayward," as seamen and seal hunters, did, under the direction and by the authority of George R. Ferry, *then and there* master of said schooner, engage in killing, and did kill in the Territory and District of Alaska, and in the waters thereof, thirty fur seals, in violation of Section 1956 of the Revised Statutes of the United States in such cases made and provided. WITHOUT THIS, however, and the said M. D. Ball not in any way alleging, or articulating, that the said seizure was made, or the said killing of seal was done within any river or bay of the United States, or within a marine league of the coast, of any portion of the mainland, or any island belonging to the United States, or that the said vessel and her master and crew were subject to the laws of the United States sailing upon the high seas, or that any portion of the high seas beyond a marine league from the coasts

of the mainland or adjacent islands was within the jurisdiction of the United States;

And whereas a demurrer by claimant filed on the fifteenth day of September, 1887, alleging the insufficiency of the libel, was overruled by the court on the said fifteenth day of September, 1887, and thereafter the claimant filed his answer specifically denying the allegations of the libel that the seizure aforesaid was made within the waters of Alaska Territory, or within the civil and judicial District of Alaska, or in any portion of Behring's Sea belonging to the United States, and specifically denying the allegations of the libel that the said vessel, her captain, officers, and crew were *then and there* found engaged in killing fur seal within the limits of Alaska Territory, or in the waters thereof, or that any of them did kill any fur seal therein;

And whereas, at the trial of said cause, the libellant, through its witnesses, by it called in that behalf, to wit, the captain and officers of the "Rush" did make plain and clear to the court, what was not clearly disclosed in the libel, that is to say, the place of the alleged offense, and the place of said seizure; and did support the averments of the claimant's answer, and by its evidence so offered in its behalf and not gainsaid in any way, did show that the place of the alleged killing of seal was without the limits of Alaska Territory or the waters thereof, and that the said seizure was not made, nor said killing of seal done, within the waters of Alaska Territory, or within the civil and judicial District of Alaska, or in any portion of Behring's Sea belonging to the United States, but that the place of the alleged offense, and the place of said seizure, was upon the high seas, to wit: in latitude 54° 43′ North, and longitude 167° 51′ West, fifty-nine miles distant from any land whatsoever, and fifty-nine miles northwest from Cape Cheerful, Oonalaska Island, upon waters between Oonalaska and Prybyloff Islands in Behring's Sea, which said testimony for libellant, as to place of seizure and place of alleged offense, was supported by that of the claimant. So that the judge of the District Court of the United States for the District of Alaska was fully informed that the seizure had been made and the said alleged killing of seal done on the high seas without the limits of Alaska Territory or the waters thereof, and that said vessel was brought by force within the jurisdiction of said court, and that therefore, under the laws of nations and under the laws of the United States, he had, and could have, no jurisdiction of the alleged offense or of the vessel so as aforesaid unlawfully, wrongfully, and tortiously seized without the jurisdiction of the United States and of the court, and so wrongfully and by force brought within the jurisdiction of the United States and of the court, yet, nevertheless, being so fully advised, said judge of the District Court of Alaska aforesaid, did, on the nineteenth day of September, 1887, in contempt of the authority of the United States, in violation of the laws of the United States and of the laws of nations, and to the great danger of the friendly relations happily subsisting between Great Britain and the United States, assert and attempt to exercise jurisdiction over the said vessel, the same being the vessel

of a friendly nation at peace with the United States, knowing the same to have been unlawfully seized on the high seas without the jurisdiction of the United States, and knowing the place of the alleged offense against a statute of the United States to be alleged and proved to be the same place as the place of seizure, that is to say, the high seas without the limits of the Territory of Alaska or the waters thereof, and without the jurisdiction of the United States; all this the said District Judge well knowing, he did find as fact the killing of fur seal on the ninth day of July, 1887, by the captain and crew of the aforesaid British vessel, the "W. P. Sayward," at the said place of seizure as aforesaid, and did find as conclusion of law that such killing at such place on the high seas, to wit, at the said place of seizure in latitude 54° 43′ North and longitude 167° 51′ West, and fifty-nine miles from any land whatsoever, and fifty-nine miles northwest from Cape Cheerful, Oonalaska Island, was in violation of Section 1956 of the Revised Statutes of the United States, and by reason thereof the libellant was entitled to a decree of forfeiture of the said British vessel, her tackle, apparel, boats, cargo, and furniture;

And whereas, after said assertion of jurisdiction to condemn and forfeit said vessel, and before decree or sentence, the claimant did move the court to arrest the decree of forfeiture, and among other grounds did distinctly set up that the court had no jurisdiction over the subject-matter of the cause, as shown by libellant's own testimony as to place of offense and seizure.

Yet the said court did, nevertheless, in contempt of the authority of the United States and in violation of the laws of the United States and in violation of the laws of nations, and to the manifest danger of the peaceful relations of the two countries, assert and attempt to exercise jurisdiction in the premises; and on the nineteenth day of September, 1887, did make and enter a pretended decree of forfeiture to the United States of said vessel, her tackle, apparel, boats, cargo, and furniture, and direct that unless an appeal be taken the usual writ of *venditioni exponas* be issued to the marshal commanding him to sell all said property and bring the proceeds into court to be distributed according to law, costs to be taxed and awarded against the claimants.

And whereas one Thomas Henry Cooper, a British subject, being admitted as the actual owner of the said schooner "W. P. Sayward," by order of the District Court to interpose as claimant, did, in order to prevent the execution of said decree, take an appeal to this Honorable Court on the 26th day of April, 1888, and docketed the same on the 30th day of October, 1888, under No. —.

And whereas all matters of fact hereinbefore recited and alleged, save and except those of which this Honorable Court takes judicial notice, appear by the record and proceedings of the District Court of the United States in and for the Territory of Alaska;

And whereas the said appeal has been dismissed by this Honorable Court on the application of the claimant, appellant, himself, not only because he is advised that there is no appeal given to this Court from the District of Alaska by the laws of the United States, but because he is advised that

the District Court being wholly without jurisdiction, its decree was and is a nullity, and this Honorable Court is fully authorized by Section 688 of the Revised Statutes of the United States to prohibit any proceedings in the District Court for the enforcement of the same;

And whereas the said Sir John Thompson, Her Britannic Majesty's Attorney-General of Canada, is advised that in consequence of the dismissal of the appeal, according to the practice of this Honorable Court, its mandate will issue in due course without further consideration by this Court, which said mandate would, in ordinary course, not only permit, but command the District Court of Alaska to proceed to execute its pretended decree of forfeiture, and it is therefore eminently proper that this Honorable Court should understand and be informed of all and singular the matters in this suggestion recited and alleged, to the end that this Court shall consider this suggestion for prohibition before issuing its mandate, so that it may either frame a special mandate or take order that the ordinary mandate shall not reach the District Court before the Writ of Prohibition herein suggested, or a rule to show cause why said writ should not issue, shall be served upon said Court.

Wherefore the said Sir. John Thompson, K. C. M. G., Her Britannic Majesty's Attorney-General of Canada, the aid of this Honorable Court most respectfully requesting, for said Thomas Henry Cooper, submits to this Honorable Court that a Writ of Prohibition ought to be issued out of this Honorable Court to the Judge of the District Court of the United States in and for the Territory of Alaska to be directed, to prohibit him from holding the plea aforesaid, the premises aforesaid, anywise concerning further before him, and to prohibit him from in any manner enforcing the said decree or sentence, or from treating the said decree as a valid sentence, for any purpose, or from taking any steps whatsoever in the cause aforesaid as to said decree, or any matter or thing remaining to be done in consequence of said decree, and prohibiting him, the said Judge, from making or entering any order, judgment, or decree in and about the certain stipulation exacted and required in the course of said proceedings, and generally from the further exercise of jurisdiction in said cause, or the enforcing any order, judgment, or decree made under color thereof.

And the said Sir John Thompson, K. C. M. G., Her Britannic Majesty's Attorney-General of Canada, most respectfully informs this Honorable Court that the fact that this his suggestion is presented with the knowledge and approval of the Imperial Government of Great Britain, will be brought to the attention of the Court by counsel duly thereunto authorized by Her Britannic Majesty's representative in the United States.

CALDERON CARLISLE,
Counsel for Sir John Thompson, K. C. M. G., Her Britannic Majesty's Attorney-General of Canada.

I have read the foregoing suggestion by me subscribed, and the facts therein stated are true to the best of my knowledge and belief.

CALDERON CARLISLE.

Subscribed and sworn to before me this 12th day of January, 1891.

OSCAR LUCKETT,
Notary Public.

[SEAL.]

PROHIBITION FORM III.—PETITION FOR WRIT OF PROHIBITION AGAINST ADMIRALTY PROCEEDINGS.

[Copied from record *In re* Cooper, 138 U. S. 404. Motion to file petition granted; writ denied, 143 U. S. 472.]

In the Supreme Court of the United States.

Ex parte THOMAS HENRY COOPER, OWNER AND CLAIMANT OF THE BRITISH SCHOONER "W. P. SAYWARD."

No. —. Original.

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Comes now, Thomas Henry Cooper, a British subject, and gives this Honorable Court to understand and be informed—

That whereas, by the law of nations, the municipal laws of a country have no extra-territorial force and cannot operate on foreign vessels on the high seas, and it is legally impossible, under the public law, for a foreign vessel to commit a breach of municipal law beyond the limits of the territorial jurisdiction of the law-making State;

And whereas the seizure of a foreign vessel beyond the limits of the municipal territorial jurisdiction for breach of municipal regulations is not warranted by the law of nations, and such seizure cannot give jurisdiction to the courts of the offended country, least of all where the alleged act was committed by the foreign vessel at the place of seizure beyond the municipal territorial jurisdiction;

And whereas, by the law of nations, a British vessel sailing on the high seas is not subject to any municipal law except that of Great Britain; and by the said law of nations a British ship so sailing on the high seas ought not to be arrested, seized, attached, or detained under color of any law of the United States;

And whereas, by the laws of the United States as well as by the law of nations, the District Courts of the United States have not, and ought not to entertain, jurisdiction or hold plea of an alleged breach upon the high seas of the municipal laws of the United States by the captain and crew of a British vessel, and can acquire no jurisdiction by a seizure of such vessel on the high seas though she be afterwards brought by force within the territorial limits of the jurisdiction of said courts;

And whereas, on the ninth day of July, 1887, there was between the governments and peoples of Great Britain and the United States profound peace and friendship, which relations of peace and friendship had happily subsisted for nearly three quarters of a century before said ninth day of July, 1887, and still endure to the great comfort and happiness of two kindred peoples;

And whereas, on the said ninth day of July, 1887, the schooner "W. P.

Sayward,'' a British vessel, duly registered and documented as such, and having her home port at Victoria in the Province of British Columbia, Dominion of Canada, and commanded by one George R. Ferry, a British subject, as Captain and Master thereof, was lawfully and peaceably sailing on the high seas, to wit: in latitude 54° 43′ North, longitude 167° 51′ West, fifty-nine miles from any land whatsoever, and then being fifty-nine miles northwest from Cape Cheerful, Oonalaska Island, upon waters between Oonalaska and Prybyloff Islands in Behring's Sea, as more fully appears by the chart in the record of the proceedings of the District Court of the United States in and for the territory of Alaska hereinafter referred to;

And whereas said schooner was at said time and place unlawfully and forcibly seized and arrested by an armed vessel of the United States Revenue Marine, to wit, the U. S. Revenue Cutter, ''Rush,'' cruising under instructions of the Secretary of the Treasury of the United States for the sole purpose of enforcing the municipal law of the United States, and the said British schooner was thereupon unlawfully, wrongfully, and forcibly detained and seized, and was by force taken by the said ''Rush'' to the port of Sitka, in the Territory of Alaska, United States of America, and within the Territory of Alaska and the waters thereof and within the dominion of the United States in Behring's Sea;

[The petition then recites the proceedings taken in the District Court for the District of Alaska by the United States attorney against the schooner for an alleged violation of § 1956 of the Revised Statutes, the allegations of the libel, and proceeds as follows:—]

Without this, however, and the said M. D. Ball, the United States attorney, not in any way alleging, or articulating, that the said seizure was made, or the said killing of seal was done, within any river or bay of the United States, or within a marine league of the coast of any portion of the mainland or any island belonging to the United States, or that the said vessel and her master and crew were subject to the laws of the United States sailing upon the high seas, or that any portion of the high seas beyond a marine league from the coasts of the mainland or adjacent islands was within the jurisdiction of the United States.

[The petition then recites the trial, the decision of the District Court against the schooner, the motion made by the petitioner in arrest of judgment, the decree of forfeiture, the appeal taken by the petitioner to the Supreme Court, and concludes as follows:—]

And whereas all matters of fact hereinbefore recited and alleged, save and except those of which this Honorable Court takes judicial notice, appear by the record and proceedings of the District Court of the United States in and for the Territory of Alaska;

And whereas the said appeal has been dismissed by this Honorable Court on the application of the claimant, appellant, himself, not only because he is advised that there is no appeal given to this Court from the District of Alaska by the laws of the United States, but because he is advised that the District Court, being wholly without jurisdiction, its

decree was and is a nullity, and this Honorable Court is fully authorized by Section 688 of the Revised Statutes of the United States to prohibit any proceedings in the District Court for the enforcement of the same.

And whereas the said Thomas Henry Cooper is advised that in consequence of the dismissal of his appeal, according to the practice of this Honorable Court, its mandate will issue in due course without further consideration by this Court, which said mandate would, in ordinary course, not only permit, but command the District Court of Alaska to proceed to execute its pretended decree of forfeiture and it is therefore the duty of the said Thomas Henry Cooper, now here, to give this Honorable Court to understand and be informed of all and singular the matters in this suggestion recited and alleged, to the end that this Court shall consider this application for prohibition before issuing its mandate, so that it may either frame a special mandate, or take order that the ordinary mandate shall not reach the District Court before the Writ of Prohibition hereinafter prayed, or a rule to show cause why said writ should not issue, shall be served upon said Court.

Wherefore the said Thomas Henry Cooper, the aid of this Honorable Court most respectfully requesting, prays remedy by writ of prohibition to be issued out of this Honorable Court to the Judge of the District Court of the United States in and for the Territory of Alaska to be directed, to prohibit him from holding the plea aforesaid, the premises aforesaid manywise concerning further before him, and to prohibit him from in any manner enforcing the said decree or sentence, or from treating the said decree as a valid sentence for any purpose, or from taking any steps whatsoever in the cause aforesaid as to said decree or any matter or thing remaining to be done in consequence of said decree, and prohibiting him, the said Judge, from making or entering any order, judgment, or decree in and about the certain stipulation exacted and required in the course of said proceedings, and generally from the further exercise of jurisdiction in said cause, or the enforcing any order, judgment, or decree made under color thereof.

JOSEPH H. CHOATE,
Of Counsel.

CHARLES STRAUSS,
Attorney for Petition.

I have read the foregoing petition by me subscribed, and the facts therein stated are true to the best of my information and belief.

JOSEPH H. CHOATE.

Subscribed and sworn to before me this 12th day of January, 1891.

OSCAR LUCKETT,
Notary Public.

[SEAL.]

PROHIBITION FORM IV.—RULE TO SHOW CAUSE WHY WRIT OF PROHIBITION SHOULD NOT ISSUE AGAINST ADMIRALTY PROCEEDINGS.

[From record in Ex parte Fassett, Collector, 142 U. S. 479. Motion granted, writ denied.]

Supreme Court of the United States. No. 10, Original.

Ex parte: IN THE MATTER OF JACOB SLOAT FASSETT, Late Collector of the Customs of the Port of New York, Petitioners.

On consideration of the petition of Jacob Sloat Fassett, late Collector of Customs of the port of New York,

It is now here ordered by the court that cause be shown by the Judge of the District Court of the United States for the Southern District of New York before this court, at Washington on the 2nd day of November next, at 12 o'clock noon of that day, or as soon thereafter as counsel can be heard, whereby a writ of prohibition should not be granted as prayed in said petition.

October 19, 1891.

PROHIBITION FORM V.—MOTION FOR LEAVE TO FILE PETITION FOR PROHIBITION OR MANDAMUS TO PREVENT PROCEEDINGS IN EQUITY.

[Motion denied, May 10, 1903, not reported. The author was counsel in opposition.]

SUPREME COURT OF THE UNITED STATES.
OCTOBER TERM, 1902.

No. —. Original.

IN THE MATTER OF THE PETITION OF GOODYEAR SHOE MACHINERY COMPANY OF PORTLAND, MAINE, for a Writ of Prohibition and a Writ of Mandamus to the Circuit Court of the United States for the Southern District of New York.

To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States and to the Court:

And now comes Goodyear Shoe Machinery Company of Portland, Maine, a corporation organized and existing under and by virtue of the laws of the State of Maine, and upon the showing made by the accompanying

petition for a writ of prohibition and for a writ of mandamus to the honorable the judges of the circuit court of the United States for the southern district of New York and to the said court, wherein it is shown that the said court by its order made and filed on the 2d day of March, 1903, in a cause at law, wherein Christian Dancel and Mary Dancel, as administrators of the goods, chattels, and credits of Christian Dancel, deceased, were plaintiffs and said Goodyear Shoe Machinery Company of Portland, Maine, was defendant, did grant leave to said plaintiffs to reframe their complaint into a bill in equity and file the same as a continuation of the said cause at law, without the service of any new process upon said defendant, and wherein it is shown that pursuant to the leave granted by said order, the said plaintiffs did on the 2d day of April, 1903, file in said court a bill in equity against said defendant, and that by the terms of said order said bill in equity will be taken *pro confesso* against said defendant unless it appears in equity and pleads thereto on the May, 1903, rule day, and wherein it is shown that no equity process has been served upon said defendant, and that it has made no appearance in equity, and wherein it is shown that said order cannot be reviewed by appeal or writ of error, and that it was made by said court without authority of law and without jurisdiction or power to do so and in violation of the Constitution of the United States; and moves this honorable court for leave to file the accompanying petition for a writ of prohibition and a writ of mandamus, and that the said writs issue as in said petition prayed for, and that your petitioner have such other and further relief in the premises as to this honorable court may seem just and right and in accordance with law; or that a rule issue on the honorable the judges of the circuit court of the United States, in the second circuit, and on the said circuit court of the United States for the southern district of New York, in the second circuit, directing them and it on a day to be named in said rule to show cause before this honorable court why a writ of prohibition should not be issued restraining them and it from continuing the said cause at law as a suit in equity, and restraining them and it from taking equity jurisdiction of the person of the defendant in said cause without service of equity process upon it, and why a writ of mandamus should not be issued directing them and it to strike the said order and the said bill in equity from the files of said court, and why your petitioner should not have the relief prayed for in said petition, and such other and further relief as to this honorable court may seem just and right and in accordance with law, and directing that in the meantime and until the hearing and determination of said motion that all proceedings in equity in said cause be stayed.

Dated April —, 1903.

EDWARD H. CHILDS,
Attorney for Petitioner.

PROHIBITION FORM VI.—PETITION FOR WRIT OF PROHIBITION OR MANDAMUS TO PREVENT PROCEEDINGS IN EQUITY.

[Motion for leave to file petition denied, May 10, 1903. Not reported. The author was counsel in opposition.]

IN THE SUPREME COURT OF THE UNITED STATES.
OCTOBER TERM, 1902.

No. —, Original.

IN THE MATTER OF THE PETITION OF GOODYEAR SHOE MACHINERY COMPANY OF PORTLAND, MAINE, FOR A WRIT OF PROHIBITION AND A WRIT OF MANDAMUS TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States of America and to the Court:

And now comes the Goodyear Shoe Machinery Company of Portland, Maine, a corporation organized and existing under the laws of the State of Maine, and respectfully represents and shows to this honorable court:

That whereas, by the Constitution of the United States of America, in article III, section 2, thereof, it is provided that the judicial power of the United States shall extend to cases both "in law *and* equity;"

And whereas, by virtue of the said constitutional provision and the laws of the United States, law and equity are recognized, preserved, and administered in the courts of the United States as two separate and distinct systems of jurisprudence;

And whereas the courts of the United States have no power to combine the two systems, or to administer them both in a single cause;

And whereas the circuit court of the United States for the southern district of New York, in the second circuit, has in a cause duly pending therein as a cause at law, wherein Christian Dancel and Mary Dancel, as administrators of the goods, chattels, and credits of Christian Dancel, deceased, were plaintiffs, and Goodyear Shoe Machinery Company of Portland, Maine, was defendant, granted leave to the plaintiffs therein to reframe the complaint at law into a bill in equity, and to proceed in equity against the defendant therein without the service of any new process and as a continuation of the cause commenced at law;

And whereas the said circuit court has assumed to have equity jurisdiction over the person of said defendant by virtue of the jurisdiction obtained in the cause at law, and is about to take jurisdiction of the said cause as a suit in equity, and as a continuation of the action at law without the service of any new process;

And whereas said defendant is advised that said court has no power

to take equity jurisdiction of the said cause without the service of new process, has no jurisdiction of the person of said defendant in equity, and that the proceedings about to be taken by said court are in direct violation of the Constitution and laws of the United States:

Now, therefore, said Goodyear Shoe Machinery Company of Portland, Maine, the petitioner herein, complaining against the honorable the judges of the circuit court of the United States for the southern District of New York, in the second circuit, and the said court, further represents and shows to this honorable court:

First. That on the 15th day of October, 1900, Christian Dancel and Mary Dancel, as administrators of the goods, chattels, and credits of Christian Dancel, deceased, commenced an action at law against your petitioner in the supreme court of the State of New York for the county of New York, by service of a summons, with notice, upon one William D. Van Roden, as the agent of your petitioner in said State; that the complaint in said action was not served with said summons, nor at any time in said State court, and that said summons, with notice, was served pursuant to the provisions of sections 419 and 420 of the New York Code of Civil Procedure.

An exemplified copy of said summons with notice, is hereto annexed as Exhibit "A."

Second. That some time prior to the said service, your petitioner had done business within the State of New York, and, pursuant to the laws of said State in such case made and provided, had designated the said William D. Van Roden as the person within said State upon whom process against it might be served.

Third. That prior to the said service by which the said cause at law was commenced your petitioner had withdrawn its business from said State, had in fact revoked the authority of said William D. Van Roden to represent it in said State, and that at the time of said service the said Van Roden was not in fact the agent of and had in fact no connection whatever with your petitioner.

Fourth. That your petitioner had no notice of the commencement of said action, and that on the 8th day of November, 1900, the plaintiffs therein entered a judgment at law against your petitioner in the office of the clerk of the State court in the sum of ten thousand two hundred and thirty-three and eighty one-hundredths dollars ($10,233.80) on account of your petitioner's failure to appear therein, and that said judgment was entered by the said clerk as a judgment at law.

An exemplified copy of said judgment is hereto annexed as Exhibit "B."

Fifth. That at the time your petitioner withdrew its business from said State, as aforesaid, it through inadvertence did not file in the office of the Secretary of State a formal revocation of its appointment of said Van Roden, as provided by the laws of said State, and that when your petitioner subsequently learned of said action, after the said judgment by default had been entered, it submitted to the jurisdiction at law in the cause commenced by said service.

Sixth. That as soon as your petitioner learned of said judgment, it made

a motion in said State court to set the same aside and for leave to come in and defend the same; that an order granting said motion was entered by consent of the parties upon the agreed conditions, viz., that your petitioner pay costs and file a bond to secure any judgment the plaintiffs might obtain in said action; that your petitioner duly complied with said conditions, and that thereupon and on the 7th day of December, 1900, an order absolute was entered by consent in said State court, excusing your petitioner's default and extending its time to answer or plead.

An exemplified copy of said order is hereto attached as Exhibit "C."

Seventh. That on the 10th day of December, 1900, and prior to the expiration of the defendant's time to answer or plead, the said cause was removed by your petitioner to the circuit court of the United States for the southern district of New York, in the second circuit, because of the diverse citizenship of the parties, and was placed upon the law docket of said court by the clerk thereof.

An exemplified copy of the petition on said removal is hereto annexed as Exhibit "D."

Eighth. That subsequently the plaintiffs in said cause made a motion to remand the same to the State court, upon the ground that the removal was made too late, and said motion was denied by an order made and filed in said circuit court of the United States on the 4th day of January, 1901.

The opinion of his honor, Judge E. Henry Lacombe, upon said motion is reported in volume 106, Federal Reporter, page 551.

Ninth. That thereafter, and on the 9th day of January, 1901, the plaintiffs filed in said circuit court of the United States an amended complaint at law, and the cause was thereupon prosecuted upon said amended complaint as a cause at law.

An exemplified copy of said amended complaint is hereto annexed as Exhibit "E."

Tenth. That said action was brought to recover a money judgment as damages for an alleged breach of contract made by the plaintiffs' intestate with the Goodyear Shoe Machinery Company of Hartford, Connecticut, which contract your petitioner is alleged to have assumed; that under said contract the plaintiffs' intestate had assigned a certain United States patent to the said Connecticut Company, and the said Connecticut Company had in consideration therefor promised to pay the said intestate in each year while the said patent remained in force as a valid patent "the sum of five thousand dollars as an annuity, such annuity to be payable monthly in installments of four hundred and sixteen and two-thirds dollars each;" that there were no words of succession in said promise; that the annuity called for by said contract was paid up to the time the annuitant died; that the plaintiffs in said action, as the annuitant's administrators, claimed therein that the annuity must be paid to them so long as the said patent remains in force as a valid patent, and that said action was brought to recover the amount alleged to be due under said contract from the time of the annuitant's death to the time the action was commenced.

Eleventh. That on the 17th day of January, 1901, your petitioner filed a demurrer at law to said amended complaint upon the ground that the facts stated therein did not constitute a cause of action; that said demurrer came on to be heard before Honorable Hoyt H. Wheeler, district judge, and was overruled by an interlocutory judgment made and filed in the office of the clerk of said circuit court on the 16th day of May, 1901.

The opinion of his honor, Judge Wheeler, upon said demurrer is reported in volume 109, Federal Reporter, page 333.

Twelfth. That on the 4th day of June, 1901, your petitioner filed its answer to said amended complaint.

An exemplified copy of said answer is hereto annexed as Exhibit "F."

Thirteenth. That on the 19th day of November, 1901, the said cause at law came on to be tried in said circuit court before Honorable Hoyt H. Wheeler, district judge, and a jury; that the jury was waived by consent of the parties; that at the opening of the trial the plaintiffs moved for judgment upon the pleadings (the said amended complaint and the said answer thereto); that said motion was granted by the court, and that judgment at law in the sum of ten thousand eight hundred and ten and three one-hundredths dollars ($10,810.03) in favor of the plaintiffs and against the defendant therein, your petitioner, was duly made and entered in said circuit court on the 2d day of December, 1901.

Exemplified copies of the extract from the minutes of the clerk upon said trial of the formal decision of the court upon said motion for judgment and of the final judgment entered thereon are annexed hereto as Exhibits "G," "H," and "I," respectively.

Fourteenth. That a bill of exceptions was forthwith prepared by your petitioner, and that the same was duly settled by his honor, Judge Wheeler, and filed in the said circuit court on the 18th day of December, 1901.

An exemplified copy of said bill of exceptions is hereto annexed as Exhibit "J."

Fifteenth. That on the 19th day of December, 1901, upon the application of your petitioner, a writ of error to review the said judgment was duly allowed by the United States circuit court of appeals for the second circuit, and the cause was duly brought on to be heard before said circuit court of appeals at the October, 1902, term thereof.

Sixteenth. That the said circuit court of appeals, in an opinion written by his honor, Judge Wallace, and reported in volume 119, Federal Reporter, at page 692, decided that the judgment of said circuit court in favor of the plaintiffs therein should be reversed upon the ground that the said plaintiffs had failed to establish a cause of action at law against your petitioner; but in said opinion, at the top of page 695, the learned judge said:

"The plaintiffs, if this action had been brought in equity, would have been entitled to enforce the covenant of the defendant."

Seventeenth. That on the 30th day of December, 1902, the said circuit court of appeals issued its mandate in said cause to the said circuit court and therein ordered and directed as follows:

"That the judgment of said circuit court be and it hereby is reversed with costs, taxed at the sum of $124.07, without prejudice to an application by plaintiffs for leave to reframe the complaint into a bill in equity."

An exemplified copy of said mandate, which was duly filed in the said circuit court, is hereto annexed as Exhibit "K."

Eighteenth. That on the 6th day of February, 1903, your petitioner moved in said circuit court, upon said mandate, for an order reversing said judgment, with costs; that in making said motion your petitioner appeared specially at law, and that the assertion of any equity powers upon the part of said court in said cause at law was objected to in the following words in the moving affidavit of Edwards H. Childs, who was the attorney for your petitioner in said cause at law:

"The defendant objects to the part of said order that permits this court to entertain an application by the plaintiffs for leave to reframe their complaint into a bill in equity, upon the ground that the court has no equity jurisdiction of the person of the defendant and has no power to grant such an application; that the granting of such an application would be a violation of article III, section 2, of the Constitution of the United States, in that it would amount to a merger of the jurisdiction at law with that in equity; and in moving for a reversal of the judgment herein, the defendant does so without prejudice to and without waiving its rights to object to such application if made."

Nineteenth. That subsequently and on the 19th day of February, 1903, an order upon said mandate was made and filed by the said circuit court reversing the said judgment with costs, and without prejudice to an application by the plaintiffs for leave to reframe the complaint into a bill in equity.

An exemplified copy of said order is hereto annexed as Exhibit "L."

Twentieth. That on the 20th day of February, 1903, the plaintiffs, by their petition filed in said circuit court, applied thereto for leave to reframe the complaint in said cause at law into a bill in equity, pursuant to the terms of said order; that your petitioner appeared specially at law in opposition to said application, and objected that the said court had no equity jurisdiction of the said cause at law, and was without power, under the Constitution and laws of the United States, to grant the said application.

Twenty-first. That the said application was granted by the said circuit court by its order duly made and filed on the 2d day of March, 1903, and that leave was thereby given to the said plaintiffs to reframe their complaint into a bill in equity and to file the same as a continuation of the said cause at law.

An exemplified copy of said order is hereto annexed as Exhibit "M."

Twenty-second. That on the 2d day of April, 1903, the plaintiffs in said cause at law filed a bill in equity in the office of the clerk of said circuit court pursuant to the leave granted by said order; that by the terms of said order the same bill in equity will be taken *pro confesso* unless your petitioner appears in equity and pleads thereto on the May, 1903, rule day; that no equity process has been served upon your

petitioner, and that it has made no appearance whatever in said cause in equity.

An exemplified copy of said bill in equity is hereto annexed as Exhibit "N."

Twenty-third. That the said order cannot be reviewed by appeal or writ of error, and yet by virtue thereof the said circuit court of the United States is about to assume equity jurisdiction in the said cause over the person of your petitioner.

Twenty-fourth. That all matters of fact hereinabove recited and alleged, save and except those of which this honorable court takes judicial notice, appear by the record and proceedings of the said circuit court of the United States for the southern district of New York.

Wherefore your petitioner, the aid of this honorable court most respectfully requesting, prays remedy by a writ of prohibition to be issued out of this honorable court to the honorable the judges of the circuit court of the United States for the southern district of New York, in the second circuit, and to the said court, to prohibit them and it from continuing the said cause at law as a suit in equity, and to prohibit them and it from taking equity jurisdiction of the person of the defendant in said cause, your petitioner, without service of equity process upon it. And your petitioner further prays remedy by a writ of mandamus to be issued out of this honorable court to the honorable the judges of the circuit court of the United States for the southern district of New York, in the second circuit, and to the said court, directing them and it to strike from the files of said court the said order filed the 2d day of March, 1903, and the said bill in equity filed the 2d day of April, 1903; and your petitioner further prays for such other and further relief in the premises as to this honorable court may seem just and right and in accordance with law.

GOODYEAR SHOE MACHINERY COMPANY
OF PORTLAND, MAINE, Petitioner.
BY EDWARDS H. CHILDS, Attorney.

UNITED STATES OF AMERICA,
State of New York, County of New York, } ss:

Edwards H. Childs, being duly sworn, deposes and says: I am the attorney for the above-named petitioner, Goodyear Shoe Machinery Company of Portland, Maine, in the above-entitled proceeding, and was the attorney of record for said company in the cause at law referred to in the foregoing petition. The said petitioner is a Maine corporation and no officer thereof is present to make this verification. I have read the foregoing petition and the same is true as I verily believe.

EDWARDS H. CHILDS.

Subscribed and sworn to before me this 10th day of April, 1903.

[Seal of Frederick T. Case, Notary Public, New York County.]

FREDERICK T. CASE,
Notary Public (25), New York County.

[Annexed were the exhibits.]

PROHIBITION FORM VII.—RETURN TO ORDER TO SHOW CAUSE AGAINST ISSUE OF WRIT OF PROHIBITION.

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court.

In compliance with the order to show cause of which a copy is annexed hereto, the undersigned, Judge of the District Court of the United States for the Southern District of New York, respectfully returns and certifies as follows:

[The return here sets forth the course of proceedings and refers to and annexes a certified copy of the records, proceedings, and papers on file in or relative to the cause.]

And thereupon it is respectfully submitted whether or not this court should take further proceedings in the said cause.

Witness my hand this 29th day of October, 1891.

ADDISON BROWN.

PROHIBITION FORM VIII.—WRIT OF PROHIBITION.

[3 Dallas 121, 129; 1 L. ed. 535, 539.]

UNITED STATES, *ss.*

THE PRESIDENT OF THE UNITED STATES to the honorable RICHARD PETERS, Esquire, Judge of the District Court, of the United States, in and for the Pennsylvania district: It is shewn to the Judges of the Supreme Court of the United States, by Samuel B. Davis, That whereas by the laws of nations, and the treaties subsisting between the United States and the Republic of France, the trial of prizes taken on the high seas, without the territorial limits and jurisdiction of the United States, and brought within the dominions and jurisdiction of the said Republic, for legal adjudication, by vessels of war belonging to the sovereignty of the said Republic, acting under the same, and of all questions incidental thereto, does of right, and exclusively, belongs to the tribunals and judiciary establishments of the said Republic, and to no other tribunal, or tribunals, court, or courts, whatsoever: And whereas by the said law of nations, and treaties aforesaid, the vessels of war belonging to the said French Republic, and the officers commanding the same, cannot, and ought not, to be arrested, seized, attached, or detained, in the ports of the United States, by process of law, at the suit or instance of individuals, to answer for any capture or captures, seizure or seizures, made on the high seas, and brought for legal adjudication into the ports of the French Republic, by the said vessels of war, while belonging to, and acting under the authority and in the immediate service of the said Republic: And whereas by the laws and treaties aforesaid, the District Courts of the United States have not, and ought not, to entertain jurisdiction or hold plea of such captures, made as aforesaid, under the above circumstances: And whereas by the laws of nations, the vessels

of war of belligerent powers, duly by them authorized, to cruize against their enemies, and to make prize of their ships and goods, may, in time of war, arrest and seize the vessels belonging to the subjects or citizens of neutral nations, and bring them into the ports of the sovereign under whose commission and authority they act, there to answer for any breaches of the laws of nations, concerning the navigation of neutral ships, in time of war; and the said vessels of war, their commanders, officers and crews, are not amenable before the tribunals of neutral powers for their conduct therein, but are only answerable to the sovereign in whose immediate service they were, and from whom they derived their authority: And whereas, on or before the twentieth day of May, now last past, the said Samuel B. Davis, was, and now is, a lieutenant of ships in the navy of the said French Republic, and commander of a corvette or vessel of war, called the Cassius, then, and now, the property of the said Republic, and in her immediate service; and on the said twentieth day of May, was duly commissioned, by and under the authority of the said Republic, to cruize against her enemies, and make prize of their ships (as by his commission and the certificate of the minister plenipotentiary of the said Republic to the United States, to the court shewn, more fully appears). Nevertheless a certain James Yard, of the city of Philadelphia, merchant, not ignorant of the premises, but contriving and intending to disturb the peace and harmony subsisting between the United States and the French Republic, and him, the said Samuel B. Davis, wrongfully to aggrieve and oppress and draw to another proof, him, the said Samuel B. Davis, and the said corvette, or vessel of war, of the French Republic, the Cassius, in the port of Philadelphia, under the protection of the laws of nations, and of the faith of treaties, has, by process out of the District Court of the United States, in and for the District of Pennsylvania, attached and arrested him, the said Samuel B. Davis, and the said corvette, or vessel of war, the Cassius, before the Judge of the said District Court, contrary to the said law of nations, and treaties, and against *the due form of the laws of the United States, hath unjustly drawn in plea, to answer to a certain libel, by him, the said James Yard, against him, the said Samuel B. Davis, and against the said corvette, or vessel of war, the Cassius, her tackle, apparel, and furniture, exhibited and promoted, craftily and subtilly therein alledging, articulating, and objecting, that on the said twentieth day of May, now last past, the said Samuel B. Davis, then commander of the said corvette, or vessel, the Cassius, did, forcibly, violently, and tortiously, take on the high seas, a certain schooner, or vessel, belonging to the said James Yard, called the William Lindsey, and brought her into Port de Paix (in the dominion of the French Republic) where she still remains; and also alledging and articulating, that the said corvette, or vessel called the Cassius, was originally equipped and fitted for war, in the port of Philadelphia, in the United States, and that the said Samuel B. Davis, was at the time of the said capture, and now is, a citizen of the United States: Without this, however, and the said James Yard, not in any manner alledging, or articulating, that the said capture was made, within the territory, rivers or bays, of the United States, or within a marine league

of the coast thereof, or that the said corvette, or vessel, the Cassius, was so fitted or equipped for war in the United States, by the said French Republic, her agent, or agents, with their knowledge, or by the means, or procurement, or by the said Samuel B. Davis, or that at the time of her being so equipped, or fitted for war, in the United States (if ever there she was so in any manner fitted or equipped) she was the property of the said French Republic, or that the said Samuel B. Davis was in any manner, in the said equipment, or fitting for war, concerned; and without this, also, and the said James Yard, not in any manner alledging, that the said Samuel B. Davis was retained, or engaged, in the service of the French Republic, within the territory or jurisdiction of the United States: And that the said James Yard, him, the said Samuel B. Davis, and the said corvette, or vessel of war, called the Cassius, by force of the process aforesaid, out of the said District Court, had and obtained, as aforesaid, still wrongfully detains, and the said Samuel B. Davis, and the French Republic, owner of the said corvette, or vessel of war, thereupon in the said District Court to answer, and in the premises, cause to be condemned, with all his power, endeavours, and daily contrives, in contempt of the government of the United States, against the laws of nations, and the treaties subsisting between the United States and the French Republic, and against the laws and customs of the United States, to the manifested violation of the law of nations, and treaties and to the manifest disturbance of the peace and harmony happily subsisting between the United States and the French Republic: Wherefore the said Samuel B. Davis, the aid of the said Supreme Court most respectfully requesting, hath prayed remedy by a writ of prohibition, to be issued out of the said Supreme Court, to you to be directed, do prohibit you from holding the plea aforesaid, the premises aforesaid any wise concerning, further before you:—You, therefore, are hereby prohibited, that you no further hold the plea aforesaid, the premises aforesaid in any wise touching, before you, nor anything in the said District Court attempt, nor procure to be done, which may be in any wise to the prejudice of the said Samuel B. Davis, of the said corvette, or vessel of war, called the Cassius; or in contempt of the laws of the United States: And also, that from all proceedings thereon you do, without delay, release the said Samuel B. Davis, and the said corvette, or vessel of war, called the Cassius, at your peril.

Witness, the honorable JOHN RUTLEDGE, Esquire, Chief Justice of the said Supreme Court, at Philadelphia, this 24th day of August, in the year of our Lord one thousand seven hundred and ninety-five, and of the Independence of the United States, the twentieth.

I. WAGNER, D. C. Sup. Ct. U. S.

CERTIORARI FORMS

CERTIORARI FORM I.—WRIT OF CERTIORARI.

The President of the United States to Thomas Alexander, Esq., United States Commissioner for the southern District of New York, and duly appointed and authorized by the District Court of the United States for the Southern District of New York to act as Commissioner under the laws of the United States concerning the extradition of fugitives from the justice of a foreign country under a treaty between the United States and any foreign country, GREETING:

For sufficient reasons shown by the petition of Walter Konrad Geissler, sworn to on the 9th day of March, 1912, you are hereby commanded to certify and send to the District Court of the United States in and for the southern district of New York in the second circuit on the 15th day of March, 1912, at 10:30 o'clock in the morning of that day or as soon thereafter as counsel can be heard, your proceedings concerning the matters described in, and those to which reference is made in, said petition and concerning the application for the extradition of Walter Konrad Geissler, together with the testimony and other evidence offered and received before you with all things touching the same and the evidence, both oral and documentary, offered and received before you therein, as fully and as entirely as it remains before you, by whatsoever names the parties may be called in said proceedings, together with this writ, that said court may cause to be done what of right ought to be done in the premises.

Witness, the HON. GEORGE C. HOLT,
U. S. District Judge, Southern District of New York.
The 9th day of March, 1912.

THOMAS ALEXANDER,
[SEAL.] Clerk of the District Court of the United States for the Southern District of New York.

The foregoing writ is hereby allowed.
New York, March 9th, 1912.

LEARNED HAND,
United States District Judge.

CERTIORARI FORM II.—WRIT OF CERTIORARI IN DISTRICT OF COLUMBIA.

In the Supreme Court of the District of Columbia the 2d day of June, 1887.

FRANCIS A. WOOD
vs.
THE DISTRICT OF COLUMBIA. } At Law, No. 27,832, Certiorari.

The President of the United States, to the Supreme Court of the District of Columbia, GREETING:

For sufficient reasons shown by the petition in this case you are hereby commanded to certify and send to this court, immediately, your proceedings therein, with all things touching the same, as fully and as entirely as it remains before you, by whatsoever names the parties may be called in said proceedings, together with this writ, that said court may cause to be done what of right ought to be done in the premises.

Witness: E. F. BINGHAM,
Chief Justice.

[SEAL.] R. J. MEIGS, Clerk.
By J. R. YOUNG, Assistant Clerk.

CERTIORARI FORM III.—CERTIORARI, FOR REMOVAL OF CRIMINAL PROSECUTION FROM STATE TO FEDERAL COURT.

The President of the United States of America to the Court of the State of ——, in the Judicial District, GREETING:

Being informed that there is now pending before you an indictment entitled ——, wherein —— —— is charged with the crime of murder, which said indictment was returned into said —— court against the said —— ——, for, and on account of acts done by him under the revenue laws of the United States; that said indictment has not been tried: we do therefore hereby command you that you send without delay to the said district court, as aforesaid, the record and proceedings in said cause, so that the said district court may act thereon as of right and according to law ought to be done.

Witness: The Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, at ——, the —— day of ——, A. D. 19—.

—— ——. —— ——, Clerk.

[NOTE.—The above writ should be served on the clerk of state court by leaving a duplicate thereof with him.]

CERTIORARI FORM IV.—NOTICE OF PRESENTMENT TO SUPREME COURT OF PETITION FOR CERTIORARI TO STATE COURT.

[Writ granted 253 U. S. 480.]

IN THE SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1920.

No.

PHILADELPHIA AND READING RAILWAY COMPANY,
Petitioner,
vs.
MARIA DOMENICA DIDONATO,
Respondent.

March 20, 1920.

Sirs:—Please take notice that upon the annexed petition of Philadelphia and Reading Railway Company, a certified copy of the entire transcript of the record of this cause, including the proceedings in the Supreme Court of Pennsylvania, submitted herewith, and the petitioner's brief, also to be submitted upon the presentation of the petition, an application will be made to the Supreme Court of the United States, at a term of said Court, appointed to be held at the Capitol, Washington, D. C., on Monday, the fifth day of April, 1920, at the opening of the Court on that day, or as soon thereafter as counsel can be heard, for a writ of *certiorari* to be directed to the Supreme Court of the State of Pennsylvania, to review the decree or judgment of said Court, rendered in the above cause on the twenty-third day of February, 1920, which affirmed the decree or judgment of the Common Pleas No. 1 of Philadelphia County, Pennsylvania, entered in said Court on the twenty-fourth day of February, 1919, upon an award of the Workmen's Compensation Board of Pennsylvania, in favor of Maria Domenica DiDonato, the respondent, for the sum of $5173.05.

Dated at Philadelphia, March 20th, 1920.

GEORGE GOWEN PARRY,
Counsel for Petitioner,
415 Reading Terminal, Philadelphia, Pa.

To Messrs. Evans, Forster & Wernick, Counsel for Respondent, Bailey Building, Philadelphia, Pa.

CERTIORARI FORM V.—NOTICE OF MOTION OF PETITION FOR CERTIORARI FROM SUPREME COURT TO CIRCUIT COURT OF APPEALS.

[176 U. S. 726.]

Supreme Court of the United States of America.

In the Matter of the Petition of LIZZIE STEARNS BLEECKER and ELSIE L. BLEECKER for a Writ of *Certiorari* directed to the Circuit Court of Appeals for the Second Circuit, to bring before the Supreme Court the case of LIZZIE STEARNS BLEECKER and ELSIE L. BLEECKER, Libelants, Appellants,

against

The Steamship "KENSINGTON," her BOILERS, ENGINES, etc., THE INTERNATIONAL NAVIGATION COMPANY, Claimants and Appellants.

SIRS—Please take notice that upon a certified copy of the transcript of the record herein and upon the annexed petition of Lizzie Stearns Bleecker and Elsie L. Bleecker, sworn to the 20th day of September, 1899, I shall move the motion hereto annexed before the Supreme Court of the United States at the Capitol in the City of Washington, District of Columbia, on Monday, the 16th day of October, 1899, at the opening of the court on that day, or as soon thereafter as counsel can be heard, and that I shall then and there move for such further relief in the premises as may be just.

Dated New York, September 21, 1899.

Yours, etc. ROGER FOSTER,
Proctor, Attorney and Counsel for Libelants, Appellants.
35 Wall Street, New York.

TO MESSRS. BIDDLE & WARD, Proctors and Counsel for Claimants, and
TO THE INTERNATIONAL NAVIGATION COMPANY.

CERTIORARI FORM VI.—MOTION FOR WRIT OF CERTIORARI TO CIRCUIT COURT OF APPEALS.

[176 U. S. 726.]

Supreme Court of the United States of America.

In the Matter of the Petition of LIZZIE STEARNS BLEECKER and ELSIE L. BLEECKER for a Writ of *Certiorari* directed to the Circuit Court of Appeals for the Second Circuit, to bring before the Supreme Court the case of LIZZIE STEARNS BLEECKER and ELSIE L. BLEECKER, Libelants, Appellants,

against

The Steamship "KENSINGTON," her BOILERS, ENGINES, etc., THE INTERNATIONAL NAVIGATION COMPANY, Claimants and Appellants.

And now come the libelants, appellants above named, by Roger Foster, their counsel, attorney and proctor, and move this court, upon a certified a copy of the transcript of the record herein, and upon the annexed petition sworn to the 20th day of September, 1899, for a writ of *certiorari*, directed to the Circuit Court of Appeals for the Second Circuit and to the District Court of the United States for the Southern District of New York, to bring before his Honorable Court the case of Lizzie Stearns Bleecker and Elsie L. Bleecker, libelants and appellants, against the steamship "Kensington," her boilers, engines, etc. The International Navigation Company, claimants and appellants, recently decided by the Circuit Court of Appeals of the United States for the Second Circuit, and by the District Court of the United States for the Southern District of New York, for such proceedings therein as to this court may seem just; and for such other and further relief in the premises as may be just.

ROGER FOSTER,
Of Counsel for Libelants' Appellants.

CERTIORARI FORM VII.—NOTICE OF SUBMISSION OF ANSWER AND CROSS PETITION.

[Writ granted 221 U. S. 580.]

SUPREME COURT OF THE UNITED STATES.

PERE ALFREDO LUIS BAGLIN, Superior General of the Order of Carthusian Monks, for Himself and all of the other Members of said Order,
Petitioners,
AGAINST
THE CUSENIER COMPANY,
Respondent and Cross-Petitioner.

To Philip Mauro, Attorney and Counsel for Pere Alfredo Luis Baglin, etc.

Please take notice that upon the submission to the Supreme Court of your petition for Writ of Certiorari, we shall submit the annexed answer, cross-petition for Writ of Certiorari and brief.

Dated, New York, March 30th, 1909.

ADOLPH L. PINCOFFS,
ROGER FOSTER,
Attorneys and of Counsel for
The Cusenier Company.

Service of the foregoing notice and annexed answer, cross-petition and brief is hereby admitted this day of March, 1909.

CERTIORARI FORM VIII.—MOTION FOR CROSS WRIT OF CERTIORARI.

SUPREME COURT OF THE UNITED STATES.

PERE ALFREDO LUIS BAGLIN, Superior General of the Order of Carthusian Monks, for Himself and all of the other Members of said Order,
Petitioners,
AGAINST
THE CUSENIER COMPANY,
Respondent and Cross-Petitioner.

And now comes the Cusenier Company, by Adolph L. Pincoffs and Roger Foster, its attorneys, and moves this Honorable Court, upon the certified Transcript of Record herein, and upon the annexed cross-petition, for a cross-writ of Certiorari directed to the Honorable the Judges of the

United States Circuit Court of Appeals, within and for the Second Judicial Circuit, commanding said Court of Appeals to certify and bring before this Honorable Court the above entitled cause—lately before said Court of Appeals, wherein this respondent was defendant-appellant and the petitioners therein were complainants appellees, for such further proceedings and for such relief as to this Honorable Court may seem just.

THE CUSENIER COMPANY,
By ADOLPH L. PINCOFFS and ROGER FOSTER,
its Attorneys.

CERTIORARI FORM IX.—PETITION FOR WRIT OF CERTIORARI TO SUPREME COURT TO REVIEW PROCEEDINGS OF STATE COURT.

[Writ granted 253 U. S. 480.]

IN THE SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1920.
No.

PHILADELPHIA AND READING RAILWAY COMPANY,
Petitioner,
vs.
MARIA DOMENICA DIDONATO,
Respondent.

To the Honorable, the Supreme Court of the United States:

Philadelphia and Reading Railway Company, in support of this, its petition for a writ of *certiorari* to be directed to the Supreme Court of the State of Pennsylvania to review a decree of judgment rendered on the twenty-third day of February, 1920, which affirmed the judgment of the Court of Common Pleas No. 1 of Philadelphia County, Pennsylvania, entered on the twenty-fourth day of February, 1919, upon an award of the Workmen's Compensation Board of Pennsylvania, affirming an award of the Compensation Referee in favor of Maria Domenica DiDonato, for the sum of $5173.05, respectfully shows:—

1. That this action was begun by petition under the Workmen's Compensation Act of the State of Pennsylvania, filed by Maria Domenica DiDonato, dependent widow of Pasquale DiDonato, claiming an award of compensation for the accidental death of her husband, which occurred while in the course of his employment as a crossing watchman of the Philadelphia and Reading Railway Company.

2. That the defendant, your petitioner, duly filed its answer to the said petition, denying liability under the Workmen's Compensation Act of Pennsylvania for the said accident, on the ground that the said Donato was engaged with the defendant in interstate commerce at the time he was injured.

3. That the record, a certified copy of which is presented herewith, shows that there is no conflict of evidence, the claimant relying solely upon the ground that the undisputed facts compelled the legal conclusion that there was not an engaging in interstate commerce.

4. That the record shows that Donato was a crossing watchman employed by your petitioner at the grade crossing formed by the intersection of the main line of its railroad with Forrest Street in the Borough of Conshohocken, Pa. This crossing was protected by safety gates, operated by the watchman, who was also provided with lanterns, flags and a signal disc for signalling purposes.

The Compensation Referee found that, while acting in the course of his employment in flagging a train over this crossing, Donato was struck by another train and instantly killed; that interstate shipments and trains constantly pass over this crossing, but there was no proof as to the character of the particular train which the decedent was flagging when he was killed.

5. An award of compensation was made by the Referee, which was affirmed by the Compensation Board, whose decree was affirmed by the judgment of the Court of Common Pleas. From this judgment, the defendant appealed to the Supreme Court of Pennsylvania, which dismissed the appeal and affirmed the judgment of the Court of Common Pleas in favor of the claimant.

6. That the questions of law for determination by the Compensation Referee were as follows:—

(a) Is a watchman employed on an interstate railroad as a grade crossing over which interstate shipments and trains constantly pass, engaged in interstate commerce within the meaning of the Federal law, while performing his duties in flagging trains over the crossing?
(b) Since in an action brought under the Workmen's Compensation Act of Pennsylvania, the burden is upon the claimant to prove a case within the Act, was a *prima facie* case made out by proof that claimant's husband was employed as a crossing watchman by a common carrier by rail and that he was injured while engaging in the commerce conducted by the carrier over the tracks at the crossing?

7. That the claimant proved, by the only person who saw the accident, that the decedent was struck by a train while flagging another train but there was no proof and no finding by the Referee to show the identity of the train which the watchman was flagging. The Referee held that the claimant was entitled to an award of compensation under the Workmen's Compensation Law of Pennsylvania, because the defendant was unable to show that an unidentified and unknown train was of interstate character.

8. The Workmen's Compensation Board in affirming the award of the Referee, said:—

"We hold, therefore, that this watchman, while in the course of his employment, met his death while flagging the train whose character has been undisclosed by the testimony. We rule that the burden of

proving its defense was upon the defendant and sustain the Referee in his finding that this burden has not been met.''

The Court of Common Pleas and the Supreme Court of Pennsylvania held that the burden was upon the defendant to show that the case did not fall within the provisions of the State Compensation Law; and furthermore held that the burden had not been met by proof that the crossing tracks were constantly in use by interstate trains and that the watchman's duties were to protect the crossing tracks from the risk of collision between traffic upon the railway and traffic upon the public highway.

9. That, although there is no finding whatever as to the character of the train which was being flagged over the crossing, the decisions below proceed upon the presumption that an intrastate train was approaching, for the Supreme Court of Pennsylvania expressly holds that had it been an interstate train, the watchman would have been engaged in interstate commerce.

10. If the Supreme Court of Pennsylvania was right in holding that a crossing watchman is engaged in interstate commerce only when flagging an interstate train, then the fundamental question for decision was the character of the train; for the State Statute could only be applicable if it was an intrastate train. In the face of the finding that the character of the train was not disclosed by the testimony, the judgment of the Supreme Court of Pennsylvania has no foundation of fact upon which to rest, and it was error for that Court to base its decision upon a presumption that the train in question was an intrastate train. Your Honorable Court has repeatedly held that a Federal right is denied as the result of finding of fact without evidence to support it, but in this case a finding involving the conclusion of law that Donato was engaged in intrastate commerce is expressly stated by the tribunals below to be based on an utter lack of proof on the subject.

11. That the Workmen's Compensation Act of Pennsylvania creates a special jurisdiction in derogation of the common law, and in this proceeding under that Act, where the jurisdiction was challenged, it was incumbent upon the claimant to prove *prima facie*, a case within the Act.

12. That the Supreme Court of Pennsylvania erred in holding that the claimant made out a *prima facie* case by showing, *inter alia*, that her decedent was employed as a crossing watchman and met with an accident in the State while in the course of his employment in flagging trains over the crossing, for the claimant was not entitled to the benefit of the State law unless she further showed that the commerce in which the decedent and his employer were engaged, was intrastate commerce or at least identified the train sufficiently to enable the defendant to ascertain its character.

13. That the decision of the Supreme Court of Pennsylvania subverts the fundamental theory of the law for its result is, not only to relieve the claimant of the necessity of making essential proof, but to effectually deprive the defendant of the protection of the Act of Congress invoked.

For proof of the character of an unknown train is obviously impossible to make.

14. That this decision is not in concord with the decisions of this Honorable Court, which has repeatedly held that, in cases where a Federal right is affected, the question of the burden of proof is not one of mere State procedure, but is a matter of substance, subject to review by your Honorable Court.

15. That upon a question herein involved, the highest Courts of the States of California and of Illinois have reached a different conclusion from the Supreme Court of Pennsylvania, and have held that a crossing watchman on an interstate railroad is engaged in interstate commerce, irrespective of the character of an approaching train, with which he is immediately concerned, as his duties embrace the prevention of collision upon the crossing and thereby tend to the maintenance and the good order of the tracks, which are instrumentalities used by the carrier in the transportation of goods in interstate commerce.

16. That your petitioner is advised that this question has not been passed upon by your Honorable Court and that, in view of the conflict of authority in the State courts, there is created confusion and uncertainty with regard to the application of the Federal Law and doubt concerning the rights and obligations of employers of labor which ought not to exist.

17. That certain other like cases are pending in the Compensation tribunals and courts of the State of Pennsylvania, and it therefore follows that, unless this Court shall correct the errors of the Court below, your petitioner will be deprived of a right, privilege and immunity under the Federal Employers' Liability Act, in this and all similar cases brought hereafter in the State of Pennsylvania.

Wherefore your petitioner prays that a writ of *certiorari* may issue out of and under the seal of this Court, directed to the Supreme Court of Pennsylvania, commanding that Court, to certify the case to this Court for review and determination, as provided in the Act of Congress known as the Judicial Code, or that your petitioner may have such other and further relief in the premises as to this Court may seem appropriate and in conformity with the said Act.

And your petitioner will ever pray, etc.

PHILADELPHIA AND READING RAILWAY COMPANY,
By
AGNEW T. DICE, President.

[SEAL]

GEORGE GOWEN PARRY, Counsel for Petitioner.

STATE OF PENNSYLVANIA, }
COUNTY OF PHILADELPHIA, } ss.

AGNEW T. DICE, being duly sworn, says that he is President of Philadelphia and Reading Railway Company, the petitioner named in the foregoing petition, that he has read the same and knows the contents thereof,

and that the facts therein stated are true to the best of his knowledge, information and belief.

AGNEW T. DICE.

Sworn to and subscribed before me this day of March, A. D. 1920.

J. V. HARE, Notary Public.

[SEAL]

My Commission expires March 1, 1923.

CERTIORARI FORM X.—PETITION TO SUPREME COURT FOR WRIT OF CERTIORARI TO REVIEW DECISION OF CIRCUIT COURT OF APPEALS IN CASE INVOLVING QUESTIONS OF INTERNATIONAL IMPORTANCE.

[Writ granted. 141 U. S. 583.]

IN THE SUPREME COURT OF THE UNITED STATES.

——— TERM, 18—.

Ex Parte Lau Ow Bew, Petitioner.

Petition for Writ of Certiorari, requiring the Circuit Court of Appeals for the Ninth Circuit to certify to the Supreme Court for its review and determination the case of Lau Ow Bew, Appellant, vs. The United States, Respondents.

To the Honorable the Supreme Court of the United States:

The petition of Lau Ow Bew respectfully shows to this honorable court as follows:

I. Your petitioner is a person of the Chinese race, and a natural-born subject of the Emperor of China; but he is now, and for the past seventeen years has been, a resident of the United States of America, and of no other country, having his domicile in the city of Portland, in the state of Oregon; and during all that time he has been a merchant engaged in the wholesale and importing business, as a member of the well-known commercial firm of Hop Chong & Co., in the said city of Portland.

II. Your petitioner, on the 30th day of September, 1890, departed from the United States on a temporary visit to his relatives in China, with the intention of returning as soon as possible, and he did return to the United States on board of the steamship Oceanic, which arrived at the port of San Francisco, in the state of California, on the 11th day of August, 1891. At the time of his departure he procured satisfactory evidence of his status in this country as a merchant, under the regulations of the treasury department of the United States, adopted July 3, 1890, one of which is as follows:

"Chinamen who are not laborers, and who may have heretofore resided in the United States, are not prevented by the existing laws or treaty from returning to the United States after visiting China or elsewhere. No certification, or other papers, however, are issued by the department, or by any

of its subordinate officers, to show that they are entitled to land in the United States, but it is suggested that such parties should, before leaving the United States, provide themselves with such proofs of identity as may be deemed proper, showing they have been residents of the United States, and that they are not laborers, so that they can present the same to, and be identified by, the collector of customs at the port where they may return."

III. Your petitioner, on his return to the United States, presented said proofs to the collector of the port of San Francisco; but the collector, while acknowledging the sufficiency of the same, and admitting that your petitioner was a merchant domiciled herein, and, therefore, entitled to the protection of the treaty between the United States and China, concluded July 28, 1868, popularly known as the Burlingame Treaty, and the supplemental treaty between the said governments, concluded November 17, 1880, and the act of congress entitled "An Act to execute certain treaty stipulations relating to Chinese," approved May 6, 1882, as amended July 5, 1884, refused to permit your petitioner to land, on the sole ground that he failed and neglected to produce the certificate of the Chinese Government, mentioned in Section 6 of the said act of May 6, 1882, as amended by the said act of July 5, 1884; and the collector based this refusal upon the opinion of this honorable court in the case of Wan Shing vs. United States, No. 1414, October term, 1890, decided May 11, 1891.

IV. Your petitioner thereupon, to wit, on August 14, 1891, filed a petition in the Circuit Court of the United States for the Northern District of California for a writ of *habeas corpus* to obtain his discharge from detention, alleging, *inter alia*, that he was a merchant domiciled in the United States for seventeen years last past, and that it was claimed by the master of the said steamship that he could not be allowed to land under the provisions of the sixth section of the said Act of May 6, 1882, as amended by the said Act of July 5, 1884.

The writ was issued directed to the master of the said steamship, who produced the body of your petitioner before the said court on the 15th day of August, 1891, and made return to the writ that he held the petitioner in his custody "by direction of the customs authorities of the port of San Francisco, California, under the provisions of the Chinese Restriction Act."

The United States District Attorney filed an intervention for and on behalf of the United States, and made opposition to the said writ. It was not alleged or pretended in such intervention, on behalf of the United States, that your petitioner was a laborer, or that the refusal of the customs officers at San Francisco to allow him to land, and his consequent detention by the master of the said steamship, were based upon the provisions of the Chinese Exclusion Act of October 1, 1888; but on the contrary, it was averred in said intervention, that your petitioner was lawfully detained by the said master because he was a Chinese person and failed to produce to the collector of customs, or to any other authorized officer, the certificate of identification required by the said Act of 1882 as amended by the said Act of 1884.

An answer or traverse to the said return to the said writ, and the said intervention on behalf of the United States, was filed by the petitioner.

The said case was and is entitled and numbered in the Circuit Court of the United States for the Northern District of California, "In the Matter of Lau Ow Bew on *Habeas Corpus*, No. 11415."

V. The said case was heard and determined by the said Circuit Court upon an agreed statement of facts, signed by the United States District Attorney, and the attorneys for the petitioner, and filed therein, which statement of facts is as follows:—

"It is hereby stipulated and agreed that the following are the facts herein:—

"*First.* That the said Lau Ow Bew is now on board the SS. Oceanic, which arrived in the port of San Francisco, State of California, on the 11th day of August, A. D. 1891, from Hong Kong, and is detained and confined thereon by Capt. Smith, the master thereof.

"*Second.* That the said passenger is now and for seventeen years last past has been a resident of the United States and domiciled therein.

"*Third.* That during all of said time the said passenger has been engaged in the wholesale and importing mercantile business in the city of Portland, state of Oregon, under the firm name and style of Hop Chong & Co.

"*Fourth.* That the said firm is worth $40,000, and said passenger has a one-fourth interest therein, in addition to other properties.

"*Fifth.* That the said firm does a business annually of $100,000, and pays annually to the United States government large sums of money, amounting to many thousands of dollars, as duties upon imports.

"*Sixth.* That on the 30th day of September, A. D. 1890, the said passenger departed from this country temporarily on a visit to his relatives in China, with the intention of returning as soon as possible to this country, and returned to this country by the steamship Oceanic on the 11th day of August, A. D. 1891.

"*Seventh.* That at the time of his departure he procured satisfactory evidence of his status in this country as a merchant, and on his return hereto he presented said proofs to the collector of the port of San Francisco, but said collector, while acknowledging the sufficiency of said proofs and admitting that the said passenger was a merchant domiciled herein, refused to permit the said passenger to land on the sole ground that the said passenger failed and neglected to produce the certificate of the Chinese government mentioned in Section 6, of the Chinese Restriction Act of May 6, 1882, as amended by the act of July 5, 1884.

"CHARES A. CARTER,
"U. S. District Attorney.
"HARVEY S. BROWN AND
"THOMAS D. RIORDAN,
"Attorneys for Petitioner."

VI. Such proceedings were had in the said case in the said circuit court of the United States, that on the 11th day of September, 1891, the said court rendered a judgment therein as follows:

"This matter having been regularly brought on for hearing before the court and the judge thereof, the United States attorney having appeared and intervened on behalf of the United States, and the same having been duly heard and submitted, and due consideration thereon had, it is by the court now here considered—

"That Lau Ow Bew, in whose behalf the writ of *habeas corpus* herein was sued out, was not at the date of the petition herein illegally restrained of his liberty as therein alleged.

"It is further adjudged and found that he came from China by the steamship Oceanic, and is a Chinese person forbidden by law to land within the United States, and has no right to be or remain therein.

"It is, therefore, ordered that the said Lau Ow Bew be remanded by the United States marshal for the Northern District of California to the custody whence he was taken, to wit, on board the said steamship to the custody of the master of said steamship, or, in case of a change of master, to the custody of the master thereof, whoever he may be, at the time of this order of remand; or to place him in the hands and charge of any party on board said steamship for the time being, representing the master or then in charge of said steamship in the absence of the master, or for the time being exercising control or authority thereon; this order to be executed as to said steamship whether still in port, not having departed therefrom, or having departed and returned since the proceedings herein were instituted. And in case said steamship has departed and not returned, or for any other reason, the said Lau Ow Bew can not be placed on said steamship, that the said marshal place him upon any other vessel available for the purpose, paying the necessary passage money, for the purpose of deporting him out of the United States and transporting him to the port whence he came. And for the purpose of carrying this order into effect it is further ordered that the said marshal shall take the said Lau Ow Bew into their custody and him safely keep till said order shall be fully executed."

VII. The said case of your petitioner, in the said Circuit Court of the United States, was heard before and decided by the Hon. W. H. Beatty, District Judge of the United States for the District of Idaho, sitting in the said Court, and the opinion of the Court was delivered by him.

VIII. Your petitioner, on the same day, was duly allowed by the said Circuit Court an appeal from its said judgment to the United States Circuit Court of Appeals for the Ninth Circuit, and it was ordered by the court that a certified transcript of the record and of all proceedings in the said case be forthwith transmitted to the said United States Circuit Court of Appeals.

IX. On the 3d day of October, 1891, a certified transcript of the record and of all proceedings of the said Circuit Court, in the said case,

was filed in the United States Circuit Court of Appeals for the Ninth Circuit, and the said case was entered and docketed in the said Court of Appeals, and entitled, "Lau Ow Bew, appellant v. The United States, respondent, No. 12."

The assignment of errors filed on behalf of your petitioner was as follows:—

"Afterwards, to wit, on this first Monday in October, in the same term, before the judges of the circuit court of appeals for the ninth circuit, at the city of San Francisco, in the district of California, comes the said Lau Ow Bew, appellant, by Harvey S. Brown, and Thomas D. Riordan, his attorneys, and says that in this record aforesaid there is manifest error in this, to wit:

"That the circuit court of the ninth judicial circuit, in and for the district of California, erred in deciding—

"1. That the appellant is not entitled to enter the United States.

"2. That he is not unlawfully restrained of his liberty.

"3. That the said appellant was required to produce the certificate required by Section 6 of the act known as the Chinese Restriction Act, passed May 6, 1882, as amended July 5, 1884.

"4. That a Chinese merchant domiciled in the United States and departing therefrom temporarily with the intention of returning should, before being permitted to reenter the United States, produce the certificate required by Section 6 of the act above referred to.

"5. That he be remanded to the custody of the master of the steamship whence he was taken.

"And the said Lau Ow Bew prays that the said judgment entered herein against him be reversed, annulled, and altogether held for nothing, and that he be restored to all things which he has lost by occasion of the said judgment.

"HARVEY S. BROWN AND
"THOMAS D. RIORDAN,
"Attorneys for Appellant."

X. The case came on to be heard in the said circuit court of appeals on the 5th day of October, 1891, before the Hon. E. M. Ross, United States district judge for the southern district of California, and the Hon. Thomas P. Hawley, United States district judge for the district of Nevada; and on the 7th day of October, 1891, the said court rendered a judgment affirming the said judgment of the said circuit court therein, as follows:

"Appeal from the circuit court of the United States for the northern district of California.

"This cause came on to be heard on the transcript of the record from the said circuit court of the United States for the northern district of California, and was argued by counsel, and the same having been duly considered, and the opinion of the court having been read in open court and filed with the clerk, it is ordered that the judgment of the said circuit

court be and the same hereby is affirmed, and the cause remanded to said circuit court at the cost of the appellant.

"On motion of Thomas D. Riordan, Esq., counsel for appellant, is ordered that a stay of proceedings herein be, and the same hereby is, granted for and during the space of thirty days."

A certified copy of the entire record of the said case in the said Circuit Court of Appeals is herewith furnished, and hereto annexed, as part of this application, in conformity with rule 37 of this Honorable Court relative to cases from Circuit Court of Appeals, and the same is marked Exhibit "A."

XI. Your petitioner is advised and believes that the said judgment of the said United States Circuit Court of Appeals in the said case is erroneous, and that this Honorable Court should require the said case to be certified to it for its review and determination under and in conformity with the provisions of the sixth section of the Act of Congress entitled "An Act to establish Circuit Courts of Appeals, and to define and regulate in certain cases the jurisdiction of the courts of the United States, and for other purposes," approved March 3, 1891, the said case being made final in the said Circuit Court of Appeals by the said Act.

XII. The said case was decided in the said Circuit Court of Appeals, as well as in the said Circuit Court, upon the supposed authority of the decision of this Honorable Court in the said case of Wan Shing v. United States, but the question presented by and involved in the said case of the petitioner was not presented by or involved in the said case of Wan Shing v. United States, and the said question was not decided in that case, nor was the decision of the same necessary for the determination of that case, by this Honorable Court.

Your petitioner is informed and believes that the question presented by and involved in his said case, was not discussed in any wise by counsel before this Honorable Court in the said case of Wan Shing v. United States.

XIII. It appears in the said agreed statement of facts, and it is thus admitted in this case by the Government of the United States, that the petitioner is and has been for seventeen years last past a Chinese merchant domiciled and doing business in the United States; that he departed therefrom September 30, 1890, on a temporary visit to his relatives in China, with the intention of returning as soon as possible, and did return on August 11, 1891; that he was not prevented from landing by the authorities of the Government of the United States upon any claim or pretense that he was a laborer, excluded by the provisions of the Act of October 1, 1888; and that he was refused permission to land on the *sole* ground that he failed "to produce the certificate of the Chinese Government mentioned in section six of the Chinese Restriction Act of May 6, 1882, as amended by the Act of July 5, 1884."

The question thus presented by the record in the case of your petitioner

was, and is, whether he is entitled, as a Chinese merchant, long domiciled in the United States, who had departed therefrom in September, 1890, for a temporary purpose, to re-enter the country without producing the certificate in section six of the Chinese Restriction Acts.

XIV. This honorable court declared in the said case of Wan Shing vs. United States that the refusal to allow the petitioner therein to land was not grounded at all upon the said act of May 6, 1882, but was based wholly upon the provisions of the Chinese Exclusion Act of October 1, 1888, which declared that it should be unlawful for any Chinese laborer, who, at any time before had been, or was then, or might thereafter be, a resident within the United States, or who had departed or might depart therefrom, and should not have returned before its passage, to return or remain in the United States.

It was thus claimed and maintained by the authorities of the United States, in the said case, that the said Wan Shing was a laborer, and lawfully detained as such, and that he was not a Chinese merchant, or within the exempt class when he sought to enter the United States.

It appeared affirmatively, by the testimony of Wan Shing, as your petitioner is advised, that he was a youth only seventeen years of age when he claimed to have been in the United States, and that he was, in fact, a laborer, and not a merchant, within the meaning of the treaties between the United States and China, and the Chinese Restriction Acts; that he first came to the United States in 1879, and departed therefrom in 1882; and that he did not return to, and seek to enter the United States until 1889. And there was no evidence in the said case, as your petitioner is advised, that Wan Shing, at the time of his departure from the United States, intended ever to return to the country, or to retain his domicile therein, if he ever had one.

XV. The petitioner is advised that the right of a Chinese merchant, admitted to be domiciled in the United States, and to have been domiciled therein for many years, who temporarily departed therefrom in the year 1890, *animo revertendi*, to re-enter the country without producing a certificate of identity, under the sixth section of the said act of 1882, as amended in 1884, was not drawn in question in the said Wan Shing case.

XVI. Your petitioner is informed and believes that the case of Wan Shing *vs.* United States, being No. 1414 on the docket of this court for the October term, 1890, and advanced on the motion of the attorney general, was submitted without argument of any kind on behalf of the appellant, and upon a printed brief of Mr. Assistant-General Parker in the part of the United States; and that no assignment of errors was filed in the case by the counsel for the appellant, who did not appear in court when the case was called for trial, and who telegraphed from San Francisco to the clerk of this court that the case might be submitted upon the record. The appeal, in that case, was thus, as the petitioner is advised, virtually abandoned by the counsel for the appellant; and the petitioner is also informed and believes that substantially the only proposition in the brief for the United States, in the said case, was that the testimony in the

record showed that Wan Shing was a laborer, and as such was not entitled to land under the provisions of the Exclusion Act of October 1, 1888.

XVII. The importance and gravity of the question as to the rights of Chinese merchants, domiciled in the United States, under the treaties between the United States and China and the legislation of the United States to execute those treaties, will be recognized, when it is stated, according to authentic statistics, that the Chinese merchants who are now domiciled in the United States are the owners and in possession of real and personal property valued at over $20,000,000; that they pay annually to the United States Government large sums of money as duties upon imports aggregating more than two millions of dollars; that nearly all of said merchants have branch houses in British Columbia, Cuba, Mexico, Peru, and the Hawaiian Islands; and that they are constantly and necessarily travelling between the United States and those countries, for the purpose of collecting moneys due to them, and attending to their various interests in their branch houses therein. If such Chinese merchants, when visiting those countries, are obliged to produce certificates of identity under the Restriction Acts, in order, after such temporary absences, to re-enter the United States, they would be required, before returning thereto, to proceed to China, and there attempt to procure such certificates. It is manifest, however, that it would be impossible for those Chinese merchants who have been long domiciled in the United States to obtain the required certificates, because the Chinese government could not certify to the facts necessary to be set forth in them, nor could the proper diplomatic or consular representatives of the United States ascertain the truth in regard to such facts for the purpose of viséing and indorsing such certificates as provided by law.

XVIII. Before the promulgation of the opinion of this Honorable Court in the said case of Wan Sing *v.* United States by the Treasury Department of the Government of the United States, in August, 1891, and thus before the petitioner went to China, in September, 1890, it had been uniformly held by that Department that section 6 of the Chinese Restriction Act of May 6, 1882, as amended by the Act of July 5, 1884, was not applicable to Chinese merchants domiciled in the United States, and who had departed therefrom temporarily, and that by the Hon. Hugh McCullouch, respectively, on December 6, 1884, December 27, 1884, and January 14, 1885.

The question, also, came before the United States circuit court for the northern district of California on April 9, 1885, in the case of Ah Ping (reported in 11 Sawyer, 17), and it was there decided the same way; and thereafter the said treasury department, on November 8, 1888, and July 3, 1890, reaffirmed its previous rulings upon the subject.

The said decisions were thus all made before the petitioner left the United States to visit his relatives in China.

XIX. Under the said decisions Chinese merchants domiciled in the United States were accustomed to go and come under the treaties between the United States and China upon the production, on their return to this country, of such evidence of their status as was deemed satisfactory by the

several collectors of the ports; and the record of custom-houses will show, as the petitioner is informed and believes, that such practice was not attended by fraud.

XX. To require Chinese merchants domiciled in the United States, whenever they may depart therefrom temporarily with the intention of returning thereto, to produce certificates from the Chinese government in order to enable them to re-enter the United States, would seem to be equivalent, as has been observed, to an absolute refusal to permit their return, whereas the treaty between the United States and China of November 17, 1880, guarantees to such merchants the right "to go and come of their own free will and accord."

XXI. Your petitioner thus respectfully submits that the question upon the legal and just construction and effect of the said Chinese Restriction Acts, involved in and presented by the said case of your petitioner, should be authoritatively and finally adjudged by this honorable court upon and after a full presentation to the court of the merits of the said question on the part of the petitioner and the United States.

Wherefore your petitioner respectfully prays that a writ of *certiorari* may be issued out of and under the seal of this court, directed to the United States circuit court of appeals for the ninth circuit, commanding the said court to certify and send to this court, on a day certain to be therein designated, a full and complete transcript of the record and all proceedings of the said circuit court of appeals in the said case, they might lawfully return upon the production of such evidence as should be satisfactory to the various collectors, of their status as resident merchants in the United States.

The first decision was rendered by the Hon. Charles J. Folger, on March 14, 1884; the second by the Hon. W. Q. Gresham, on September 25, 1884; the third by the Hon. H. F. French on December 2, 1884; the fourth, fifth, and sixth therein, entitled, Lau Ow Bew, appellant, *versus* The United States, respondent, number 12, to the end that the said case may be reviewed and determined by this court, as provided in section 6 of the Act of Congress, entitled "An Act to establish Circuit Courts of Appeals, and to define and regulate in certain cases the jurisdiction of the Courts of the United States, and for other purposes," approved March 3, 1891, or that your petitioner may have such other or further relief or remedy in the premises as to this court may seem appropriate, and in conformity with the said Act, and that the said judgment of the said Circuit Court of Appeals in the said case, and every part thereof, may be reversed by this Honorable Court.

And your petition will ever pray, etc.

LAU OW BEW,
By THOMAS D. RIORDAN,
Attorney and Counsel for Petitioner.

J. HUBLEY ASHTON,
THOMAS D. RIORDAN,
Of Counsel for Petitioner.

DISTRICT OF COLUMBIA, } ss:
CITY OF WASHINGTON. }

Thomas D. Riordan, being duly sworn, says that he is one of the attorneys and of counsel for Lau Ow Bew, the petitioner above named, and as such had personal charge for him of the case in the foregoing petition mentioned in the Circuit Court of the United States for the Northern District of California, and in the United States Circuit Court of Appeals for the Ninth Circuit; that he has read the said petition by him subscribed; and that the facts therein stated are true to the best of his information and belief.

THOMAS D. RIORDAN.

Sworn to and subscribed before me this 29th day of October, 1891.
[SEAL.]

E. L. WHITE,
Notary Public, District of Columbia.

CERTIORARI FORM XI.—PETITION FOR WRIT OF CERTIORARI TO CIRCUIT COURT OF APPEALS IN ADMIRALTY CASE.

[Granted Bleecker v. Steamship Kensington, 175 U. S. 726.]

To the Supreme Court of the United States of America.

The Petition of LIZZIE STEARNS BLEECKER and ELSIE L. BLEECKER for a Writ of *Certiorari*, directed to the Circuit Court of Appeals for the Second Circuit, to bring before the Supreme Court the case of LIZZIE STEARNS BLEECKER and ELSIE L. BLEECKER, Libelants and Appellants,

against

The Steamship "KENSINGTON," her BOILERS, ENGINES, etc.: THE INTERNATIONAL NAVIGATION COMPANY, Claimants and Appellants.

The said petitioners respectfully show to this court as follows:

I. Your petitioners were, at the time of the commencement of this suit, citizens and residents of the State of New Jersey, and the claimant was at that time a corporation, duly organized and existing under the laws of the State of New Jersey.

II. On or about the 9th day of December, 1897, the said The International Navigation Company entered into a contract with the libelants and petitioners herein for a valuable consideration to them paid by the libelants, whereby it agreed to and with your petitioners to convey and transport the libelants from the Port of Antwerp, in the Kingdom of Belgium, to the Port of New York, in the United States of America, by the said steamship "Kensington," and by said steamship to carry and transport with safety to said Port of New York, and there deliver to the libelants,

in good order and condition, the personal luggage or baggage of the libelants.

III. On or about the 11th day of December, 1897, the libelants took passage at Antwerp for New York upon said steamship "Kensington," then lying at said Antwerp, bound for said Port of New York, and, in pursuance of the terms of the contract between them and on or about said day last mentioned, delivered to the said The International Navigation Company, on board of said steamship at Antwerp, the wearing apparel and other personal baggage of libelants, to be transported as aforesaid by said steamship to said Port of New York, and there delivered to the libelants in good order and condition.

IV. Early in December, 1897, your petitioners engaged their passage from the claimant herein in Paris, France. At that time they paid part of their passage money, and received in return either a receipt or a ticket, which was not good until the balance of the purchase money was paid in Antwerp. In Antwerp they paid the balance of the purchase money. Neither of them read the ticket, and the day that they went on board the steamer they gave it up to the paymaster (Mrs. Bleecker, p. 15, fols. 57, 58; p. 21, fols. 83, 84; Miss Bleecker, p. 26, fols. 101, 102).

Your petitioners received in Antwerp a receipt for their baggage, which they also did not read, and which acknowledges the receipt of their baggage, "weight, contents and value unknown, and shipped by the Red Star Line Steamers, subject to the conditions contained in the company's ticket and bill of lading. Red Star Line, Antwerp, December, 1897. Caisse" (p. 56, fol. 222). They were not asked concerning the value of their baggage by any agent of the ship or of the shipowners (p. 24, fol. 96). The ticket so far as is material is as follows:

"Paris, on the 2 Decr., 1897. This ticket is good for second-cabin passage of the persons named in the margin, viz., * * * by the British steamship 'Kensington' from Antwerp, on the 11th of December, 1897, at one o'clock P. M., unless prevented from unforeseen circumstances." * * * In minute type, much smaller than what preceded: '7Notice to passengers. It is a condition upon which this ticket is granted, and is mutually agreed, for the consideration aforesaid, that * * *

"(c) The shipowner or agent are not under any circumstances liable for loss, death, injury or delay to the passenger or his baggage, arising from the act of God, the public enemies, fire, robbers, thieves of whatever kind, whether on board the steamer or not; perils of the seas, rivers or navigation; accident to or of machinery, boilers or steam; collisions, strikes, arrest or restraint of princes, courts of law, rulers or people, or from any act, neglect or default of the shipowner's servants, whether on board the steamer or not, or on board any other vessel belonging to the shipowner, either in matters aforesaid or otherwise howsoever. Neither the shipowner nor the agent is, under any circumstances, or for any cause whatever or however arising, liable to any amount exceeding two hundred and fifty francs for death, injury or delay of or to any passenger carried under this ticket. The shipowner will use all reasonable means to send the

steamer to sea in a seaworthy state, and well-found, but does not warrant her seaworthiness.

"(*d*) The shipowner or agent shall not, under any circumstances, be liable for any loss or delay of or injury to passengers' baggage carried under this ticket beyond the sum of two hundred and fifty francs, at which such baggage is hereby valued, unless a bill of lading or receipt be given therefor and freight paid in advance on the excess value at the rate of one per cent., or its equivalent, in which case the owner shall only be responsible according to the terms of the shipowner's form of cargo bill of lading in use from the port of departure, etc. All questions arising hereunder are to be settled according to Belgian Law."

V. Said steamship sailed from said port of Antwerp with your petitioners and their baggage on board on or about the 11th day of December, 1897, for the port of New York, and where said steamship arrived in safety on or about the 23d day of December, 1897, but owing to the careless, negligent, unusual, insufficient and improper manner in which your petitioner's baggage, was stored, and the careless, negligent and insufficient manner in which other merchandise in said steamship was stored, and the want of proper care on the part of the master of said steamship, his officers and crew, and persons employed by him or them, the said personal baggage of your petitioners, which was of the value of four thousand dollars ($4,000), was in great part utterly ruined, whereby your petitioners were severally damaged in the sum of two thousand dollars ($2,000).

VI. On the 9th of February, 1898, the libel herein was filed in the office of the Clerk of the District Court of the United States for the Southern District of New York, and on the same day the above-named steamship was levied upon.

VII. The claimant The International Navigation Company interposed an answer admitting all of the matters alleged in the libel except that it agreed to transport the said luggage with safety and to deliver it in good order and condition except so far as that duty is to be implied from its engagement in the aforesaid ticket, and that the said baggage was damaged by reason of insufficient and improper stowage, and alleged in said answer that the said baggage was injured by reason of the violence of the sea and unusual weather. For a further and independent defense it alleged therein that it was a part of the contract of transportation that all questions arising under the same should be settled according to Belgium law with reference to which the alleged contract was made, and that the said alleged contract contained a provision which was alleged to be valid under the law of Belgium to the effect that the shipowner should not be liable for loss or injury to the passenger or his baggage arising from perils of the sea, rivers or navigation, or from any act, neglect or default of the shipowner's servants. And for a further, separate and partial defense the claimant alleged in said answer that in and by said contract of transportation it was provided that the shipowner should not, under any circumstances, be liable for any loss or injury to passengers' baggage beyond the sum of two hundred and fifty francs, at which such baggage

is valued, unless a bill of lading be given therefor, and freight paid in advance on the excess value of the rate of one per cent, or its equivalent, and the claimant avers that no bill of lading or receipt was given or freight paid on any value in excess of the sum of two hundred and fifty francs by the libelants or by either of them.

VIII. On the 8th day of June, 1898, the above suit came on for trial before the Honorable Addison Brown, District Judge for the Southern District of New York, who, on or about the 1st day of July, 1898, filed his decision to the following effect: That the aforesaid ticket marked "Claimant's Exhibit A" was a contract; that the baggage was damaged by the negligence of the men in charge of the ship; that the clauses of the ticket which purported to exempt the shipowner from liability did not apply, but that the clause limiting the liability to two hundred and fifty francs was applicable; and on the 29th day of October, 1899, a decree in accordance with said decision was made and entered herein awarding to your petitioners herein the sum of only $96.20, with interest and costs amounting to $51.59, making in all the sum of $151.59, instead of the sum of $4,000 with interest and costs.

Upon said trial your petitioners offered to prove the value of their said baggage, and that the value of the baggage of each of them exceeded in value the sum of $2,000; but the said District Judge excluded the testimony so offered by your petitioners. Said judge, however, admitted testimony and evidence which showed that the value of the said baggage of each of your petitioners exceeded the sum of two hundred and fifty francs (pp. 15–17, fols. 59–66).

IX. On or about the 29th day of October, 1898, your petitioners were duly allowed by the said Honorable Addison Brown, District Judge for the Southern District of New York, an appeal from his said decree to the United States Circuit Court of Appeals for the Second Circuit, and it was ordered that a certified transcript of the record and all proceedings in the said case be forthwith transmitted to the United States Circuit Court of Appeals.

X. A certified transcript of the record and of all proceedings in the case was duly so transmitted to the said United States Circuit Court of Appeals; and on or about the 21st day of April, 1899, the appeal by your petitioners from so much of the aforesaid decree which does not award to each of your petitioners severally damages in the sum of two thousand dollars, and from that part of said decree which limits the recovery of each of your petitioners for damages to the sum of forty-eight and 10-100 dollars, came on to be heard, and together with a cross-appeal by the claimants was argued by counsel for all parties before Judges Wallace, Lacombe and Shipman. And thereafter, and on the 25th day of May, 1899, said Circuit Court of Appeals rendered and filed an opinion and decisions written by Judge Lacombe, which, among other things, held that the provisions of section 2 of the Harter Act as to the limiting of liability by bills of lading or shipping documents does not apply to passenger tickets; that a stipulation in a passenger ticket which limits the liability of the car-

rier for loss of baggage to two hundred and fifty francs, unless the passenger declares the value of his baggage in excess of such amount, pays for the transportation of the excess and takes a bill of lading therefor, is not so unreasonable as to be void as against public policy; and that such a stipulation, though in terms limiting the liability of the "shipowner or agent" only, inures to the benefit of the ship itself. Said opinion and decision affirmed said decree of said District Court; and a mandate issued accordingly from said Circuit Court of Appeals to said District Court.

XI. On or about the 6th day of July, 1899, an order was made by the District Court of the United States for the Southern District of New York and entered in the office of the Clerk of said Court on the same day, which order directed that the libelants file with the Clerk of said Court on or before the 12th day of July, 1899, the mandate issued herein by the United States Circuit Court of Appeals for the Second Circuit; which mandate ordered, adjudged and decreed that the decree of said District Court be, and it thereby was, affirmed without interest or costs; and said order further directed that all proceedings upon the decree to be entered upon the said mandate be, and they thereby were, stayed until the 14th day of November, 1899.

XII. In accordance with said order, on the 10th day of July, 1899, the said mandate was duly filed in the office of the Clerk of the United States District Court for the Southern District of New York.

XIII. On or about the 20th day of July, 1899, without prejudice to the rights of your petitioners to apply to this court for a writ of *certiorari*, an order was duly made by the United States District Court for the Southern District of New York and entered in the office of the Clerk of said Court on the same day, which, among other things, ordered, adjudged and decreed: that the decree of the said Circuit Court of Appeals be, and it thereby is made the decree of the United States District Court for the Southern District of New York; and that the decree of said District Court entered herein on the 10th day of October, 1898, be and it thereby is affirmed.

XIV. The questions and propositions of law involved in this case are substantially as follows:

I. Is the following clause, in a ticket purchased in Paris, France, for the transport of a passenger from Antwerp, Belgium, to the City, County and State of New York, upon an ocean steamship, reasonable, valid and enforceable in a court of the United States assuming the Belgian law does not forbid such a contract?

"The shipowner or agent shall not under any circumstances, be liable for any loss or delay of or injury to passengers' baggage carried under this ticket beyond the sum of two hundred and fifty francs, at which such baggage is hereby valued, unless a bill of lading or receipt be given therefor, and freight paid in advance on the excess value at the rate of one per cent., or its equivalent, in which case the shipowner shall only be responsible according to the terms of the shipowner's form of cargo bill of

lading, in use from the port of departure. All questions arising hereunder are to be settled according to the Belgian law."

II. Does the following language, in a ticket purchased in Paris, France, for the transport of a passenger from Antwerp, Belgium, to the City, County and State of New York, upon an ocean steamship release the steamship from liability in a suit in admiralty *in rem* brought by the passenger, assuming that the Belgian law does not forbid such a contract?

"The shipowner, or agent, shall not, under any circumstances, be liable for any loss or delay of or injury to passengers' baggage carried under this ticket beyond the sum of two hundred and fifty francs, at which such baggage is hereby valued, unless a bill of lading or receipt be given therefor, and freight paid in advance on the excess value at the rate of one per cent., or its equivalent, in which case the shipowner shall only be responsible according to the terms of the shipowner's form of cargo, bill of lading, in use from the port of departure. All questions arising hereunder are to be settled according to the Belgian law."

III. Does the Harter Act—viz., chapter 105, of the laws passed by the fifty-second Congress at its twentieth session, which is published in volume 27 of the statutes at large at page 445—apply to and regulate the liability in admiralty of an ocean steamship which transports from Antwerp, Belgium, to the City, County and State of New York, trunks, which are the property of a passenger upon said steamship when the contract between the passenger and the steamship, its owner and agent is embraced in a document called a ticket, in print and manuscript form, signed by the agents of the owners of the steamships and also in a receipt for said ticket in the following language:

"Total fr.

"Weight, contents and value unknown and shipped by the Red Star Line steamer, subject to the conditions contained in the company's ticket and bill of lading. RED STAR LINE.

"Antwerp, Dec. 97. CAISSE."

All of said questions were duly raised and argued by your petitioners in said District Court and in said Circuit Court of Appeals.

XV. Concerning the clause in said ticket limiting the liability of the carrier, Judge Lacombe said in his opinion, which is reported in Volume 94 of the Federal Reporter at page 888.

"However unreasonable would be a 'condition' attempting to relieve the carrier entirely from liability in excess of some named amount, there seems to be no impropriety in the carrier's requiring the passenger to declare the value of the baggage in excess of such named amount, to take regular bill of lading therefor, and to pay for its transportation in proportion to its value, with the proviso that, if he fails so to do, the carrier will not be liable. As to the question whether the sum named (two hundred and fifty francs) is too small, the supreme court, in The Majestic, *supra*, intimated some doubt as to the reasonableness of ten pounds in the case of a first cabin passenger's baggage, but rendered no decision thereon.

In view of the circumstance that the condition complained of contained an offer to carry the excess value under a regular bill of lading, we are not prepared, in the absence of authority, to hold that two hundred and fifty francs is an unreasonable valuation for personal baggage of a second-cabin passenger not thus carried."

XVI. In The Majestic, 166 U. S. 375, 386, this court, speaking through the Chief Justice of the United States, said concerning the following clause:

"Neither the shipowner nor the passage broker or agent is in any case liable for loss or injury to or delay in delivery of luggage or personal effects of the passenger beyond the amount of ten pounds unless the value of the same be declared at or before the issue of this contract ticket, and freight at current rates for every kind of property," with certain exceptions, "is paid;" that it was a "limitation which we must say *does not* strike us as *reasonable,* in view of the 'twenty cubical feet' of baggage for each which the company had expressly contracted to carry."

In the case of Glovinsky v. Cunard Steamship Co. (4 N. Y. Miscellaneous Reports, 266) the General Term of the City Court of New York held that the same limitation, to the amount of fifty dollars ($50), upon the liability of a transatlantic steamship company for damage to the baggage of a steerage passenger, when it was contained in passenger ticket, was unreasonable and void. The sum of one hundred dollars ($100) is the usual limitation for such damage in railroad tickets for short journeys in the United States.

XVII. And your petitioners further aver that the present case is one in which it is proper for this court to issue a writ of *certiorari,* for the following reasons, among others:

1. Because, in the case of The Majestic, *supra,* this court intimated that a provision in a passenger ticket exempting the carrier from all liability for loss of baggage beyond ten pounds is unreasonable.

2. Because the Circuit Court of Appeals held that there is no authority as to what is a reasonable limitation of liability for baggage in a passenger ticket.

3. Because the questions of law involved herein have not been passed upon by this court.

4. Because the public interest and the interests of jurisprudence require the decision of this court upon the question of law involved herein.

5. Because, in view of the large number of persons using similar steamship tickets, said questions are of sufficient general, national and material importance and interest as to make it necessary that they should be determined by the court of last resort.

6. Because there is a conflict in this respect between the law as expounded by said Circuit Court of Appeals and the rule observed in the State Courts held in the same district and circuit.

Wherefore your petitioners pray that this Honorable Court will be pleased to grant a writ of *certiorari* in this case to the Circuit Court of

Appeals for the Second Circuit to bring up this case to this Honorable Court for such proceedings therein as to this Honorable Court may seem just.

LIZZIE STEARNS BLEECKER.
ELSIE L. BLEECKER.
ROGER FOSTER,
Petitioners' Attorney.

STATE OF NEW YORK, Southern District of New York. } ss.

Lizzie Stearns Bleecker and Elsie L. Bleecker, being duly sworn, say, and each for herself says: I have read the foregoing petition. The same is true to my own knowledge, information and belief; my knowledge is derived from the record in this case and from what has taken place in my presence and hearing in the court in which this action has been heard.

LIZZIE STEARNS BLEECKER.
ELSIE L. BLEECKER.

Sworn to before me this 20th day of September, 1899.
[SEAL.] GEORGE E. HAMMOND,
Notary Public.

I hereby certify that I have examined the foregoing petition, and in my opinion the petition is well founded, and that the case is one in which the prayer of the petitioners should be granted by this court.

ROGER FOSTER,
Of Counsel for Petitioners.

CERTIORARI FORM XII.—PETITION TO SUPREME COURT FOR WRIT OF CERTIORARI TO REVIEW DECISION OF CIRCUIT COURT OF APPEALS IN TRADE-MARK CASE.

[Writ granted, 221 U. S. 580, in which the author was counsel.]

SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1908.

PERE ALFREDO LUIS BAGLIN, Superior-General of the order of Carthusian Monks, for Himself and all of the other Members of said Order,
Petitioners,
vs.
THE CUSENIER COMPANY,
Respondent.

To the Honorable the Justices of the Supreme Court of the United States:

The Petition of Pere Alfredo Luis Baglin, Superior-General of the Order of Carthusian Monks, for himself and all the other members of the said Order, respectfully shows as follows:

1. That the Order of Carthusian Monks, known also as the Congregation of or Order of the Chartreux, is a religious Order of voluntary asso-

ciation, which, up to the year 1903, had maintained almost uninterruptedly for several hundred years its main chartreuse or "Mother House" (the abode of its Superior-General) near Voiron, in the Department of Isère, Republic of France,—the exact location of said main chartreuse being on the demesne now known as "La Grande Chartreuse."

2. That the said Carthusian Monks have for several hundred years last past carried on the manufacture of a certain liqueur or cordial, known throughout the world as "Chartreuse," which said liqueur or cordial has been and now is manufactured exclusively by them, in accordance with a secret recipe or formula whereof the said Carthusian Monks have been and now are the sole proprietors, and which, by reason of its excellence, the care and skill exercised in making it, and the good repute of its makers, has become widely and favorably known, and is, and always has been, known by the trade-name "Chartreuse."

3. That in the year 1903, in consequence of the enforcement by the French Government of a legislative enactment known as the "Associations Act" of July 1, 1901, the said Carthusian Monks were expelled from French territory, and thereupon they did establish at Tarragona, in the Kingdom of Spain, their factory for the continuance of their ancient business of making the liqueur or cordial known as "Chartreuse"; and from that time to the present, said manufacture of Chartreuse liqueurs has been (and still is being) carried on in accordance with said original secret recipe or formula (which is still the exclusive property of said Carthusian Monks); and in fabricating said liqueurs at their factory in Tarragona said Carthusian Monks have employed identically the same ingredients as have been used for time immemorial in fabricating the same.

4. Said liqueur or cordial has been commonly packed in bottles of peculiar design having conspicuously ground therein the word "Chartreuse" together with distinctive markings and ecclesiastical symbols which have been adopted by the Order of Carthusians, to wit, a segmented circle surmounted by a cross and seven stars, said bottles also bearing distinctive labels whereon is found the word "Chartreuse" and the facsimile of the signature of L. Garnier, who was, a half century or over ago, the "Procureur" of said Order. A reproduction of certificate of Trade Mark Registration No. 3,989, September 12, 1876, opposite this page, shows the general style of bottle and labels used by petitioners.

5. That in the year 1876, the said Order, by its then Procureur, Frère (that is to say, "Brother") Marcel Marie Grézier, caused the said name "Chartreuse" to be registered in the United States Patent Office on behalf of said Order, as evidenced by certificate of registration No. 3377, dated January 25, 1876; and that in the year 1884, said Order caused a re-registration of said mark by its Procureur (Frère Grézier), as evidenced by certificate No. 10,897, dated January 29, 1884.

6. That, after the migration of petitioners from France as aforesaid, the Procureur of the Republic of France addressed to the Civil Court of First Instance of Grenoble, France, a Petition praying for the appointment of one Henri Lecouturier as a "sequestrating administrator and

liquidator of the property of the Congregation called des Chartreux, not only the properties situated and held at the principal monastery at St. Pierre des Chartreuse, but also those held by the said Congregation in France at its different establishments''; and thereupon the said Court at Grenoble, by a judgment rendered March 31, 1903, did appoint the said Lecouturier as administrator and liquidator of the property of the Congregation then in France; and by virtue of certain other subsequent judgments and decrees of the French Courts, the property of the Monks then in France was seized by said Lecouturier; and the latter thereupon contracted with a manufacturer of distilled liquors, one Cusenier, to manufacture and to sell as ''Chartreuse'' a liqueur or cordial, and assumed to authorize said Cusenier to market the same in bottles identical in appearance with those long used by your petitioners, and under labels and other markings so nearly as possible identical with those theretofore used exclusively by the said Monks in the marketing of their genuine ''Chartreuse.''

7. The said Lecouturier, or his concessionaire the said Cusenier, thereafter assumed to appoint one Jules Aubry, who in turn assumed to appoint the Cusenier Co. (respondent herein), of which Company said Aubry was Vice-President, to be the sole agent for the United States and Canada for the sale of the cordial or liqueur manufactured and put up by the said Cusenier in France, as aforesaid.

8. That thereafter, namely, on January 4, 1905, the said Aubry or his representative, the respondent herein, being about to import a large number of cases of the so-called ''Chartreuse'' into this country, and having made shipment of the same to this country, your petitioners filed in the Circuit Court of the United States, for the Southern District of New York, a bill of complaint praying for the usual injunction and accounting; that a motion for preliminary injunction was brought within a week thereafter, and on January 11, 1905, a broad and comprehensive injunction order was issued by Hon. E. HENRY LACOMBE, Circuit Judge, against the respondent herein; thereafter, the respondent herein appealed to the Circuit Court of Appeals, for the Second Circuit, and the cause coming on in due time for argument, the said Court of Appeals, by a majority opinion, modified the injunction granted by Judge LACOMBE at Circuit, on the ground that such sweeping relief should not be given on proofs so meagre as those before the Court at that time; but the late Judge TOWNSEND dissented from the majority opinion of the Court of Appeals and filed an opinion to the effect that the injunction as originally granted by Judge LACOMBE should not be modified, saying (141 Fed. Rep., 497, 499) there was

> ''no uncertainty as to the material facts upon which the injunction was granted, namely, the validity of the trade-name ''Chartreuse,'' complainants' title and long-continued possession, and the infringement by defendant, and deception of the public. The only doubts raised are as to defendant's rights even in France.''

9. Thereafter, full proofs having been taken, both in this country and abroad, the cause came on for final hearing at Circuit, and his Honor Judge HOUGH sustained the bill of complaint, and granted the relief therein

prayed, concluding his opinion by saying that to do otherwise "by every canon of American law" would "amount to confiscation." A decree in accordance with the opinion was thereupon entered and an injunction order issued which was substantially identical with the injunction originally issued by his Honor Judge LACOMBE on motion for preliminary injunction.

10. Thereupon the respondent again appealed to the United States Circuit Court of Appeals, for the Second Circuit, from the decree granted by Judge HOUGH; and, the cause coming on for argument, the said Court of Appeals in due time handed down its opinion affirming the decree appealed from, except as to the paragraph numbered 4 of said decree. The paragraph numbered 1 of said decree, as affirmed by the Court of Appeals, reads as follows (Trans., p. 1567):

> "1. Adjudged, Ordered and Decreed that the word symbol 'Chartreuse,' as applied to liqueur or cordial, is a good and valid trade-mark, and in this country has been and is now the sole and exclusive property of the Carthusian Monks or Fathers ('Peres Chartreux') complainants herein; and that the said word symbol, 'Chartreuse,' accompanied by the fac-simile signature of L. Garnier, as set forth in U. S. Trade-mark Certificate No. 3377 registered in the U. S. Patent Office, January 25, 1876 (re-registered January 29, 1884, as No. 10,897) and in U. S. Certificate No. 3989, registered September 12, 1876 (re-registered January 29, 1884, as No. 10,898), and as appearing upon 'Complainants' Exhibit, Bottle of Chartreuse sold by Batjer & Co.,' constitute good and valid trade-marks, and in this country have been and now are the sole and exclusive property of said complainants the Carthusian Monks or Fathers ('Peres Chartreux'); and that in this country the said complainants still have the right, and the exclusive right, to use the said marks, or any of them, upon liqueurs or cordials manufactured by the complainants."

Then, after thus holding that the trade-mark "Chartreuse" was a good and valid trade-mark, and that in this country it was the *exclusive* property of the Carthusian Monks, the Court of Appeals nevertheless proceeded to modify the paragraph numbered 4 of the decree appealed from so as to allow the respondent herein to use the trade-mark "Chartreuse," on liqueur or cordial sold by respondent, if (Trans., p. 1591)

> "so used as clearly to distinguish such liqueur or cordial from the liqueur or cordial manufactured by the complainants,"

and also to allow the respondent herein to make use of the peculiarly shaped bottle which the Carthusian Monks had used for many generations as a package for their liqueur or cordial,—and this after saying in their opinion (Trans., p. 1589):

> "A purchaser is compelled to rely upon external appearances and if he wanted the Monks' product he would be justified in thinking he had procured it if the *bottle were identical in appearance* with that which contained the liqueur of years ago when he first became acquainted with it" (our italics).

But the said Court of Appeals awarded a perpetual injunction against

the use by the respondent herein of the fac-simile signature of L. Garnier, or any of the above specified details of the trade-marks referred to, or from in any manner dealing, within this country, in

> "any liqueur or cordial not manufactured by complainants, in any dress or package like or simulating in any material respects the dress or package heretofore used by complainants—and in particular from making use of any label or symbol like or substantially similar to those appearing on 'Complainants' Exhibit Defendant's Liqueur,' being the bottle now on file as an exhibit in this Court—and from in any wise attempting to make use of the good-will and reputation of complainants in putting out in this country any liqueur or cordial not made by complainants."

11. The Court of Appeals in their said opinion suggested two forms of label, of which the Court said they could "see no reason why the defendant should not be permitted" to use them, "printed in any language." The second of these labels proposed by the Court of Appeals begins with the words "Liqueur made at the Grande Chartreuse,"—the *identical* words which the Carthusian Monks have for generations used on their old labels. It is true that these words as used by the Carthusian Monks were printed in French ("Liqueur Fabriquée à la Gde. Chartreuse"), but the Court of Appeals says that the defendant may use either of these proposed labels "printed in any language." (Trans., p. 1590.)

12. Your petitioners submit that, if the respondent be permitted to use the word "Chartreuse," if it be permitted to use the peculiarly shaped bottle of the Carthusian Monks, and if in addition to this it be permitted to use the identical words ("Liqueur Fabriquée à la Gde. Chartreuse") the only conspicuous words on the old labels of the Carthusian Monks the admitted property rights of petitioners will be seriously damaged, and full opportunity will be afforded to all unscrupulous dealers to sell the liqueur of this respondent as and for the original and genuine Chartreuse of the Carthusian Monks; in fact, the rights granted to respondent under such decree would amount in substance to the right appropriate and use the recognized trade-mark of the Order of the Chartreux.

13. At different times, seven United States Judges have heard argument and written or concurred in opinions on the subject-matter of this litigation; three Judges (LACOMBE, TOWNSEND, HOUGH, JJ.) of the said seven were most emphatic in their opinions that the Bill of Complaint should be sustained and the prayers thereof granted; one of said Judges (WALLACE, J., who sat in the Court of Appeals on the appeal from the order granting a preliminary injunction) declined to pass finally on the case on the meagre proofs (*ex parte* affidavits) then before him; two of said Judges (COXE and WARD, JJ., on appeal after final hearing) held that the Bill should be sustained but that the decree should be modified as herein before stated; and the last of said seven Judges (NOYES, J.) concurred in the result obtained by the holding of COXE and WARD, JJ., but arrived at that result by a process of reasoning radically different from that of the majority of the said Court of Appeals.

14. From the foregoing recital it will be seen that this cause involves questions of unusual gravity and importance,—questions involving the interpretation of the trade-mark laws of the United States and of the protection afforded thereunder; involving also the effect upon a business, good-will, and trade-marks existing in the United States of the French law known as the "Associations Act"; also the effect upon American trade-marks and good-will of the decrees of French Courts, and the actions of the receiver appointed thereunder; also the effect upon the same property-rights of the transfer of the factory of the Monks from France to Spain, and of the changes made by them in their bottles and labels; and involving also the interests of the American public to be protected from fraudulent substitution of an imitation article for that with which the trade-mark "Chartreuse" has been for several generations associated (*Medicine Co. v. Wood*, 108 U. S. 218, 223).

WHEREFORE, in order that the foregoing and other matters may be properly considered and adjudicated, your petitioners pray that this Honorable Court will grant its writ of *certiorari* directed to said Circuit Court of Appeals, for the Second Circuit, requiring the complete record of this cause in said Court to be certified to this Court, and that this Court will thereupon proceed to correct the errors herein complained of, and reverse the decree of said Circuit Court of Appeals in so far as the decree of the Circuit Court is modified thereby, and remand said cause, and give to your petitioners such other and further relief as the nature of the case may require, and to the Court may seem proper in the premises.

And your petitioners, having already taken an appeal to this Court from the said decision of the Circuit Court of Appeals for the Second Circuit, but being uncertain whether they are entitled to an appeal as matter of right, therefore, they further pray the Court to direct that the transcript of the record herein, filed under said appeal, be accepted as the return to the *certiorari*.

And your petitioners will ever pray.

PERE ALFREDO LUIS BAGLIN,
Superior-General of the Order of Carthusian Monks, for himself and all of the other members of said Order.

BY PHILIP MAURO,
Their Attorney.

CERTIORARI FORM XIII.—PETITION TO SUPREME COURT FOR WRIT OF CERTIORARI TO REVIEW DECISION OF CIRCUIT COURT OF APPEALS IN CASE INVOLVING LEGITIMACY OF CHILD.

[Application denied.]

TO THE SUPREME COURT OF THE UNITED STATES OF AMERICA:

The petition of Leonora A. Arnold and Thomas E. Arnold, her husband, for a writ of certiorari directed to the Circuit Court of Appeals, for the Second Circuit, to bring before the Supreme Court the case of

LEONORA A. ARNOLD and THOMAS E. ARNOLD, her husband,
Complainants and Appellants,
vs.
CHARLES A. CHESEBROUGH, individually and as Executor and Trustee under the Last Will and Testament of Margaret Chesebrough, and ELIZABETH LOUNSBURY, as Executrix of the Last Will and Testament of Stephen R. Lounsbury, deceased,
Defendants and Appellees.

The said petitioners respectfully show to this Court as follows:

I.—That your petitioners were, at the time of the commencement of this action, citizens and residents of the State of New Jersey, and the defendants were at that time citizens and residents of the State of New York.

II.—That on the 10th day of November, 1860, one Margaret Chesebrough, a widow, died, leaving her surviving as her only heirs-at-law, her two sons, Blasius M. Chesebrough, the father of the petitioner, Leonora A. Arnold, and Charles A. Chesebrough, one of the defendants in said action.

III.—That upon her decease said Margaret Chesebrough left a last will and testament, which was thereafter duly admitted to probate by the Surrogate of the City and County of New York, on the 26th day of November, 1860 (pages 4 to 8, Pleadings and Orders, vol. 5), in and by which, after making certain specific bequests, she devised the rest, residue and remainder of her estate, real and personal, to her executors and trustees therein named and appointed, to wit, said defendant Charles A. Chesebrough, said Blasius M. Chesebrough and one Stephen R. Lounsbury, in equal one-half parts to be held in trust by them, to collect the rents, issues and profits thereof, and pay one-half thereof to her son Blasius M. Chesebrough during his life, and the other half to her other son Charles A. Chesebrough, and upon the death of either of her said sons to pay and distribute and divide said one-half share and the accumulations thereof to and among the lawful issue of said deceased son; and upon the death

of the remaining son to likewise to dispose of the other one-half share, and upon the decease of either son without issue, then to dispose of such one-half share to the surviving son (pages 4 to 8, Pleadings and Orders, vol. 5).

IV.—That thereafter and on about the 4th day of June, 1884, said executor and trustee, Stephen R. Lounsbury, who had duly qualified as such, departed this life, leaving a last will and testament, in and by which he appointed the defendant Elizabeth Lounsbury, his executrix (page 39, Pleadings and Orders, vol. 5).

V.—That thereafter and on the 16th day of April, 1866, said Blasius M. Chesebrough died intestate, leaving the petitioner Leonora A. Arnold him surviving, his sole lawful issue and heir-at-law; and thereupon said petitioner, under and by virtue of said last will and testament of said Margaret Chesebrough, became entitled to have and receive one-half of the said residue and remainder of the estate of said Margaret Chesebrough, consisting at the time of the commencement of this action of a large amount of real estate situate in the cities of Brooklyn and New York in said State of New York, valued at upward of two million dollars at that time, and of personal property, and the proceeds of certain real estate sold, amounting to upward of two hundred and forty thousand dollars (pages 104-112, Pleadings and Orders, vol. 5).

VI.—That thereafter and on the 13th day of March, 1886, these petitioners, upon the refusal of the defendant Charles A. Chesebrough, as executor and trustee of said last will and testament of said Margaret A. Chesebrough, and upon the refusal of said Elizabeth Lounsbury, as executrix of the estate of the other trustee Stephen R. Lounsbury, to account for and pay over to her said personal property, and to deliver to her possession of said real estate after demand prior thereto duly made, filed a bill of equity in said cause in the Circuit Court of the United States for the Eastern District of New York, to have it established that your petitioner Leonora A. Arnold was the lawful issue of said Blasius M. Chesebrough and entitled to have and receive from these defendants the property theretofore demanded of them by her as aforesaid.

VII.—That the defendant, Elizabeth Lounsbury, interposed an answer denying any knowledge or information sufficient to form a belief as to the matters alleged in said bill of complaint, and the defendant, Charles A. Chesebrough, interposed his answer in and by which he denied that said Blasius M. Chesebrough and the mother of your petitioner, Leonora A. Arnold, were married, and claiming upon that ground that said petitioner, Leonora A. Arnold, was not the lawful issue of said Blasius M. Chesebrough, and entitled to take, have and receive under and by virtue of the terms of said will of said Margaret A. Chesebrough said one-half share, together with its accumulations of the rest, residue and remainder of her estate (page 215, Pleadings and Orders, vol. 5).

VIII.—That thereafter, and on the 24th day of February, 1891, after the taking and printing of a large amount of testimony, said cause came on for final hearing before Hon. E. Henry Lacombe, Circuit Judge,

who thereafter, and on the 30th day of June, 1891, filed his decision to the effect that these petitioners had failed to establish that said Blasius M. Chesebrough and the mother of your petitioner, Leonora A. Arnold, were married, and dismissing said bill of complaint, but without costs; and thereafter, and on the 21st day of December, 1891, a decree in accordance with said decision was duly entered (page vol.).

IX.—That thereafter and on the 3d day of May, 1893, said appeal to said Circuit Court of Appeals came on to be heard before Judges Wallace, Shipman and Wheeler (vol. 10, page 2). And thereafter and on the 24th day of October, 1893, said Circuit Court of Appeals rendered and filed two opinions (vol. 10, page 4), one written by Chief Judge Wallace and concurred in by Judge Shipman, holding that said petitioners had failed to establish a marriage between the father and mother of said petitioner, Leonora A. Arnold, and for an affirmance, upon that ground, of said decree. The other opinion was written by Judge Wheeler, holding that such a marriage had been established, and for a reversal of said decree, and in favor of awarding to these petitioners the rights sought to be obtained by them in said action; copies of which said opinions are hereto annexed and marked respectively "Exhibits A and B."

X.—That the principal facts established by the evidence in this case as to a marriage between Blasius M. Chesebrough and the mother of your petitioner, Leonora A. Arnold, all of which was uncontradicted except that of the mother, who was contradicted by herself alone, are very briefly as follows:

That in the month of February, 1854, Josephine Cregier (the mother of your petitioner, Leonora A. Arnold), then about sixteen years old, and a Christian girl, who had received a religious and moral training at the hands of her mother, a respectable widow of the name of Rachel Cregier residing at Sixth avenue and Twenty-eighth street in the City of New York, met and formed the acquaintance of Blasius M. Chesebrough, at a high-toned and highly respectable school for instruction in dancing, at No. 16 Bond street in said City of New York, where she was being prepared to enter society (Complainant's Proofs, vol. 2, pages 604 to 606; vol. 3, pages 1175, 1176, 1179, 1183, 1165, 1288, 1289, 1300).

That after about six or seven months of courtship she and Blasius eloped and went to the City of Baltimore, in the State of Maryland, where they both claimed to have been married (Complainant's Proofs, vol. 3, pages 1179-1183).

That a marriage between them was duly solemnized there at this time is proven by the only living party to it; viz., the wife (Complainant's Proofs, page 1387, vol. 3, page 1649, vol. 4).

That thereupon they took up their abode at the Everett House, and from that time forth they continuously, publicly and notoriously lived together as husband and wife until their separation four and a half years thereafter (Complainant's Proofs, vol. 3, page 1183; vol. 1, pages 70-71).

During this cohabitation there were born to them two children, the older since deceased, and the other, the said petitioner, Leonora A. Arnold

(Complainant's Proofs, vol. 3, page 1387; vol. 1, pages 49 and 427; vol. 4, pages 1545 and 1608).

That such cohabitation of the father and mother of your petitioner, Leonora A. Arnold, as husband and wife during such period of time, was well known to the members of both of the families of said petitioner's father and mother; and that upon the birth of said petitioner, Blasius' mother sent to them presents, consisting, among other things, of an outfit of infant's wear, etc. (Complainant's Proofs, vol. 2, page 950, and vol. 3, page 1234, fol. 3702; Defendant's Proofs, vol. 2, page 293, fol. 879).

That the birth of said petitioner was at the time duly recorded by the attendant physician with the knowledge and consent of all the parties, and duly registered as required by law, in the Bureau of Vital Statistics for the City and County of New York (Complainant's Proofs, vol. 4, pages 1546 and 1608).

That the birth and death of the first child born to the father and mother of your said petitioner was duly and publicly announced by both its parents.

That this cohabitation was that of husband and wife, and that it was continuous and apparently and reputedly matrimonial, is indisputably established by the admissions and declarations of both parties to it made during that time, and also by the testimony of twenty-two persons who knew of this cohabitation and were acquainted with the parties themselves or with the members of their respective families.

See testimony of

Mrs. Huldah H. Clapp, Complainant's Proofs, vol. 1, p. 65.
Daniel Goff, Complainant's Proofs, vol. 1, p. 210, 248 to 249.
Mrs. Emeline Irving, Complainant's Proofs, vol. 1, p. 381.
Lawrence Harran, Complainant's Proofs, vol. 1, p. 329 and 275.
Mrs. Julia H. Doubleday, Complainant's Proofs, vol. 1, p. 156 and 170.
James M. Marvin, Complainant's Proofs, vol. 1, p. 50.
Hiram Tompkins, Complainant's Proofs, vol. 1, p. 39.
John Tully, Complainant's Proofs, vol. 1, p. 71 and 75.
Mrs. Fannie Post, Complainant's Proofs, vol. 1, p. 7.
Samuel E. Meade, Complainant's Proofs, vol. 1, p. 186, 190, 191 and 204.
Mrs. Maria Van Vleck, Complainant's Proofs, vol. 1, p. 174 to 184.
Peter Staeden, Complainant's Proofs, vol. 1, p. 88-90, 106, 120, 120 to 124 and 151.
Mrs. Robert Franklin, Complainant's Proofs, vol. 1, p. 425.
Mrs. Margaret A. Cregier, Complainant's Proofs, vol. 1, p. 479.
Christian S. Storms, Complainant's Proofs, vol. 2, p. 522.
Mrs. J. Fitzgerald, Complainant's Proofs, vol. 2, p. 949 and 950.
Edwin Wood, Complainant's Proofs, vol. 2, p. 487.
Mrs. Elizabeth Blum, Complainant's Proofs, vol. 3, p. 1526 to 1528.
Wm. S. Kinch, Complainant's Proofs, vol. 3, p. 1382.
Miss Eliza M. Storms, Complainant's Proofs, vol. 3, p. 991.

Mrs. Almira W. Sisson, Complainant's Proofs, vol. 3, p. 1179 to 1183.

Philip B. Segee, Complainant's Proofs, vol. 3, p. 1415.

Certificate of birth of child, Complainant's Proofs, vol. 4, p. 1546 and 1608.

Judgment for board against Blasius M. Chesebrough for himself and family, Complainant's Proofs, vol. 4, p. 1610.

Letters, Complainant's Proofs, vol. 4, p. 1621, 1625 to 1648.

Josephine Chesebrough's action for dower, Complainant's Proofs, vol. 4, p. 1689.

Affidavit of Josephine Chesebrough, Complainant's Proofs, vol. 4, p. 1649.

Powers of attorney of Josephine Chesebrough, Complainant's Proofs, vol. 4, p. 1652 and 1623.

Hotel Records, Complainant's Proofs, vol. 4, p. 1539 to 1545.

Release of dower by Mrs. Josephine Chesebrough, Complainant's Proofs, vol. 1, p. 481 and vol. 4, p. 1625.

XI.—The defendant Chesebrough's evidence consisted entirely of the four classes hereinafter mentioned:

First—The testimony of some twenty-six persons, some of whom testified to the effect that they had not heard that Blasius was married, while others said that, after his separation from his wife, they had heard him say that he was not married, or that he would not marry the best woman living.

None of these persons were ever acquainted with Josephine, none of them knew of this cohabitation between her and Blasius during the time it continued, and many of them never knew Blasius and never spoke to him. Such testimony was inadmissible, as has been expressly held by the New York Court of Appeals, in Badger *vs.* Badger, 88 N. Y. 546-554, § 556.

See testimony of—

Jonas Holzwasser, Defendant's Proofs, vol. 1, p. 32.

Blaze Ryer, Defendant's Proofs, vol. 1, p. 42.

Mary E. Haley, Defendant's Proofs, vol. 1, p. 45.

Maria Hegeman, Defendant's Proofs, vol. 1, p. 50.

Amelia R. Moore, Defendant's Proofs, vol. 1, p. 54.

Martin Brill, Defendant's Proofs, vol. 1, p. 79.

Oscar Hudson, Defendant's Proofs, vol. 1, p. 86.

Martha M. Bowers, Defendant's Proofs, vol. 1, p. 96.

Mary Roose, Defendant's Proofs, vol. 1, p. 112.

Jeremiah V. Spader, Defendant's Proofs, vol. 1, p. 175.

Margaret G. Spader, Defendant's Proofs, vol. 1, p. 176.

Frederick A. Putnam, Defendant's Proofs, vol. 1, pp. 199, 243.

Thomas W. Bollas, Defendant's Proofs, vol. 1, p. 235.

Harry Hill, Defendant's Proofs, vol. 1, pp. 267, 268.

John D. Clark, Defendant's Proofs, vol. 1, pp. 276, 285, 287, 294.

Francis Nelson Drew, Defendant's Proofs, vol. 1, p. 316.

James McPyke, Defendant's Proofs, vol. 1, p. 358.

John Judge, Defendant's Proofs, vol. 1, p. 377.
William T. Delany, Defendant's Proofs, vol. 2, p. 10.
William G. Peterson, Defendant's Proofs, vol. 2, p. 51.
Samuel Hemple, Defendant's Proofs, vol. 2, p. 69.
George W. Smith, Defendant's Proofs, vol. 2, p. 85.
Alice Unger, Defendant's Proofs, vol. 2, p. 109.
Emma Ryder, Defendant's Proofs, vol. 2, p. 130.
Samuel I. Ryan, Defendant's Proofs, vol. 2, pp. 146, 149, 154.
Catharine Speight, Defendant's Proofs, vol. 2, p. 262.

This evidence was introduced by the defendant for the purpose of showing a divided repute as to this marriage, and was objected to by the complainants upon the three following grounds:

(1) The testimony of persons who had no knowledge of this cohabitation, to the effect that they had never heard of it, could not by any possibility tend to show whether it was meretricious or matrimonial, and consequently of the character held inadmissible in Badger *vs.* Badger, 88 N. Y. 554.

(2) That declarations made by Blasius after this cohabitation had ceased were incompetent to show what its true character was. In other words, if it was matrimonial, he could not, after it had ceased, make it meretricious by saying that it was such.

(3) That after a cohabitation had ceased, and issue from it is living, neither party to it will be allowed to bastardize that issue by saying that it was meretricious and not matrimonial, as it appeared to be.

Second.—Two deeds claimed to have been executed by Blasius seven years after his separation from his wife, and at a time when each was ignorant of the other's whereabouts, to which deeds Josephene was not a party, which were objected to by the complainants upon the same grounds as last above stated (defendant's proof, vol. 4, pp. 187 and 183, and complainant's proofs, vol. 3, pp. 1253 to 1256, 1387, 1393, and vol. 4, pp. 1718 to 1719, 1725, 1723, 1742, 1743).

Third.—The judgment roll in an action brought by Josephene's mother against Blasius after their separation, in which she claimed to recover damages against him for the alleged seduction of her daughter, which was also objected to by the complainants upon the ground that as Josephene was not a party to the suit and did not know of it, said suit did not in any way tend to show what was the character of this cohabitation because the parents of neither party to a marriage can divorce them by bringing such a suit (defendant's proof, vol. 2, p. 303).

Fourth.—Also that one year and six months after the mother of your said petitioner had testified with regard to her marriage with Blasius M. Chesebrough in Baltimore, the defendant Chesebrough suborned her to commit perjury and testified that she was not married to Blasius, but lived with him *as his wife* during this period of time under a promise that he would marry her immediately after his mother's death (pp. 296, 293 and 285; Defendant's Proofs, vol. 2, and Complainant's Proofs, pp. 621 to 627, 676, 677, vol. 2), which testimony these complainants claim, even if true, still showed a marriage valid in law.

The foregoing mentioned evidence constituted all the proofs introduced on behalf of the defendant, Chesebrough, to show, as he claimed, that this cohabitation which had existed for four and a half years between Blasius and Josephene, in the course of which two children were born to them, was not a matrimonial one, as it seemed to be and as they had both declared it to be, but one which had been entered into under a promise that it should be followed by a marriage after the death of Blasius' mother, and therefore not valid in law.

XII.—That by reason of the fact that said defendant, Charles A. Chesebrough was able to suborn the mother of said petitioner to commit perjury as aforesaid, and testify that she was not married to said Blasius M. Chesebrough, as she had first testified to, but that she had lived with him as his wife under a promise to marry her *de futuro*, said Circuit Court of Appeals, in the written opinion of Judge Wallace, held that her testimony in regard to her marriage having taken place in Baltimore should be disregarded; and also, that her living with him under a promise to marry her *de futuro* did not establish a legal marriage (p. 14, vol. 10).

Judge Wheeler, in his opinion, held that as she had lived with Blasius as his wife, whether it was under a contract of marriage made *per verba de praesenti* or *per verba de futuro*, followed by such cohabitation, still it was in law a valid marriage.

1 Blackstone's Commentaries, 465.
1 Kent's Commentaries, 87.
2 Greenleaf Ev., § 460.

And he further held that the fact that she had been suborned by the defendant to commit perjury did not tend to destroy the effect of her first testimony in regard to the contracting of a marriage, in view of the fact that the taking place of such a marriage was so strongly corroborated by their open, public and continuous cohabitation as husband and wife in the presence of their relatives, friends and acquaintances for a period of four and a half years thereafter, and by the reputed declarations of both herself and of Blasius, during it, that they were husband and wife (pp. 6 and 9, vol. 10).

XIII.—That it is not shown by the evidence in this case that there was any cohabitation whatever between the parents of your petitioner prior to said 18th day of August, 1854, except the testimony of said petitioner's mother, who says that it existed only for a very short time, and that, too, upon a promise that it should be consummated by a marriage ceremony which she says took place at Baltimore, Maryland, immediately preceding their beginning to live together at the Everett House on said date (Complainant's Proofs, vol. 3, p. 1387).

XIV.—That the uncontradicted evidence shows that after the separation of the parents of said petitioner in the fall or winter of 1858-9 the parents of said petitioner never thereafter intermarried with any other person, and did not know of each other's whereabouts or doings until shortly after the death of said Blasius M. Chesebrough, when the mother of said petitioner, Leonora A. Arnold, came from Nashville, Tenn., where she was then living,

and endeavored to obtain an enforcement of her rights, as his widow, for her dower in and to a small piece of property which he owned in his own right (Defendant's Proofs, vol. 2, pp. 181, 283, 284-303, and Complainant's Proofs, vol. 3, p. 1,254, and vol. 4, pp. 1718, 1719-1725, 1723-1742).

Thereafter she commenced a suit to enforce such dower rights, in the Circuit Court of the United States for the Southern District of New York, which was dismissed by default, without her knowledge, and without the calling of any witnesses, upon the call of the calendar of that Court (Defendant's Proofs, vol. 2, pp. 300 to 302, and Complainant's Proofs, vol. 4, pp. 1689 to 1697).

XV.—The questions of law with regard to the proving of a marriage involved in this case are substantially as follows:

1. Whether or not the proof of such a marriage, by the direct testimony of one of the parties to it, when corroborated by the acts and declarations of herself and the other party to it during the time of the cohabitation immediately following it, and by the undisputed evidence of a large number of witnesses that they openly, publicly and continuously cohabited together as husband and wife for a period of four and a half years, and bore issue during that time, can be destroyed by the testimony of such party after the death of the other, to the effect that such marriage did not take place, and that such cohabitation, although continuous, and openly and publicly and apparently matrimonial, was really had under a secret agreement that a marriage should not take place until the happening of some future event.

2. Whether or not a cohabitation under a promise that a ceremonial marriage should be performed after the happening of some future event, where an open, public and continuous cohabitation has immediately followed such promise and is had after the happening of such future event, upon the faith and strength thereof, and issue born is the result of such cohabitation, does not establish a marriage valid at common law in at least one of the different States in which the parties cohabited as husband and wife (as held by Judge Wheeler, following Blackstone, Kent, Greenleaf and other authorities).

3. Assuming that the intercourse between the parties to the marriage was secretly illicit for a short period of time, whether or not undisputed evidence showing that immediately after this commencement they openly, publicly and continuously cohabited together as husband and wife for a period of four years and a half thereafter, during which time two children were born of it, does not establish a marriage.

4. Whether or not, after the cohabitation between the parties has ceased, and issue has been born, and neither of them ever thereafter intermarries with any other person, the declarations of either party to the effect that they were not married, is competent to disprove a presumption of marriage arising from such cohabitation.

5. Whether or not a judgment roll in a suit for the seduction of the woman by the man, brought against the man by the mother of the woman, after such cohabitation has ceased, is competent evidence to disprove such a marriage or the presumption thereof arising from such cohabitation.

XVI.—And your petitioners further aver that the present case is one in which it is proper for this Court to issue a writ of certiorari, for the following reasons:

1. The Judges of the Circuit Court of Appeals are divided in their opinions (hereto attached) upon the questions of law involved herein as to the construction and application of the rules of evidence in regard to establishing not only a ceremonial marriage, but also one at common law; that is, as to whether or not a promise to marry *de futuro* immediately followed by an apparently matrimonial cohabitation during which issue was born, is not valid as a marriage at common law, which is the same question that this Court was equally divided on in Jewell *vs.* Jewell, 1 Howard 219.

2. Because the legitimacy of children is involved in the application and construction of these principles of law in regard to the proving and establishing of a marriage.

3. Because the pecuniary rights of the parties hereto involved are large, being upward of several millions of dollars.

4. Because this decision of a majority of the Judges of the Circuit Court of Appeals, as it now stands, is opposed to the decisions of this Court, and of the highest Courts of the State of New York, upon the law of marriage.

Wherefore your petitioners pray that this Honorable Court will be pleased to grant a writ of certiorari in this case to the Circuit Court of Appeals for the Second Circuit to bring up this case to this Honorable Court for such proceedings therein as to this Honorable Court may seem just.

LEONORA A. ARNOLD.
THOS. E. ARNOLD.

STATE OF NEW YORK, }
Southern District of New York, } *ss.:*

Leonora A. Arnold and Thomas E. Arnold, her husband, being duly sworn say, and each for herself and himself say: That deponent has read the foregoing petition, that the same is true to petitioner's knowledge, information and belief; and that deponent's knowledge is derived from the record in this case and from what has taken place in his presence and hearing in the Court in which this action has been heard.

LEONORA A. ARNOLD.
THOS. E. ARNOLD.

Sworn to before me this 26th day of February, 1894. }
[SEAL.]

JOS. F. ARNOLD,
Notary Public,
N. Y. City and Co.

We hereby certify that we have examined the foregoing petition, and in our opinion the petition is well founded, and that the case is one in which the prayer of the petitioners should be granted by this Court.

JOSEPH H. CHOATE.
JOHN H. V. ARNOLD.
ROGER FOSTER.

CERTIORARI FORM XIV.—PETITION TO SUPREME COURT TO REVIEW DECISION OF CIRCUIT COURT OF APPEALS IN CASE OF PROMISE TO LEAVE LEGACY.

[The author was counsel in opposition.]

IN THE SUPREME COURT OF THE UNITED STATES.

[Application denied.]

OCTOBER TERM, 1921.

[Title.]

To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States:

Your petitioners, William Nelson Cromwell and Louis H. Cramer, as executors of the last will and testament of Frank Leslie, deceased, respectfully show to this honorable Court as follows:

I. This is a petition for a writ of certiorari to review a final determination of the Circuit Court of Appeals for the Second Circuit, made and entered in said Court on the 25th day of January, 1922.

II. The case presents the following unusual situation:

The case has been twice in the Circuit Court of Appeals on Writ of Error. On the second appeal the Court, after most carefully reconsidering a question which it had passed upon on the first appeal, came to the conclusion that its decision on the first appeal was erroneous, which conclusion it has expressed in an able and convincing opinion. The question involved is one which is determinative of the case. Had it been correctly decided upon the first appeal the directed verdict for the defendants (Petitioners here) on the first trial in the District Court would have been affirmed. Could the error be corrected now the judgment for the plaintiff (Respondent here) on the second trial would be reversed with directions to enter judgment for the defendants.

The Circuit Court of Appeals, however, despite the fact that it has been willing on the second appeal to reconsider its first decision and to confess its error, has felt itself bound by "the law of the case" to follow its decision on the first appeal.

The result is that the Court affirms a judgment for the plaintiff for upwards of $53,000, which it now holds that there was no evidence to support.

Your Petitioners represent that such an application of "the law of the case" would tend seriously to discredit the administration of justice, and that the refusal of the learned Circuit Court of Appeals to correct its admitted error is in conflict with its own recent and prior decision as to "the law of the case" in Johnson vs. Cadillac Motor Car Co., 261 Fed.

Rep., 878. Your Petitioners ask for a Writ of Certiorari on the authority of Messenger vs. Anderson, 225 U. S. 436.

The opinion of the learned Circuit Court of Appeals on the second appeal concludes as follows (Record, fol. 678):

"The majority of the Court which heard the case on the second writ of error have felt it their duty, however, to state fully and frankly their view of the law and to point out herein and why we differ from the decision rendered when the case was here before. We may be in error, or the majority of the Court at the former hearing may have been in error; we are certainly not both right. It may be that the learned counsel who argued this cause may still find in this unusual situation, involving as it does a considerable amount of money, some way of ascertaining which of these conflicting views is correct. But however that may be we have no alternative and the judgment must be affirmed."

The respondent, Annie S. Simons, was the plaintiff below. She brought an action at law against the defendants, as executors, to recover for breach of an alleged contract made by their testatrix, Frank Leslie (Frank Leslie was a woman), to give Mrs. Simons a legacy of $50,000. Mrs. Leslie's will gave her only $10,000. The action was on an alleged express oral agreement to leave a legacy of $50,000.

On the first trial in the District Court the judge presiding (Hon. Augustus N. Hand) directed a verdict for the defendants, on the ground that there was no evidence sufficient to establish a contract between Mrs. Leslie and the plaintiff. On plaintiff's writ of error, the Circuit Court of Appeals reversed, holding that there was evidence from which a jury would have been warranted in finding that the alleged contract was made. (Simons vs. Cromwell, 262 Fed. Rep., 680.)

On the second trial in the District Court before a jury (Judge Learned Hand presiding), on evidence for the plaintiff identical with the evidence on the first trial, the issue was submitted to the jury, and the jury found in favor of the plaintiff. On defendant's writ of error, the Circuit Court of Appeals affirmed the judgment of the District Court in favor of the plaintiff, the determination of the Circuit Court of Appeals being therefore final.

The majority of the Circuit Court of Appeals, however, on the second appeal was strongly of the opinion and in terms held that the decision on the first appeal was erroneous, and that there was, on neither trial, sufficient evidence to warrant the jury in finding that Mrs. Leslie ever made a contract to leave a legacy to the plaintiff. The affirmance was on the sole ground that its decision on the first appeal was "the law of the case" and that, therefore, the Court had "no alternative," being bound by its decision on the first appeal.

On the first appeal the case was heard by Judges Ward, Rogers and Manton, and on the second appeal by Judges Rogers, Manton and Mayer. The majority opinion on the first appeal was written by Judge Ward. Judge Manton concurring and Judge Rogers dissenting. (As pointed out by Judge Rogers in his opinion on the second appeal, the official report

of the case on the first appeal does not show his dissent [fol. 605]. This was due to an error in the Clerk's office.) On the second appeal the majority opinion (fol. 592) was written by Judge Rogers, Judge Mayer concurring. Judge Manton wrote a concurring opinion (fol. 679), in which he expressed his agreement with the decision on the first appeal, in which he had concurred.

Judge Rogers' opinion states (fol. 671):

"I am authorized by Judge Mayer to say that he fully concurs in the views expressed herein that there is no evidence whatever that any promise or agreement was ever made by Mrs. Leslie to Mrs. Simons that she would leave $50,000 to her by will, and therefore that there was no question to be submitted to the jury under the cause of action pleaded.

"The majority of the Court, as constituted at the present hearing, are convinced that the conclusion reached on the first hearing was erroneous * * *."

The question as to which the Court now finds itself in disagreement with its decision on the first appeal is this:

The plaintiff was a first cousin of Mrs. Leslie. The alleged contract on which she sues is the usual agreement to leave a legacy in consideration of services to be rendered by the promisee. The evidence shows that the plaintiff, after the making of the alleged promise by the testatrix, did render certain services—chiefly as an occasional companion,—the rendering of which C, or the promise to render which) would have constituted sufficient consideration for a promise to leave a legacy. The only question is whether the alleged contract was ever made.

The only witness who testified on this issue was the husband of the plaintiff, Mr. Robert H. Simons, and his one and only piece of testimony on this issue relates to a conversation which he had with Mrs. Leslie in March, 1902, years before the death of Mrs. Leslie in 1914.

Mrs. Leslie had come to Charleston, S. C., from New York to visit the plaintiff and her husband. The plaintiff had accompanied her on the journey. A day or two after their arrival in Charleston Mr. Simons had the following talk with the testatrix:

Mr. Simons: "Cousin Florence, my wife tells me you are going to leave her $50,000 in your will, and I wish to thank you."

Mrs. Leslie: "Robert, I am due Annie that money for what she has done, rendering many services in my present condition, and I propose to call on her in the future." (fols. 275-276.)

Mr. Simons thanked her and she never mentioned the subject again (fols. 295-296).

There is absolutely no other evidence in the case tending to prove the making of the alleged contract.

The majority of the Circuit Court of Appeals on the second appeal held that this testimony was not sufficient to take the case to the jury. Inasmuch, however, as this was exactly the same evidence which the same Court on the first appeal had held sufficient to warrant a jury in finding

that the alleged contract had been made, the learned Court on the second appeal felt that it had no choice but to affirm the judgment for the plaintiff.

On the second trial, plaintiff's husband admitted, on cross-examination, that Mrs. Leslie did not say that she had "agreed" or "promised," or even that she "intended" or "expected" to leave a legacy to the plaintiff (fols. 618-630; 294-306). Her actual language consisted merely of the words quoted above. The learned Court did not think that these admissions of the witness on cross-examination on the second trial differentiated the evidence from the evidence on the first trial, since his testimony as to the actual words used by Mrs. Leslie was the same on both trials (fol. 631).

III. (a) This case has been in this Court before on a mandamus. (*Ex parte* Simons, 247 U. S., 231.) Nothing, however, now turns upon the point decided by this Court on that proceeding. (See opinion of Judge Rogers, fols. 598-603.)

(b) The complaint in the case originally contained three counts,—one on an alleged express oral agreement to leave the $50,000 legacy; one on an alleged agreement to leave the plaintiff by will the reasonable value of her services; and one on an ordinary quantum meruit. The issues raised by the second and third of these counts were disposed of adversely to the plaintiff on the first trial (a verdict for the defendants being directed as to them), which decision was affirmed on the first appeal; and on the second trial and the second appeal the same disposition was made of these issues.

IV. Your petitioners respectfully show that of the five judges who have had to pass upon the sufficiency of the plaintiff's evidence to establish the alleged contract, three—namely, Judge Augustus N. Hand in the District Court and Judges Rogers and Mayer in the Circuit Court of Appeals—have held that the evidence was insufficient to establish the alleged contract, while two—namely, Judges Ward and Manton have held to the contrary. (Judge Learned Hand, who tried the case on the second trial, being bound by the decision of the Circuit Court of Appeals on the first appeal, was not called upon to decide and expressed no opinion on the question.)

V. Your petitioners respectfully show that the situation in this case is therefore an extremely unusual one, and one which will warrant this Honorable Court in allowing a certiorari, in that—

(a) The case of Messenger vs. Anderson, 225 U. S. 436, is authority for the allowance of the writ in this case. In that case this Court allowed a certiorari to review the decision of a Circuit Court of Appeals construing a will, where that Court, on a subsequent appeal, had held that "the law of the case" compelled it to adhere to its construction of the will on an earlier appeal.

(b) The decision of the Circuit Court of Appeals on the first appeal is clearly in conflict with the New York decisions on the question. Under the New York authorities it is plain that the plaintiff would have been non-suited if she had sued in a New York court.

(c) The Circuit Court of Appeals misapplied the rule of "the law of the case," and in this respect its decision is in conflict with its own recent decision in Johnson vs. Cadillac Motor Car Co., 261 Fed. Rep., 878, the distinction between the cases taken by the Court being unsound.

(d) "In the absence of statute the phrase, law of the case, as applied to the effect of previous orders on the later action of the Court rendering them in the same case, merely expresses the practice of courts generally to refuse to reopen what has been decided, not a limit to their power." (Messenger vs. Anderson, *supra*, at p. 444.) The law of the case expresses a rule of public policy. The public policy of the rule prevents the courts, in general, from reconsidering questions already decided, except in unusual cases. Where, however, a Court does consent to reconsider, and, upon thorough and conscientious reconsideration, concludes firmly and expresses its conclusion that its former decision was erroneous, the situation is reversed, and public policy requires that it should correct its admitted error, except in unusual circumstances.

(e) The correction of the Court's admitted error would not prolong the litigation, by requiring still another trial, since the Court now holds that the directed verdict on the first trial should have been affirmed.

(f) The situation is also analagous to the situation in which this Court is asked to pass upon a question concerning which the decisions of the Circuit Court of Appeal in different circuits are conflicting.

(g) In the opinion of three of the five judges who have passed on the question, the present judgment in favor of the plaintiff is, as a matter of law, unsupported by any evidence whatever.

For the foregoing reasons your petitioners respectfully represent that the case is one of gravity and importance, and they therefore respectfully pray that a Writ of Certiorari may be issued out of and under the seal of this Court, directed to the United States Circuit Court of Appeals for the Second Circuit, commanding said Court to certify and send to this Court, on the date to be designated in said writ, a full and complete certified transcript of the record of all proceedings of the said Circuit Court of Appeals in this case, to the end that the said case may be reviewed and determined by this Court as provided by law, and that your petitioners may have such other and further relief and remedy in the premises as to this Court may seem proper, and that the judgment of the Circuit Court of Appeals for the Second Circuit, affirming the judgment of the District Court for the Southern District of New York, be reversed, with directions that judgment shall be entered for your petitioners, the defendants.

And your petitioners will ever pray.

William Nelson Cromwell
Louis H. Cramer
As executors of the Last Will and Testament of Frank Leslie, deceased, by
Edgar T. Brackett
Philip L. Miller

CERTIORARI FORM XV.—STIPULATION FOR DISMISSAL OF APPEAL ANNEXED TO PETITION.

UNITED STATES SUPREME COURT.

LEONORA A. ARNOLD and THOMAS E. ARNOLD, her husband,
Complainants and Appellants,
vs.
CHARLES A. CHESEBROUGH, individually as Executor and Trustee under the last Will and Testament of Margaret Chesebrough and Elizabeth Lounsbury, as Executrix of the last Will and Testament of Stephen R. Lounsbury, deceased,
Defendants and Appellees.

At the time of the entry of the decree of the Circuit Court of the United States for the Eastern District of New York, dismissing the bill of the petitioners herein, the complainants in that suit, upon the merits, the construction of the Evarts Act was so unsettled and doubtful that the petitioners were advised by their counsel that the only safe practice for them to pursue was to take two appeals: one to the Circuit Court of Appeals upon the whole case; and the other to the Supreme Court of the United States upon the jurisdictional question involved as to whether a Court of Equity had jurisdiction of the complainants' suit, and if not, whether the decree should not have been for a dismissal of the bill without prejudice instead of upon the merits. In view of the recent decision of the Chief Justice of the United States in the Circuit Court of Appeals for the Seventh Circuit, in the case of World's Columbian Exposition et al. *vs.* U. S., 56 Fed Rep. 645, it is hereby *stipulated* and agreed that in case this Court shall consider that the pendency of this appeal is a bar to, or in any way prejudicial to the issuance of the writ of certiorari to said Circuit Court of Appeals, which is herewith applied for, then this appeal to this Court shall be dismissed at the costs of the appellants.

Dated March 16, 1894.

LEONORA A. ARNOLD,
THOS. E. ARNOLD,
Complainants and Appellants.
HENRY A. RAWCLIFFE,
Solicitor for Complainants and Appellants.

STATE OF NEW YORK, Southern District, } *ss.*

On this 16th day of March, 1894, before me the subscriber personally came and appeared Leonora A. Arnold and Thomas E. Arnold, her husband, to

me known to be the person described in and who executed the foregoing stipulation, and they acknowledged to me that they executed the same.

JOS. F. ARNOLD,
Notary Public,
N. Y. Co.

[SEAL.]

CERTIORARI FORM XVI.—NOTICE OF MOTION FOR WRIT OF CERTIORARI FOR DIMINUTION OF THE RECORD.

[144 Fed. 679.]

UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

CHRISTIAN DANCEL and MARY DANCEL, as Administrators of the Goods, Chattels and Credits of Christian Dancel, Deceased,
Respondents,
against
THE GOODYEAR SHOE MACHINERY COMPANY OF PORTLAND, MAINE,
Appellant.

Upon the petition of Christian Dancel and Mary Dancel, a copy of which is hereto annexed, sworn to October 6th and 7th, 1905; and the certificate of John A. Shields, Clerk of the [District Court] of the United States for the Southern District of New York, a copy of which is hereto annexed, I shall make the annexed motion to the United States Circuit Court of Appeals for the Second Circuit at a stated term thereof in the Court Room of said Court, in the Post Office Building, in the Borough of Manhattan, City and County of New York, on October 16th, 1905, at the opening of Court on that day, or as soon thereafter as counsel can be heard, and that I shall then and there move for the relief prayed in said petition and for such other and further relief in the premises as may be just.

Dated Oct. 10, 1905.

Yours, &c.,
J. PHILIP BERG,
Attorney and Solicitor for Pl'ffs and Resp'ts,
302 *Broadway, New York.*

To Edwards H. Childs, Esq., Attorney and Solicitor for Appl't, 59 Wall. Street, N. Y. City.

CERTIORARI FORM XVII.—MOTION FOR WRIT OF CERTIORARI FOR DIMINUTION OF THE RECORD.

[144 Fed. 679.]

UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

CHRISTIAN DANCEL AND MARY DANCEL, as Administrators of the Goods, Chattels and Credits of Christian Dancel, Deceased,
Respondents,
against
THE GOODYEAR SHOE MACHINERY COMPANY OF PORTLAND, MAINE,
Appellant.

And now come the plaintiffs-respondents by J. Philip Berg, their attorney; and upon the petition of Christian Dancel and Mary Dancel, sworn to October 6th and 7th, 1905, they move that a writ of certiorari for a diminution of the record issue to the clerk of the United States [District] Court for Southern District of New York directing him to certify to this Court at the expense of the appellants herein, the summons with which the said suit was begun; and the proceedings for the removal of said cause from the Supreme Court of the State of New York to the [District] Court of the United States for the Southern District of New York; the order of said [District] Court denying motion to remand said cause; the opinion of this Circuit Court of Appeals when this suit was formerly before the same; the opinion of the Honorable Hoyt H. Wheeler, United States District Judge, overruling the demurrer herein; and the opinion of the Honorable E. Henry Lacombe, United States Circuit Judge denying the motion to remand this cause to the State Court; and that a further order may be made and entered directing the said Goodyear Shoe Machinery Company of Portland, Maine, the defendant below, which claims to be the appellant in this court, to pay to said Clerk, the expense of certifying said papers, and also to print the same; and that an order may be further made and entered striking out from page 257 of said transcript the words "amended complaint at law" and from page 263 of said alleged transcript, the words "answer at law" and from page 11 thereof the words, "affidavits and papers used to oppose motion for judgment at law"; and that your petitioners have such other and further relief in the premises, as may be just, with the costs of this application.

J. PHILIP BERG,
Attorney & Solicitor, for plaintiffs-respondents,
302 Broadway, Manhattan, N. Y.

CERTIORARI FORM XVIII.—PETITION FOR WRIT OF CERTIORARI FOR DIMINUTION OF THE RECORD.

[144 Fed. 679.]

To the Honorable the Judges of the United States Circuit Court of Appeals for the Second Circuit:

The petition of Christian Dancel and Mary Dancel, as Administrators of Christian Dancel, deceased, respectfully show:

I. Heretofore and on or about February 28th, 1905, a decree in equity, was duly entered in the Clerk's Office of the [District] Court of the United States for the Southern District of New York, which said decree directed the payment by the Goodyear Shoe Machinery Company of Portland, Maine, to your petitioners of the sum of $28,028.11; and the further payment by said Company to your petitioners of the sum of $416.66⅔ on the last day of each month subsequent to February 28th, 1905, until and including August 31st, 1908, with interest to the date of payment unless certain letters patent of the United States number 459,036 should hereafter cease to remain in force as a valid patent. Subsequently proceedings were taken by the said defendant which were claimed by said defendant to constitute an appeal to this Circuit Court of Appeals from said decree; and at some time subsequent to March 15th, 1905, what purports to be a transcript of the record below was filed in this Court; and said alleged transcript has been printed under the direction of said defendant for use in this Court upon said alleged appeal. Said alleged appeal has not yet been dismissed and has not yet been determined.

II. Said paper which purports to be a transcript of said record contains at certain portions of the same certain descriptions and characterizations of the papers therein contained, which have not to be found in the record in the Court below. At page 257 of said alleged transcript a certain paper is preceded by and characterized by the words "amended complaint at law;" at page 263 another paper in said alleged transcript is characterized by and preceded by the words "answer at law." The said words are included in said alleged transcript for the sole reason that the Clerk of the said Circuit Court, in making up the same used as a part thereof, the paper printed by the defendant and submitted to the Court below upon the final hearing. At page 11 of said alleged transcript certain papers are characterized by and preceded by the words "affidavits and papers used to oppose motion for judgment at law." Said words are not to be found in the record below.

III. Should an application hereafter be made to the Supreme Court of the United States by the defendant for the review of the final decision of this Court upon said alleged appeal there is danger lest it may be claimed by said defendant that these words were part of the said papers

and of the record in said Circuit Court inserted there by your petitioners or else that they were inserted there by the direction of the said Circuit Court and that they estop your petitioners from disputing that said papers were in fact not pleadings and proceedings at common law; which position your petitioners wish to be allowed to dispute.

IV. The said suit in which said decree was entered was begun in the Supreme Court of the State of New York. It was thence removed from said State Court to the said Circuit Court of the United States, and a motion to remand the said cause to said State Court was duly made by your petitioners in said Circuit Court and denied by said Circuit Court. The said alleged transcript omits the proceeding for the removal of said cause. The said transcript also omits proceedings upon said motion to remand. The said transcript also apparently omits and as your petitioners are informed and believe does omit the summons with which said suit was begun in said State Court. The alleged transcript upon said alleged appeal consequently does not show the manner in which jurisdiction of the cause below was acquired by the said Circuit Court; and as your petitioners were informed and believe said transcript is insufficient in said respect. The said alleged transcript also omits the opinion of this Circuit Court of Appeals when this cause was formerly brought before this Court; the opinion of the Honorable Hoyt H. Wheeler, District Judge of the United States overruling the demurrer heretofore filed herein and the opinion of Honorable E. Henry Lacombe, United States Circuit Judge, denying the motion to remand this cause to the said State Court.

Wherefore, your petitioners pray that a writ of certiorari for a diminution of the record issue to the Clerk of the Circuit Court of the United States, for the Southern District of New York, directing him to certify to this Court at the expense of the appellant herein the summons with which said suit was begun and the proceeding for the removal of said cause from the Supreme Court of the State of New York to the Supreme Court of the United States for the Southern District of New York; the order of said Circuit Court denying a motion to remand said cause; the opinion of this Circuit Court of Appeals when this suit was formerly before the same; the opinion of the Honorable Hoyt H. Wheeler, United States District Judge, overruling the demurrer herein; and the opinion of the Honorable E. Henry Lacombe, United States Circuit Judge, denying the motion to remand this cause to the State Court, and that a further order be made and entered, directing the said Goodyear Shoe Machinery Company of Portland, Maine, the defendant below which claims to be the appellant in this Court, to pay to said Clerk the expense of certifying said papers; and also to print the same; and that an order may be further made and entered striking out from page 257 of said transcript the words "amended complaint at law" from page 263 of said alleged transcript the words "answer at law;" and from page 11 thereof, the words "affidavits and papers used to oppose motion for judgment at law;" and that your

petitioner may have such other and further relief in the premises as may be just with the costs of this application.

CHRISTIAN DANCEL,
MARY DANCEL.

J. PHILIP BERG,
Attorney & Solicitor for Petitioners Pl'ffs,
302 *Broadway, N. Y. City.*

COUNTY OF NEW YORK, *ss:*

Christian Dancel, being duly sworn, says:—That he is one of the petitioners above named; that the foregoing petition is true to his own knowledge except as to the matters therein stated to be alleged on information and belief and as to those matters he believes it to be true.

CHRISTIAN DANCEL.

Sworn to before me this 7th day of October, 1905.

WARD W. SMITH,
[L. S.] *Notary Public, N. Y. Co.*

COUNTY OF KINGS, *ss:*

Mary Dancel, being duly sworn, says:—That she is one of the petitioners above named; that the foregoing petition is true to her own knowledge, except as to the matters therein stated to be alleged on information and belief and as to those matters she believes it to be true.

MARY DANCEL.

Sworn to before me this 6th day of October, 1905.

H. D. WILSON,
[L. S.] *Notary Public, No. 14, Kings Co.*

Certificate filed in New York County.

CERTIORARI FORM XIX.—ORDER UPON PETITION FOR WRIT OF CERTIORARI FOR DIMINUTION OF THE RECORD.

[144 Fed. 679.]

At a stated term of the United States Circuit Court of Appeals for the Second Circuit, held at the Court Rooms in the Post Office Building, City of New York, on the 16th day of October, 1905.

Present: Hon. William J. Wallace, Hon. E. Henry Lacombe, Hon. Alfred C. Coxe, Judges.

CHRISTIAN DANCEL and MARY C. DANCEL, as Administrators of the Goods, Chattels and Credits of Christian Dancel, Deceased,
Complainants-Appellees,
against
THE GOODYEAR SHOE MACHINERY COMPANY OF PORTLAND, MAINE,
Defendant-Appellant.

A motion having been made by the complainants-Appellees for a writ of certiorari, directed to the Clerk of the [District] Court of the United

States for the Southern District of New York and requiring that certain papers in addition to those contained in the Transcript of Record already filed on this appeal be certified to this Court and that a supplemental return be made containing said papers; and for an order striking out on page 257 of the Transcript of Record on file the words "amended complaint at law," and from page 263 the words "answer at law," and from p. 11, the words "affidavits and papers used to oppose motion for judgment at law," and said motion having come on to be heard;

Now, on reading and filing the petition of Christian Dancel and Mary Dancel, verified October 6th and 7th, 1905, and the certificate of the Clerk of the [District] Court of the United States for the Southern District of New York, dated September 29th, 1905, filed in support of said motion and the affidavit of Edwards H. Childs, sworn to the 13th day of October, 1905, in opposition thereto, and on the Transcript of Record filed herein upon this appeal, and after hearing Roger Foster, Esq., of counsel for the complainants-Appellees in support of the motion and Edwards H. Childs, Esq., counsel for the defendant-appellant in opposition thereto, it is

Ordered that said motion to strike out the said words from the Transcript of Record be and the same hereby is denied.

And counsel for the defendant appellant having consented that the Transcript of Record filed in this Court upon the writ of error in the cause entitled The Goodyear Shoe Machinery Company of Portland, Maine, plaintiffs in error against Christian Dancel and another defendants in error may be deemed part of the transcript of record upon this appeal, it is further

Ordered that the said Transcript of Record filed upon said writ of error be considered as before this Court upon the argument of this appeal in addition to and as a part of the Transcript of *Error* filed herein and that counsel be and they hereby are permitted to refer upon this appeal to the papers contained in said Transcript of *Error* filed on the writ of error.

W. J. W.
E. H. L.
A. C. C.

CERTIORARI FORM XX.—PETITION TO STATE COURT FOR STAY OF PROCEEDINGS PENDING APPLICATION FOR WRIT OF CERTIORARI.

[253 U. S. 480.]

In the Supreme Court of Pennsylvania, Eastern District, January Term, 1920.

No. 12.

PHILADELPHIA AND READING RAILWAY COMPANY, Appellant,
vs.
MARIA DOMENICA DI DONATO.

To the Honorable J. Hay Brown, Chief Justice of the Supreme Court of Pennsylvania, and to the other Justices of the said Honorable Court and to the Honorable Supreme Court of Pennsylvania:

The petition of Philadelphia and Reading Railway Company, Appellant herein, respectfully represents:

1. That on Friday, February 22, 1920, an opinion of this Court was filed affirming the judgment of the Court of Common Pleas No. 1 of Philadelphia County in favor of Maria Domenica Di Donato and against Philadelphia and Reading Railway Company, Appellant in a cause of action in which the jurisdiction of the Workmen's Compensation tribunals was challenged on the ground that the claimant's decedent was engaged in interstate commerce.

2. That the questions presented by the assignments of error in this cause, particularly those relating to the exclusive application of the federal employers' Liability Act to cases where an employee of an interstate railroad is engaged in work incident to interstate commerce, are questions of broad general interest to railroad companies throughout the country; and your petitioner is advised by counsel that it is desirable that the Supreme Court of the United States be asked to pass finally upon these questions in order that the management of the said companies be advised as to the proper disposition of similar cases arising in the future.

3. That the Act of Congress and the rules of the Supreme Court in such cases made and provided, fix the time within which petitions for writs of certiorari may be filed in the Supreme Court of the United States at three months. It is further provided by Rule 37 of the Supreme Court of the United States that the party making application for writ of certiorari shall, as a part thereof, furnish the court with a certified copy of the whole record, that 30 printed copies of the petition for the writ of certiorari and brief in support thereof shall be filed and notice of the date of submission of the petition, together with a copy of petition and brief in support of the same, shall be served on the counsel for the respondent at least two weeks before such date.

4. Your petitioner is prepared to perfect the record in this case, and to file its petition for writ of certiorari in the Supreme Court of the United States on or before the 5th day of April, 1920.

5. That your petitioner is advised that in order that the proceedings may remain in their present status pending the disposition of such a petition for writ of certiorari, a special order of this Court is required to stay the issuing of the mandate.

Wherefore your petitioner prays that this Court enter an order directing the prothonotary of your Honorable Court to hold the mandate in this cause pending the filing of the aforesaid petition for a writ of certiorari in the Supreme Court of the United States until the 5th day of April, 1920, and that if said petition shall be filed in the Supreme Court of the United States on or before that day the mandate be further held until the Supreme Court of the United States shall act upon the said petition for the writ of certiorari aforesaid.

And your petitioner will ever pray, etc.

PHILADELPHIA AND READING RAILWAY COMPANY,
By GEORGE GOWEN PARRY,
GEORGE GOWEN PARRY,
Counsel.

CERTIORARI FORM XXI.—ORDER OF STATE COURT GRANTING STAY OF PROCEEDINGS PENDING APPLICATION FOR WRIT OF CERTIORARI.

[253 U. S. 480.]

And now, to wit this 9th day of March, A. D., 1920, upon consideration of the foregoing petition and upon motion of George Gowen Parry, Esq., Counsel for Philadelphia and Reading Railway Company, appellant, it is ordered that the mandate in the above entitled case shall not issue but shall be stayed until April 5, 1920, and that if on or before that day there shall be filed with the Prothonotary of this Court an affidavit of Counsel for Philadelphia and Reading Railway Company showing that a petition for writ of certiorari has been filed by the said appellant in the Supreme Court of the United States that the mandate shall be held for a further period thereafter, and shall not issue before final disposition shall be made by the Supreme Court of the United States of the petition for writ of certiorari aforesaid.

J. HAY BROWN,
Chief Justice.

CERTIORARI FORM XXII.—APPLICATION TO DISTRICT COURT FOR STAY OF PROCEEDINGS UNDER MANDATE OF CIRCUIT COURT OF APPEALS PENDING APPLICATION TO SUPREME COURT FOR CERTIORARI.

[Stay granted. The decision is not reported. The author was counsel for the complainants. In the Second Circuit the proper practice now is to make to the Circuit Court of Appeals, or during its vacation to a judge thereof the application for the stay. C. C. A. Rule, 2nd Ct. 29, *supra* § 689d.]

CIRCUIT COURT OF THE UNITED STATES.

For the Southern District of New York.

CHRISTIAN DANCEL and MARY DANCEL, as Administrators of the Goods, Chattels and Credits of Christian Dancel, deceased,
Complainants,
against
GOODYEAR SHOE MACHINERY COMPANY OF PORTLAND, MAINE,
Defendant.

STATE OF NEW YORK, }
County of New York. } *ss:*

EDWARDS H. CHILDS, being duly sworn, deposes and says:—

On Saturday, March 17th, 1906, an order was made and entered by the United States Circuit Court of Appeals for the Second Circuit affirming the final decree made herein in favor of the complainants and from which an appeal had been taken to said Court of Appeals by the defendant. On Monday, March 19th, 1906, I obtained a certified copy of the record in said cause from the Clerk of said Circuit Court of Appeals and on Tuesday, March 20th, 1906, the same was duly filed in the office of the Clerk of the Supreme Court of the United States at Washington, D. C., together with an original petition by the defendant for a writ of certiorari to the said Circuit Court of Appeals. The rules of the Supreme Court with respect to such petitions provide that they shall be submitted to the Court upon "about two weeks'" notice and that the petitioner's brief must also be served upon the respondents. The brief on behalf of the petitioner is now being made and as soon as the same is prepared and printed, the notice will be served and the said application will be duly brought on before the Supreme Court. The record in the said cause is now being printed under the direction of the Clerk of the Supreme Court in accordance with the rule requiring that fifty copies be printed. I requested the said Clerk to have the printing done as quickly as possible and he has agreed to do so, but the record is long and the printing has not as yet been completed. There has been no delay whatever in this matter and

the defendant is proceeding with all the diligence possible to bring the said petition before the Supreme Court at the earliest possible day.

WHEREFORE, the defendant prays that all proceedings by this Court on the mandate of said Circuit Court of Appeals may be stayed, pending the determination of said application to the Supreme Court for a writ of certiorari and for such other and further relief upon the complainants' application for proceedings on said mandate that may be just.

Sworn to before me this 27th day of March, 1906.

EDWARDS H. CHILDS.

JOHN P. SHAFER,
Notary Public, Kings County.
Certificate filed in New York County.

CERTIORARI FORM XXIII.—ANSWER TO PETITION FOR WRIT OF CERTIORARI.

[From record in 202 U. S. 619.]

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1908.

No. 643.

THE GOODYEAR SHOE MACHINERY COMPANY OF PORTLAND, MAINE,
Petitioner,
AGAINST
CHRISTIAN DANCEL and MARY DANCEL, as Administrators of the Goods, Chattels and Credits of Christian Dancel, deceased,
Respondents.

Christian Dancel and Mary Dancel, as administrators of the goods, chattels and credits of Christian Dancel, deceased, in answer to the petition for a writ of *certiorari* herein, which has been filed in this Honorable Court, dated March 19, 1905, respectfully show:

I.—They deny the allegation in the fourth paragraph of said petition, that the promise therein mentioned was purely personal; and they deny the allegation in said paragraph contained, that the payments thereunder were to be made to Dancel personally.

II.—They deny that the action begun by the respondents herein on October 15, 1900, was an action at law. The said action was begun in the Supreme Court of the State of New York. Section 3339 of the Code of

Civil Procedure of that State was then in force and provided as follows: "There is only one form of civil action. The distinction between actions at law and suits in equity, and the forms of those actions and suits have been abolished."

III.—They deny, upon information and belief, each and every allegation in the tenth paragraph of said petition. They deny that the judgment, which is described in the eleventh paragraph of said petition, was a judgment at law. They deny, upon information and belief, each and every allegation in the twelfth paragraph of said petition. They deny the allegation, in the thirteenth paragraph of said petition, that said action, which was removed to the Federal court, therein described, was an action at law. They deny that the amended complaint filed by these respondents on January 9, 1901, in the office of the Clerk of the Circuit Court of the United States for the Southern District of New York was an amended complaint at law. They deny that the allegation in said amended complaint, that the petitioner herein had agreed to assume the obligations of the Connecticut Company, therein described, was immaterial. They aver that said allegation was material and was admitted by the defendant, the present petitioner, under the oath of its attorneys, to be true. They deny each and every allegation in the nineteenth paragraph of said petition, which avers that the statement therein quoted from the opinion of the Circuit Court of Appeals was a dictum, and which avers that the said Court did not notice the facts of the authority therein cited. They deny that the appearance made by the petitioner in its motion for said mandate was a special appearance at law; and they aver that said appearance was a general appearance; and that no leave of said Court to make a special appearance for that purpose was granted to the petitioner. They deny the allegation in the twenty-first paragraph of said petition, that the petitioner appeared specially at law in opposition to the application for leave to reframe the complaint in said action. They aver that the said appearance was general, and that no permission was given to the said petitioner to make a special appearance at that time. They deny the allegations in the twenty-first paragraph of said petition, concerning the form of the bill of complaint as amended, in accordance with the leave then granted. They allege that the substantial allegations of the facts constituting the cause of action averred in said bill of complaint, except those concerning the history of the litigation, were the same as those in the complaint previously filed; and that the only material difference between the two pleadings was that in the last complaint more relief was prayed for than in the former pleadings. They deny the allegation in the twenty-second paragraph of said petition, that no equity process was served on the petitioner. They aver that process, equivalent to equity process, was served upon said petitioner in the State Court before said removal and that said petitioner made a general appearance in said action in said State Court. They deny the allegation in said paragraph of said petition that the petitioner made no appearance whatever in equity. They deny the allegation in the twenty-third paragraph of said petition, that the said petitioner appeared special-

ly on June 1, 1903. They aver that the appearance then made by said petitioner was a general appearance; and that no permission was ever given to said petitioner to make a special appearance then, nor at any other time in said case. They deny the allegation in the twenty-fourth paragraph of said petition, that the answer of the petitioner filed on or about August 4, 1903, did not waive the objection to the jurisdiction previously taken. They deny the allegations in the twenty-fifth paragraph of said petition, concerning the matters which were proved in said case, and each and of all of the same. They deny the allegations in said paragraph of said petition concerning the law of Massachusetts. They deny the allegation in said paragraph of said petition that the omission of words of succession in the promise to Dancel was intentional. They further deny the allegation therein contained that the annuity contract was performed in Massachusetts. They deny each and all of the allegations in the twenty ninth paragraph of said petition. They deny each and every allegation in the thirtieth paragraph of said petition.

IV.—This action was commenced by the service of a summons without a complaint in the Supreme Court of the State of New York, on October 15, 1900, to enforce a contract for the payment of $5,000 a year in equal monthly installments to Christian Dancel, during the life of certain Letters Patent. The said contract was dated January 2, 1892, and was then made between said Christian Dancel and the Goodyear Shoe Machinery Company of Hartford, Connecticut, a Connecticut corporation. On March 9, 1893, the said Connecticut corporation transferred all its property to the defendant and petitioner herein, which had been organized for the purpose of accepting said transfer. In consideration of said transfer, the said defendant and petitioner assumed all the debts of the said Connecticut Company, and agreed to dissolve the same. The said Connecticut corporation was duly dissolved, and an entry of said dissolution was made upon the books of the defendant. The said defendant furthermore transferred into its books of account all accounts between the said Connecticut corporation and other persons, including the account between said Connecticut corporation and said Dancel; and charged against itself, namely, said defendant petitioner, all debit entries in said accounts. A novation of said contract thereupon took place between said Christian Dancel and said defendant. The said defendant until the death of Dancel paid to him all the installments maturing under said contract; and said Dancel accepted said payments from said defendant. The same defendant paid after the death of Dancel to his personal representatives, the plaintiffs below the respondents here, one installment of said annuity. After the death of said Dancel and about September 1, 1899, the said defendant executed a paper which purported to assign to a corporation named the United Shoe Machinery Company of New Jersey, all of the property of said defendant in the State of New York, and as these respondents are informed and believe in the United States, excepting, however, certain Letters Patent. Said conveyance was made without any adequate consideration, and was in fraud of the creditors of the said Maine corporation, including the plaintiffs below and the re-

spondents here. It was made with the intention of preventing the plaintiffs below and the respondents here from enforcing the contract in suit; this action to enforce which was then contemplated and expected by defendant, but had not yet been taken. In return for the execution of said paper, the said New Jersey corporation executed a paper, which as these respondents are informed and believe assumed the debts of the said defendant Maine corporation. At or about said time, or subsequently thereto before the entry of the decree, the name of said defendant was changed to the United Shoe Machinery Company of Maine. After the first decision of the Circuit Court of Appeals herein, in which decision the contract in suit had been construed, in accordance with the contention of the plaintiffs below and respondents here, said defendant executed a paper which purported to release said New Jersey corporation from its obligations under said indemnity agreement. The said paper purporting to be a release was executed fraudulently for the purpose of defrauding the creditors of said Maine corporation, and for the purpose of defrauding the plaintiffs below and the respondents here. There was no adequate consideration for the paper purporting to be a release. Subsequently to the entry of the decree below, which was entered on or about February 28, 1905, the defendant below and the petitioner here, appealed to the Circuit Court of Appeals from said decree; but filed no supersedeas bond, merely filing a bond as security for costs. Executions against the property of said defendant were duly issued under said decree to the marshals of the United States for the Southern and Eastern Districts of New York and returned unsatisfied. The Circuit Court of the United States for the Southern District of New York appointed on or about April 8, 1905, Robert C. Beatty, Receiver of the assets of the defendant in the State of New York. Shortly thereafter, or about said time, said defendant caused to be organized in the State of New York a new corporation by the name of the United Shoe Machine Company of New Jersey. These respondents, upon information and belief, charge: That the formation of such new corporation was for the purpose of making a third fraudulent transfer of the assets of said Connecticut corporation to said New Jersey corporation, in order to prevent the collection of the debt due these respondents; and that a transfer of said assets for said purpose was then contemplated. The Honorable E. Henry Lacombe, United States Circuit Judge, thereupon granted an injunction against the former New Jersey corporation, restraining any transfer by it of said assets, and further enjoining all persons within the Southern District of New York, in whose possession were machines formerly the property of said Connecticut corporation from paying royalties thereupon to the said New Jersey corporation. In order to obtain a vacation of said injunction and of said receivership said defendant finally filed a supersedeas bond to secure the payment of the said decree in case of affirmance by the Circuit Court of Appeals.

Since the petitioner appears to have procured the omission from the

transcript of the first opinion of the United States Circuit Court of Appeals herein handed down on or about December 15, 1902, written by Judge Wallace, a copy of the same is hereto annexed marked A.

Wherefore, these respondents pray that the said petition for a writ of *certiorari* may be dismissed, with costs; and these respondents will ever pray, &c.

Dated New York, April 25, 1906.

CHRISTIAN DANCEL and MARY DANCEL,
As Administrators of Christian Dancel, deceased.
J. PHILIP BERG,
Solicitor and Attorney for Respondents,
Dancel's Administrators.

ROGER FOSTER,
Of Counsel.

STATE OF NEW YORK,
County of New York. } ss.:

CHRISTIAN DANCEL, being duly sworn, deposes and says: I am one of the respondents hereinabove named. I reside in the County of Kings, Borough of Brooklyn, City and State of New York; and I am one of the administrators of Christian Dancel, deceased. Each and every allegation in the foregoing answer is true to my own knowledge except as to the matters therein stated to be alleged upon information and belief; and as to those matters I believe the same to be true.

CHRISTIAN DANCEL.

Sworn to before me this
25th day of April, 1906.

CHARLES STEIN,
Notary Public,
N. Y. Co.

STATE OF NEW YORK,
County of New York, } ss.:

MARY DANCEL, being duly sworn, deposes and says: I am one of the respondents hereinabove named. I reside in the County of Kings, Borough of Brooklyn, City and State of New York; and I am one of the administrators of Christian Dancel, deceased. Each and every allegation in the foregoing answer is true to my own knowledge, except as to the matters therein stated to be alleged upon information and belief, and as to those matters I believe the same to be true.

MARY DANCEL.

Sworn to before me this
25th day of April, 1906.

CHARLES STEIN,
Notary Public,
N. Y. Co.

CERTIORARI FORM XXIV.—ANSWER TO PETITION FOR WRIT OF CERTIORARI WITH CROSS-PETITION.

[Cross-writ granted. 221 U. S. 580.]

SUPREME COURT OF THE UNITED STATES.

PERE ALFREDO LUIS BAGLIN, Superior General of the Order of Carthusian Monks, for Himself and all of the other Members of said Order,
Petitioners,
against
THE CUSENIER COMPANY,
Respondent and Cross-Petitioner.

To the Honorable the Justices of the Supreme Court of the United States:

The answer and cross-petition of the Cusenier Company respectfully show as follows:

1. It denies that the Order of Carthusian Monks is also known as the congregation of or Order of the Chartreux. It denies that it had maintained almost uninterruptedly for several hundred years its main Chartreuse and it further alleges that said order was an illegal and unauthorized Congregation and had not a right to own any property in the Republic of France.

2. It denies that said Carthusian Monks have carried on a manufacture of a certain liqueur or cordial for several hundred years, and it denies that said liqueur was manufactured in accordance with a secret recipe or formula and that said liqueur is exclusively manufactured by them. It denies that said liqueur is or has been favorably known by reason of the good repute of its makers, and it denies that the word "Chartreuse" constitutes a tradename, and it alleges that the reputation of said article was due to the peculiar qualities of the herbs which grew in the locality where said liqueur was manufactured, which locality had been known as Chartreuse long before the establishment of the said Monks.

3. It denies that the establishment at Tarragona referred to in Paragraph 3 of the petition is a continuance of the ancient business of making the liqueur or cordial known as Chartreuse, and it denies that any liqueur called "Chartreuse" is manufactured there and that the liqueur manufactured there is manufactured in accordance with any secret recipe or formula; and it denies that identically the same ingredients are used now for the said manufacture as had been used from time immemorial.

4. It admits that the liqueur or cordial manufactured by the monks prior to their expulsion from France has been commonly packed in the bottles and with the designs printed appearing opposite to page 4 of the petition, and it denies that the same are correctly set out in Paragraph 4 of said petition.

5. It denies that the registration referred to in Paragraph 5 of the

petition was caused to be made by the said Order, or on its behalf, and it denies that the said registration was for the name Chartreuse, and that any rights were conferred by the same registration to the said Order or to the complainants herein.

6. It denies that the appointment and powers of Henri Lecouturier and his agreement with Mr. Joseph Cusenier are correctly set forth in Paragraph 6 of the petition, and it alleges that said Mr. Lecouturier was expressly and duly authorized and instructed by the Courts of the Republic of France to continue the business formerly carried on by the Carthusian Monks at the place where such business had been carried on by them, and that the title to all the trademarks, tradenames and goodwill was vested in him by virtue of Decrees of the Courts having jurisdiction in the premises, and that he was given the exclusive right to harvest the plants, to which the cordial manufactured by the monks owed its peculiar qualities and reputation.

7. It admits that a bill was filed by the petitioners herein against it praying for the usual injunction and accounting. It was alleged in said bill that the defendants had made use of the word "Chartreuse" as a trademark to designate the said cordial or liqueur manufactured by them and that they attempted to sell to the public a spurious imitation article falsely representing that it was made pursuant to the so-called secret recipe which complainants claimed to own, and that said imitation liqueur was offered in bottles and cases similar in appearance to those long used by the complainants for the purpose of injuring the complainants and of deceiving the public. No evidence was introduced that any representation had ever been made by the defendant that the liqueur manufactured by it was made according to any recipe owned by complainants. It was found by the Circuit Court of Appeals that the liqueur had never been designated by the complainants as Chartreuse, that said word was of geographical origin and had been used on the labels in a geographical sense and that it had acquired a secondary meaning, indicating both that it was manufactured by monks and that it was made at a certain place, that its reputation was due to a great extent to the peculiar plants which grew in that locality; that the defendants had acted in good faith and in pursuance of the decrees of the Courts of the Republic of France by which the liquidator had been appointed, that the proof of deception was extremely unsatisfactory, that the parties represented by the defendant had acquired the right in France to use the old labels and bottles and to designate their liqueur by the name of "Chartreuse", and also the right to manufacture their liqueur at the place where the herbs grew which gave the said liqueur its peculiar character and that they were entitled to mention this fact on their labels and bottles and to all the advantages resulting therefrom, and that to deprive them of the right to mention said locality would be to deprive them of a substantial right. In giving the defendant the right to make use of the word "Chartreuse," if it was so used as clearly to distinguish such liqueur from the liqueur or cordial

manufactured by the complainants, the said Circuit Court of Appeals followed, as is stated in its opinion, the English Decree, which is referred to in the brief attached to the petition as the leading authority in favor of the complainants herein.

The said Cusenier Company further presents its cross petition and respectfully shows as follows:

1. That the complainants herein were, prior to the passage of the Association Act of 1901, an illegal and unauthorized association, having no civil rights and existing only by reason of a toleration which was entirely extra-legal and could be withdrawn at any time.

2. Before said Lecouturier was appointed as liquidator under the Association Act all the property of the Order, including all trademarks and goodwill, had been transferred by it to one Rey, a former procureur of the Order, by a deed bearing date of the 20th of November, 1897.

3. Thereafter it was finally decided by a Court of competent jurisdiction of the Republic of France, viz., the Court of Cassation, by its decision of July 31, 1906, that said Rey was a passive trustee and that the property transferred to him formed part of the assets to be so liquidated, and the title thereto was vested in the said Lecouturier and passed to the Compagnie Fermiere de la Grande Chartreuse, whose agent the defendant is.

4. That all the proceedings appointing said Lecouturier as liquidator and determining the extent of the rights vested in him, and all the other proceedings determining the rights of the respective parties herein, were made by Courts of competent jurisdiction in France after due notice to the complainants herein, and after they had been heard in respect to their rights; that all such property, trademark, good will, so vested in Lecouturier were obtained at a judicial auction sale held by order of the Court having jurisdiction of the premises, by the Compagnie Fermiere de la Grande Chartreuse, and are now vested in it.

That these defendants were the agents, at the beginning of the suit, of said Mr. Lecouturier, and are now the agents of the Compagnie Fermiere de la Grande Chartreuse.

5. The complainants herein had no property in the United States, they did not manufacture the liqueur here. After they began the manufacture at Taragona they completely abandoned the old labels and trademarks and use of the word Chartreuse, and gave the widest publicity, not only in trade papers but in papers of general circulation, to the fact that the old labels no longer indicated that the liqueur was manufactured by them. The evidence adduced by complainants shows that this fact was known to the trade and there is no evidence whatever that any one of the public was deceived into the belief that the liqueur sold by the defendant was manufactured by the Monks.

6. The word "Chartreuse" was a geographical term, designating the place or territory where the monks formed their establishment, it was never used by the monks to designate their liqueur; at the most it could be said to have acquired a secondary meaning, denoting not only that the liqueur was manufactured by monks but primarily that it was

manufactured at a certain place, the habitat of the herbs to which the liqueur owes its peculiar aroma and qualities.

7. The said Circuit Court of Appeals in its opinion recognized the fact that the primary meaning of the word "Chartreuse" was geographical and that it only later acquired a secondary meaning, but yet it affirmed that part of the decree of the Circuit Court which holds that the word symbol "Chartreuse" constitutes a technical trademark. It recognized that there is no proof of actual deception, that the defendant has acted in absolute good faith and is not to be treated as a pirate, and it then proceeded to give the complainants relief which can only be justified if the fact of unfair competition had been affirmatively found to exist.

8. From this it will be seen that this case involves the determination of important questions:

Whether geographical expressions can ever be considered as technical trademarks and entitled to protection as such;

Whether a trademark or protection against unfair competition can be claimed, not only after the word and label for which protection is sought, have been abandoned, but after it has been proved that the former owner has given publicity to the fact that they no longer represent the article of his manufacture, and after it has been proved that he has succeeded in convincing the public of that fact.

Whether, in the absence of any business or manufacture in the United States, a foreign corporation can claim title to a trademark, the title to which it has lost by virtue of a decree of a competent court in its country of origin, after full notice and opportunity to be heard, and whether relief can be granted on the ground of unfair competition after it has been affirmatively found that the defendant has acted in good faith, and when there is no evidence that the public has been deceived.

WHEREFORE, in order that the foregoing and other matters may be properly considered and adjudicated, your petitioners pray that this Honorable Court will grant its cross writ of Certiorari, directed to said Circuit Court of Appeals, for the Second Circuit, requiring the complete record of this cause in said Court to be certified to this Court, and that this Court will thereupon proceed to correct the errors herein complained of, and such other errors as may appear in said record, and reverse the decree of said Circuit Court of Appeals, in so far as it affirms the decree of the Circuit Court, and remand said cause with directions to dismiss the bill herein and give to your Petitioners such other and further relief as the nature of the case may require, and to the Court may seem proper in the premises.

And your Petitioner will ever pray.

THE CUSENIER COMPANY,
By
JULES AUBRY, (L.S.)
Vice-President.
ADOLPH L. PINCOFFS and
ROGER FOSTER,
Its Attorneys and Counsel.

CERTIORARI FORM XXV.—WRIT OF CERTIORARI FROM SUPREME COURT TO STATE COURT.

[253 U. S. 480.]

UNITED STATES OF AMERICA, *ss:*

[SEAL OF THE SUPREME COURT OF THE UNITED STATES.]

The President of the United States of America to the Honorable the Judges of the Supreme Court of the State of Pennsylvania, Greeting:

Being informed that there is now pending before you a suit in which Philadelphia & Reading Railway Company is appellant, and Maria Domenica Di Donato is appellee, which suit was removed into the said Supreme Court by virtue of an appeal from Court of Common Pleas No. 1 of the County of Philadelphia, and we, being willing for certain reasons that the said cause and the record and proceedings therein should be certified by the said Supreme Court and removed into the Supreme Court of the United States, Do hereby command you that you send without delay to the said Supreme Court, as aforesaid, the record and proceedings in said cause, so that the said Supreme Court may act thereon as of right and according to law ought to be done.

Witness the Honorable Edward D. White, Chief Justice of the United States, the sixth day of May, in the year of our Lord one thousand nine hundred and twenty.

JAMES D. MAHER,
Clerk of the Supreme Court of the United States.

CERTIORARI FORM XXVI.—WRIT OF CERTIORARI FROM SUPREME COURT TO CIRCUIT COURT OF APPEALS.

[175 U. S. 762, in which the author was counsel.]

UNITED STATES OF AMERICA, *ss:*

[SEAL OF THE SUPREME COURT OF THE UNITED STATES.]

The President of the United States of America to the honorable the judges of the United States circuit court of appeals for the second circuit, Greeting:

Being informed that there is now pending before you a suit in which Lizzie Stearns Bleecker and Elsie L. Bleecker and The Steamship "Kensington," her engines, &c., The International Navigation Company, claimant, on appeal and cross-appeal, which suit was removed into the said circuit court of appeals by virtue of appeals from the district court of the United States for the southern district of New York, and we, being willing for certain reasons that the said cause and the record and proceedings

therein should be certified by the said circuit court of appeals and removed into the Supreme Court of the United States, do hereby command you that you send without delay to the said Supreme Court, as aforesaid, the record and proceedings in said cause, so that the said Supreme Court may act thereon as of right and according to law ought to be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the 31st day of October, in the year of our Lord one thousand eight hundred and ninety-nine.

JAMES H. MCKENNEY,
Clerk of the Supreme Court of the United States.

CERTIORARI FORM XXVII.—STIPULATION THAT TRANSCRIPT OF PROCEEDINGS IN STATE COURT PREVIOUSLY FILED STAND AS RETURN.

[253 U. S. 480.]

IN THE SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1919.

PHILADELPHIA & READING RAILWAY COMPANY, Petitioner,
vs.
MARIA DOMENICA DI DONATO, Respondent.
No. 842.

The Writ of Certiorari in the above entitled case having been granted to the above entitled petitioner to review the judgment and decision of the Supreme Court of the State of Pennsylvania in the above case, in which Philadelphia & Reading Railway Company was Appellant and Maria Domenica Di Donato was Appellee:

Now it is therefore stipulated and agreed between counsel for the above named petitioner and counsel for the above named respondent that the Transcript of Record of the said Supreme Court of Pennsylvania in said cause now on file in the Supreme Court of the United States be taken as a return to the said writ and that the Prothonotary of the Supreme Court of Pennsylvania forward a certified copy of this stipulation to the Clerk of the Supreme Court of the United States forthwith, as his return to the said Writ of Certiorari.

Done the 10th day of May, A. D. 1920.

GEORGE GOWEN PARRY,
Counsel for Above Petitioner.
ROWLAND C. EVANS,
Counsel for Above Respondent.

CERTIORARI FORM XXVIII.—STIPULATION THAT TRANSCRIPT OF PROCEEDINGS IN CIRCUIT COURT OF APPEALS PREVIOUSLY FILED STAND AS RETURN.

[175 U. S. 762.]

SUPREME COURT OF THE UNITED STATES.

LIZZIE STEARNS BLEECKER and ELSIE L. BLEECKER
against
THE STEAMSHIP "KENSINGTON," HER ENGINES, &c.;
The International Navigation Company, Claimant.
No. 414.

No. 414.

We hereby stipulate that the certified copy of the transcript of record filed in the Supreme Court of the United States, with the petition for a writ of certiorari, may be taken as and shall be the return to the writ of certiorari granted herein by said Supreme Court of the United States to the United States circuit court of appeals for the second circuit on the 30th day of October, 1899.

Dated New York, November 2nd, 1899.

ROGER FOSTER,
Attorney and Proctor for the Bleeckers,
Libellants and Appellants.
H. G. WARD,
Proctor for Claimant.

CERTIORARI FORM XXIX.—RETURN BY CLERK OF STATE COURT.

[253 U. S. 480.]

STATE OF PENNSYLVANIA, *Eastern District:*

SUPREME COURT OF PENNSYLVANIA, MAY 12, 1920.

In obedience to the writ of certiorari hereto attached and returned herewith, I hereby certify that the foregoing contains a true copy of the stipulation of counsel in the case therein stated, as appears from the original now of file in this office.

Witness my signature and the seal of said court hereto affixed, the day and year above written.

[Seal of the Supreme Court of Pennsylvania, Eastern District, 1776.]

RUDOLPH N. SCHICK,
Prothonotary Pro Tem.

CERTIORARI FORM XXX.—RETURN BY CLERK OF CIRCUIT COURT OF APPEALS.

[175 U. S. 762.]

To the Honorable the Supreme court of the United States:

The record and all proceedings in the cause wherein mention is within made having been lately certified and filed in the office of the clerk of the honorable the Supreme Court of the United States, a copy of the stipulation of counsel is hereto annexed, and, under the direction of counsel for the appellant, said stipulation is certified as a return to this writ.

New York, November 3, 1899.

[Seal United States Circuit Court of Appeals, Second Circuit.]

WM. PARKIN,
Clerk of the United States Circuit Court
of Appeals for the Second Circuit.

APPELLATE FORMS

APPELLATE FORM I.—APPEAL AND ALLOWANCE.

District Court of the United States for the Southern District of New York.

RICHARD ROE, Defendant, Respondent.
against
JOHN DOE, Plaintiff, Appellant,

The above named plaintiff, John Doe, conceiving himself aggrieved by the order entered on December 3, 1912, in the above entitled proceeding, doth hereby appeal from said order to the Supreme Court of the United States, and he prays that this his appeal may be allowed; and that a transcript of the record and proceedings and papers upon which said order was made, duly authenticated, may be sent to the Supreme Court of the United States.

ROBERT JONES,
Attorney for Plaintiff and Appellant John Doe,
206 & 208 Broadway, New York, N. Y.

New York, January 13th, 1913.

And now, to wit: On January 14th, 1913: it is ordered that the appeal be allowed as prayed for. E. HENRY LACOMBE, Circuit Judge.

APPELLATE FORM II.—CITATION ON APPEAL OR WRIT OF ERROR.

UNITED STATES OF AMERICA, ss.

To Richard Roe, GREETING:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States, to be holden at Washington, on the 15th day of February, nineteen hundred and thirteen, pursuant to an appeal, filed in the clerk's office of the District Court of the United States for the Southern District of New York, wherein John Doe is appellant and Richard Roe is respondent, to show cause, if any there be, why the judgment [decree or order] in the said writ of error [or appeal as the case may be] mentioned should not be corrected, and speedy justice should not be done to the parties on that behalf.

Witness, the Hon. [Learned Hand, United States District Judge] this 16th day of January, in the year of our Lord one thousand nine hundred and thirteen.

E. HENRY LACOMBE, Circuit Judge.

APPELLATE FORM III.—WRIT OF ERROR FROM SUPREME COURT TO [DISTRICT] COURT.

UNITED STATES OF AMERICA, ss.

The President of the United States, to the Honorable the Judges of the [District] Court of the United States for the Southern District of New York, GREETING:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said [District] Court, before you, or some of you, between John Stiles, plaintiff, and Richard Roe, defendant, a manifest error hath happened to the great damage of the said defendant, Richard Roe, as by his complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington, on the second Monday of October next, in the said Supreme Court to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct the error, what of right, and according to the laws and customs of the United States, should be done.

Witness the Honorable Edward Douglass White, Chief Justice of the said Supreme Court, the 14th day of September, in the year of our Lord one thousand nine hundred and thirteen.

JAMES HALL MCKENNEY,
Clerk of the Supreme Court of the United States.

Allowed by
LEARNED HAND, United States District Judge.

APPELLATE FORM IV.—WRIT OF ERROR FROM SUPREME COURT TO CIRCUIT COURT OF APPEALS.

[From record in 144 U. S. 465, in which the author was counsel.]

UNITED STATES OF AMERICA, ss.

The President of the United States, to the Honorable the Judges of the United States Circuit Court of Appeals for the Second Circuit, GREETING:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Circuit Court of Appeals, before you, for some of you, between Dominick Amato, plaintiff, and The Northern Pacific Railroad Company, defendant, a manifest error hath happened, to the great damage of the said defendant, the Northern Pacific

Railroad Company, as by its complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington, within thirty days from the date hereof, in the said Supreme Court, to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the said Supreme Court, the twentieth day of February, in the year of our Lord, one thousand eight hundred and ninety-two.

(Signed) JAMES H. MCKENNEY,
Clerk of the Supreme Court of the United States.

Allowed by

(Signed) SAMUEL BLATCHFORD,
Associate Justice of the Supreme Court of the United States.
February 20, 1892.

APPELLATE FORM V.—WRIT OF ERROR FROM CIRCUIT COURT OF APPEALS TO [DISTRICT] COURT.

UNITED STATES OF AMERICA, ss.

The President of the United States of America, to the Judges of the [District] Court of the United States for the Southern District of New York, GREETING:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said [District] Court, before you, or some of you, between Dominick Amato, plaintiff, and the Northern Pacific Railroad Company, defendant, a manifest error hath happened, to the great damage of the said Northern Pacific Railroad Company, as is said and appears by the complaint: We, being willing that such error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Justices of the United States Circuit Court of Appeals for the Second Circuit, at the court rooms of said court in the Post-office building in the city of New York, together with this writ, so that you have the same at the said place, before the Justice aforesaid, on the twentieth day of August next, that the record and proceedings aforesaid being inspected, the said Justices of the said Circuit Court of Appeals may cause further to be done therein, to correct that error,

what of right and according to the law and custom of the United States ought to be done.

Witness, the Honorable MELVILLE W. FULLER, Chief Justice of the Supreme Court of the United States, this 27th day of July, in the year of our Lord one thousand eight hundred and ninety-one, and of the Independence of the United States the one hundred and sixteenth.

(Signed) JOHN A. SHIELDS,

[Seal of District Court.]

Clerk of the District Court of the United States for the Southern District of New York.

The foregoing writ is hereby allowed.

(Signed) E. HENRY LACOMBE.

APPELLATE FORM VI.—WRIT OF ERROR TO STATE COURT.

UNITED STATES OF AMERICA, ss.

The President of the United States of America, to the Honorable the Judges of the Supreme Judicial Court of the Commonwealth of Massachusetts, GREETING:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Supreme Judicial Court of the Commonwealth of Massachusetts before you, or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between John Doe and Richard Roe, wherein it was drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision was against their validity; or wherein was drawn in question the validity of a statute of, or an authority exercised under, said State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision was in favor of their validity or wherein was drawn in question the construction of a clause of the Constitution, or of a treaty, or statute of, or commission held under the United States, and the decision was against the title, right, privilege, or exemption specially set up or claimed under such clause of the said Constitution, treaty, statute, or commission; a manifest error hath happened to the great damage of the said Richard Roe, as by his complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington, on the —— day of —— next, in the said Supreme Court, to be then and there held, that the record

and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the said Supreme Court, the 18th day of December, in the year of our Lord one thousand eight hundred and eighty-nine.

JAMES HALL MCKENNEY,
Clerk of the Supreme Court of the United States.

Allowed by
HORACE GRAY, Justice.

APPELLATE FORM VII.—CITATION ON WRIT OF ERROR.

UNITED STATES OF AMERICA, ss.

To Dominick Amato, GREETING:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within thirty days from the date hereof, pursuant to a writ of error, filed in the Clerk's office of the United States Circuit Court of Appeals for the Second Circuit, wherein the Northern Pacific Railroad Company is plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable SAMUEL BLATCHFORD, Associate Justice of the Supreme Court of the United States, this twentieth (20th) day of February, in the year of our Lord one thousand eight hundred and ninety-two.

(Signed) SAMUEL BLATCHFORD,
Associate Justice of the Supreme Court of the United States.

APPELLATE FORM VIII.—PETITION FOR WRIT OF ERROR TO STATE COURT.

[Frank v. Vollkommer, 205 U. S. 521.]

To the Honorable Melville Weston Fuller, Chief Justice of the United States; and to the Honorable Rufus W. Peckham, Associate Justice of the Supreme Court of the United States; and to the other Justices of said Honorable Courts and to the Honorable the Supreme Court of the United States:

The petition of Solon L. Frank and Samuel Frank, who reside in the City, County and State of New York, respectfully shows:

I. Heretofore and on or about the 20th day of December, 1902, an action was commenced in the Supreme Court of the State of New York for

the County of Kings by Joseph Vollkommer, Jr., as Trustee in Bankruptcy of the estate of Jacob Vogt, bankrupt, plaintiff against your petitioners Solon L. Frank and Samuel Frank, doing business as S. L. & S. Frank, and one Jacob Vogt, as defendants. The complaint in said action alleged: That on or about July 10th, 1902, said Jacob Vogt was duly adjudged an involuntary bankrupt in the United States District Court for the Eastern District of New York; that on November 12th, 1902, plaintiff was duly appointed trustee in bankruptcy of said bankrupt, and that he duly qualified as such on November 21st, 1902; that on April 16th, 1902, said Vogt delivered to your petitioners, the defendants Frank, a certain chattel mortgage on certain of the goods and chattels owned by said Vogt, to secure the payment of the sum of $8,500; that at the time of making said alleged mortgagee, said Vogt was insolvent; that said mortgage was intended to create an unlawful preference; that said mortgage was void for usury; and that said mortgage was fraudulent for the reason that it was made for an amount greatly in excess of the indebtedness owing from said Vogt to said Franks; and was intended to injure the other creditors of said Vogt. Said complaint further alleged that on June 30th, 1902, one Arthur T. Stoutenberg was appointed by the Judge of the said United States District Court, Receiver of the property of said bankrupt; that by agreement between said Franks and the petitioning creditors of said Vogt in bankruptcy, an order was made, a copy of which order was annexed to said complaint, which order directed as follows: "It is ordered, that the said temporary Receiver be and he hereby is authorized and directed to sell at public auction on Thursday, July 3rd, at 11 A. M., in the forenoon of that day, at the Auction-mart of the Fiss, Doerr & Carroll's Horse Company, on the north side of 24th Street, between Third and Lexington Avenues in the Borough of Manhattan, City of New York, and on such other and further days as the receiver may designate, notice of the time and place of this sale to be published on the 3rd day of July, in the New York Herald, a newspaper published in the County of New York, the entire plant known as Jacob Vogt's Suburban Delivery, consisting of the personal property before described, belonging to the said alleged bankrupt, free from any and all liens of any kind and nature thereon, and it is further ordered, that the expenses of said sale be deducted from the moneys derived therefrom, and it is further ordered, that said temporary Receiver be and he hereby is authorized and directed, within five days from the date of said sale to deposit in the People's Trust Company of Brooklyn, as a special fund, there to await the further order of the Court, upon due notice to all creditors who have or may hereafter appear, the proceeds resulting from the sale of said property, after the deduction of the expenses of said sale, and that the lien, if any, of the said alleged chattel mortgage of the said S. L. & S. Frank, be transferred to and attached to said special fund or deposit in lieu of, and to the same extent that it attached to the said property hereinbefore directed to be sold. It is further ordered, that the temporary Receiver be and he hereby is authorized and directed to deposit the balance of the proceeds of said sale as part of the general fund of the

estate of the alleged bankrupt.'' Said order was entered by the consent of the attorneys for the petitioning creditors and for the attorneys of your petitioners. Said sale took place and the net proceeds thereof were duly deposited in said Trust Company in pursuance of said order subject to the further order of said District Court of the United States.

Said Complaint prayed that the said chattel mortgage be declared null and void and be cancelled; and that the said fund, which was deposited as aforesaid under the order of said District Court of the United States in bankruptcy be declared free of the lien or incumbrance of said chattel mortgage, and free from any lien or claim by your petitioners under said mortgage or otherwise.

II. Your petitioners duly answered said complaint. The said bankrupt made a default. Subsequently, the issues raised by said pleadings came on for trial on June 16, 1903, before Mr. Justice Marean of said Supreme Court of the State of New York at a special term thereof, held in the County of Kings. Upon said trial, your petitioners moved to dismiss the complaint in said action for several reasons, amongst other reasons, specifying the following: That the said Supreme Court of the State of New York had no jurisdiction because said suit was brought to determine the title to property in the possession of said District Court of the United States. Said motion to dismiss was denied and your petitioners duly excepted to the denial of said motion. Subsequently, judgment was entered in said action, which judgment provided as follows: ''It is ordered, adjudged and decreed that the chattel mortgage executed and delivered by Jacob Vogt of the Borough of Brooklyn, County of Kings, to the above named defendants Solon L. Frank and Samuel Frank of the City and State of New York, April 16, 1902, to secure the sum of $8,500 with legal interest and filed in the office of the register of the County of Kings, April 18, 1902, as No. 11,230 be, and the same hereby is anulled and declared void and of no effect. That said register upon receiving a certified copy of this judgment cancel the said chattel mortgage of record and that the said chattel mortgage be and the same is hereby adjudged and declared to be no lien upon the moneys, viz., $5,481.47 deposited on July 9, 1902, by Arthur T. Stoutenburgh in the Peoples' Trust Company of Brooklyn, N. Y., under an order of the District Court of the United States for the Eastern District of New York, made July 2, 1902.''

III. Thereupon, your petitioners duly excepted to said judgment and to the decision upon which the same was rendered and they duly appealed from said judgment to the Appellate Division of the Supreme Court of the State of New York for the second department. Said appeal duly came on for argument before said Appellate Division and your petitioners through their counsel duly argued that said judgment should be reversed, and that said complaint should be dismissed for the reason that the District Court of the United States for the Eastern District of New York, sitting in bankruptcy, had the exclusive right to determine the title to said fund deposited as aforesaid in pursuance to an order of said court; and for the further reason that your petitioners had a contractual right under

said order to have all questions concerning the right to said fund determined in said District Court of the United States, sitting in bankruptcy; and your petitioners then in said Appellate Court and previously in said court of first instance insisted that they had a title, right, privilege and immunity under the Constitution and Statutes of the United States, which relieved them from the jurisdiction of said State Court in said action; and which entitled them to have all questions concerning the title to said fund determined by the said District Court of the United States, sitting in bankruptcy.

IV. Thereafter on or about October 11, 1905, an order was entered in the office of the Clerk of said Appellate Division, which order affirmed said judgment. On the same day, a certified copy of said order together with the original papers on said appeal were entered in the office of the Clerk of the County of Kings in the State of New York. Subsequently, on October 23, 1905, a judgment for the costs taxed upon said appeal was thereupon entered in the office of the Clerk of the County of Kings, which judgment directed as follows: "Ordered and adjudged that plaintiff recover of said defendants. Solon L. Frank and Samuel Frank, doing business as S. L. & S. Frank, the sum of $149.50; and that said plaintiff have execution therefor." Said decision of said Appellate Division was unanimous.

V. The constitution and laws of the State of New York provide as set forth in section 191 of the Code of Civil Procedure, that no appeal shall be taken to the Court of Appeals of said State from a judgment of affirmance in an action to set aside a judgment, sale, transfer, conveyance, assignment or written instrument as in fraud of the rights of creditors, when the decision of the Appellate Division of the Supreme Court is unanimous, unless such Appellate Division shall certify that in its opinion a question of law is involved which ought to be reviewed by the Court of Appeals, or unless in case of its refusal to so certify, an appeal is allowed by a judge of the Court of Appeals. The decision of the Justice of said Supreme Court upon which said judgment was entered expressly stated as follows: "The grounds upon which the issues have been decided are as follows: Said mortgage was made with the intent and purpose of said Vogt and said defendants Frank to hinder, defeat, defraud and delay said Vogt's creditors." Upon the trial of said action, no evidence of usury was offered; and the contention that said chattel mortgage was void under the bankruptcy law as a preference was not raised by the plaintiff, whose only contention upon the trial was that said chattel mortgage was void as a fraud upon the rights of the creditors of said Vogt. Subsequently to said order of affirmance by said Appellate Division, your petitioners duly applied to said Appellate Division and requested said Appellate Division to certify that in its opinion, a question of law was involved in said case which ought to be reviewed by the Court of Appeals, and requested said Appellate Division to allow an appeal from said judgment to said Court of Appeals; but said Appellate Division refused to make such certification and refused to allow such appeal. Thereupon your petitioners duly applied

to the Honorable Edward T. Bartlett, a judge of the Court of Appeals of said State and moved before him for the allowance of an appeal to the said Court of Appeals from said judgment; but on December 7, 1905, the said Judge Bartlett denied said motion.

VI. Upon said trial and upon said appeal and upon said subsequent motions, which were made in said Appellate Division and before said judge of the Court of Appeals, your petitioners duly argued and insisted and asked that said complaint should be dismissed upon the further ground that a trustee in bankruptcy could not maintain an action to set aside a chattel mortgage for fraud upon creditors in this case; in which there was no evidence that there were judgment creditors of said bankrupt represented by said trustee. Said objection made by your petitioners was overruled in all said courts. Your petitioners duly excepted to said ruling in the trial court. Your petitioners argued in said Appellate Division and before said judge of said Court of Appeals, the question of the jurisdiction of said court and of the said contractual right of your petitioners to have the questions decided by said District Court of the United States, which are hereinbefore set forth. Said decisions of said courts and judges, and of each of them, denied to your petitioners, a title, right, privilege and immunity held by your petitioners under the constitution and statutes of the United States.

Wherefore your petitioners pray that a writ of error may issue and that they may be allowed to bring up for review before the Supreme Court of the United States, the said order and judgment of said Appellate Division of said Supreme Court of the State of New York; and that your petitioners may have such other and further relief in the premises as may be just; and your petitioners will ever pray, etc.

SOLON L. FRANK.
SAMUEL FRANK.

ROGER FOSTER,
Petitioners' Attorney, 35 Wall Street, New York.
ROGER FOSTER,
Of Counsel.

STATE OF NEW YORK, }
County of New York. } ss.

Solon L. Frank, being duly sworn, deposes and says: I am one of the foregoing petitioners. The foregoing petition is true to my own knowledge except as to the matters therein stated to be alleged upon information and belief; and as to those matters I believe the same to be true.

Sworn to before me this 9th day of December, 1905.

(Seal of Isidor Mehrbach, Notary Public. New York County.)

ISIDOR MEHRBACH,
Notary Public, N. Y. Co.

Read on application for writ of error, Dec. 19, 1905.

R. W. PECKHAM,
Asso. Jus. Sup. Ct., U. S.

APPELLATE FORM IX.—PRAYER FOR REVERSAL.

[Frank v. Vollkommer, 205 U. S. 521.]

To the Honorable the Supreme Court of the United States:

SOLON L. FRANK and SAMUEL FRANK, Doing Business as S. L. & S. FRANK, Plaintiffs in Error,
against
JOSEPH VOLLKOMMER, JR., as Trustee in Bankruptcy of the Estate of JACOB VOGT, a Bankrupt, and JACOB VOGT, Defendants in Error.

And now come Solon L. Frank and Samuel Frank, the plaintiffs in error, and pray for a reversal of the judgment of the Appellate Division of the Supreme Court of the State of New York for the Second Department in the action brought by Joseph Vollkommer, Jr., as trustee in bankruptcy of the estate of Jacob Vogt, a bankrupt, plaintiff and respondent, against Solon L. Frank and Samuel Frank, doing business under the name of S. L. & S. Frank, defendants, appellants, who were impleaded with Jacob Vogt, who made default, which judgment was entered in the office of the clerk of the County of Kings on or about the 23rd day of October, 1905; and they also pray for a reversal of the order of affirmance in said action by said Appellate Division, in the office of the clerk of said Appellate Division on or about October 11, 1905; and they also pray for a reversal of the judgment in said action, of the Supreme Court of the State of New York in and for the County of Kings, entered in the office of the clerk of the County of Kings on or about July 21, 1903.

ROGER FOSTER,
Attorney for Solon L. Frank and Samuel Frank, 35 Wall Street, New York.

APPELLATE FORM X.—NOTICE TO JOIN IN WRIT OF ERROR.

[From record in Frank v. Vollkommer, 205 U. S. 521.]

Supreme Court, County of New York.

JOSEPH VOLLKOMMER, JR., as Trustee in Bankruptcy of the Estate of Jacob Vogt, a Bankrupt,
against
SOLON L. FRANK and SAMUEL FRANK, doing business under the name of S. L. & S. Frank, and JACOB VOGT.

Dear Sir: Please take notice that Messrs. Solon L. Frank and Samuel Frank are about to apply to a Justice of the Supreme Court of the United

States for a writ of error to review the order and judgment of the Appellate Division, which affirmed the judgment of the Special Term herein; and that they hereby demand and request and notify you to join in the application for such writ of error.

Dated New York, December 12th, 1905.

Yours, etc., SOLON L. and SAMUEL FRANK.
By ROGER FOSTER, Their Attorney.

To JACOB VOGT.

APPELLATE FORM XI.—CERTIFICATE OF QUESTION OF JURISDICTION.

[Bigby v. U. S., 188 U. S. 400, in which the author was counsel.]

The [District] Court of the United States for the Eastern District of New York.

WILLIAM SAMUEL BIGBY
vs.
THE UNITED STATES OF AMERICA. } Certificate.

The [District] Court of the United States for the Eastern District of New York hereby certifies to the Supreme Court of the United States that on the thirtieth day of January, 1901, a judgment was entered in the above-entitled action, pursuant to the decision of said court sustaining a demurrer filed by the defendant. The United States of America, to the petition of the petitioner, William Samuel Bigby, on all the grounds specified in said demurrer, namely:

(1) That it appears upon the face of the petition that the court has no jurisdiction of the person of the defendant.

(2) That it appears upon the face of the petition that the court has no jurisdiction of the subject of the action.

(3) That it appears upon the face of the petition that it does not state facts sufficient to constitute a cause of action against the defendant. A copy of such petition and demurrer is contained in the judgment roll filed herein, to which reference is had for a more particular description thereof.

And this court further certifies that in said cause the jurisdiction of this court is in issue, and further certifies to the Supreme Court of the United States said question of jurisdiction raised by said demurrer to the petition on the grounds aforesaid, namely: The question whether a person who is not, and has not been, an employee of the United States, can sue the United States, in the [District] Court of the United States, in the district where he resides, to recover damages to the amount of ten thousand ($10,000) dollars, which damages were caused by personal injury received by said person through the negligence of an employee of the United States, while said person injured as aforesaid, was being carried on an elevator in a public building, owned and used by the United States

as a postoffice and for other governmental uses and purposes, when said person entered said elevator for the purpose of visiting the office of the United States marshal of such district on official business.

Dated Brooklyn, Jan. 31, 1901.

(The Seal of the [District] Court, Eastern District of New York.)

EDWARD B. THOMAS,
United States Judge.

APPELLATE FORM XII.—SUPERSEDEAS BOND.

[District] Court of the United States of America for the Southern District of New York, in the Second Circuit.

JOHN DOE, Appellant,
against
RICHARD ROE, Respondent.

Know all men by these presents, that we, John Doe and George Palliser, both of the city, county and State of New York, are held and firmly bound unto the above-named Richard Roe in the sum of two hundred and fifty dollars, to be paid to the said Richard Roe, for the payment of which well and truly to be made, we bind ourselves, and each of us, our and each of our heirs, executors, and administrators, jointly and severally firmly by these presents. Sealed with our seals, and dated the 18th day of December, in the year of our Lord one thousand eight hundred and eighty-nine. Whereas, the above-named John Doe has prosecuted an appeal to the Supreme Court of the United States, to reverse the decree rendered in the above-entitled suit, by the Judge of the [District] Court of the United States, for the Southern District of New York:

Now, therefore, the condition of this obligation is such, that if the above named John Doe shall prosecute said appeal to effect and answer all damages and costs, if he fail to make said appeal good, then this obligation shall be void, otherwise the same shall be and remain in full force and virtue.

JOHN DOE, [L. S.]
GEORGE PALLISER. [L. S.]

Sealed and delivered, and taken and acknowledged, this 18th day of December, 1889, before me.

JOHN A. SHIELDS, U. S. Commissioner.

Approved by
E. HENRY LACOMBE, Circuit Judge.

APPELLATE FORM XIII.—ASSIGNMENT OF ERRORS.

[From record in Frank v. Vollkommer, 205 U. S. 521.]

Supreme Court of the United States.

SOLON L. FRANK and SAMUEL FRANK, Doing Business Under the Name of S. L. & S. FRANK, Plaintiffs in Error,

against

JOSEPH VOLLKOMMER, JR., as Trustee in Bankruptcy of the Estate of JACOB VOGT, a Bankrupt, Defendant in Error.

And now come Solon L. Frank and Samuel Frank, plaintiffs in error, and make and file this their assignment of error.

I. The Appellate Division of the Supreme Court of the State of New York for the Second Department erred in refusing to direct a dismissal of the complaint in the action below for the reason that the Supreme Court of the State of New York had no jurisdiction of said case.

II. The Supreme Court of the State of New York for the County of Kings erred in refusing to dismiss said complaint for the same reason.

III. The said Appellate Division erred in refusing to direct the dismissal of said complaint for the reason that the plaintiff below had no right to sue to set aside a chattel mortgage in a case where he did not represent a judgment creditor of the mortgagor.

IV. The Supreme Court of the State of New York for the County of Kings erred in refusing to dismiss said complaint for the same reason.

V. The said Appellate Division for the Supreme Court of the State of New York erred in refusing to set aside so much of the judgment of said Supreme Court in the County of Kings as adjudicated concerning the title to a fund, which had been deposited under an order of the District Court of the United States for the Eastern District of New York.

VI. The Supreme Court of the State of New York for the County of Kings erred in making such an adjudication.

VII. The Appellate Division of the Supreme Court of the State of New York for the Second Department erred in affirming the judgment of the Supreme Court of the State of New York for the County of Kings hereinbefore referred to.

ROGER FOSTER,
Attorney for Plaintiffs in Error, 35 Wall Street, New York.

Read on application for writ of error, Dec. 19, 1905.

R. W. PECKHAM,
Asso. Jus. Sup. Ct. U. S.

APPELLATE FORM XIV.—NOTICE AND PETITION FOR REVIEW OF ORDER IN BANKRUPTCY.

[Re Abbey Press, 134 Fed. 51.]

[Title in Circuit Court of Appeals.]

SIRS:

Please take notice that on the 3d day of February, 1904, I shall present to this Court and file with the Clerk thereof, the petition of J. Campbell Thompson herein, for review by this Court of a certain order of the Hon. George C. Holt, one of the Judges of the United States District Court for the Southern District of New York, filed and entered with the Clerk of said Court on the 27th day of January, 1904, and confirming certain rulings and findings of the Hon. Macgrane Coxe, one of the Referees herein, and for review of the said findings and rulings of the said Referee, and at the same time or as soon thereafter as counsel can be heard, a motion will be made before said Court for a review of said order and of the said findings of the said Referee, and for such other and further relief in the premises as may be just.

Dated New York, January 28, 1904.

Yours, &c.,
ROGER FOSTER,
Attorney for J. Campbell Thompson,
35 Wall Street,
New York.

To MSRS. STERN, SINGER & BARR,
390 Broadway, New York.

[Title in Circuit Court of Appeals.]

To the Honorable WILLIAM J. WALLACE, E. HENRY LACOMBE, WILLIAM K. TOWNSEND and ALFRED C. COXE, Judges of the United States Circuit Court of Appeals, and to the HONORABLE THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SOUTHERN DISTRICT OF NEW YORK.

The petition of J. Campbell Thompson, a resident of the Southern District of New York, respectfully shows this Court:

I.—Heretofore under the order of the Honorable Thomas Alexander, Special Commissioner of the United States District Court for the Southern District of New York, and upon the order of the Honorable George C. Holt, one of the Judges of said Court, upon motion of Louis H. Moos, Esq., attorney for Hugh A. Bayne, Esq., the Receiver of the assets of the said bankrupt, The Abbey Press, in said District Court, your petitioner was on May 27, 1903, exhaustively examined by John T. Foley, Esq., of counsel for said Receiver and for certain creditors herein, who was then assisted by said Moos, concerning the acts, conduct and property of said bankrupt, and your petitioner then fully and fairly answered all questions then

and there put to him and stated all knowledge which he possessed concerning the acts, conduct and property of said bankrupt.

II.—Subsequently thereto, and on or about December 21, 1903, your petitioner received a certain paper, which purported to be a subpoena purporting to be signed by the Clerk of said District Court, but which was not under the seal of said Court and which did not purport to be issued in pursuance of any order of said Court, nor of any judge thereof nor of any referee in bankruptcy. Said paper purported to order your petitioner to attend before the Honorable Macgrane Coxe, the Referee in Bankruptcy, on December 22, 1903, to testify in the above entitled proceedings on the part of the trustee of the assets of the said bankrupt, and to bring with him certain papers therein specified. Your petitioner attended at the office of said Referee on said date, but said Referee was then absent from his said office. Your petitioner thereupon left said papers with said Referee for inspection, and stated to the attorney for said trustee that he did not recognize any rights on the part of said trustee to compel your petitioner to attend and give evidence before said Referee. Subsequently, on December 28, 1903, your petitioner attended before said Referee and specifically objected to the examination of your petitioner on the following grounds as well as other grounds: (1) that your petitioner could not be lawfully examined except in pursuance of an order of this Court; (2) that no such order had been made; (3) that the said Referee had no power to make such an order; (4) that, inasmuch as your petitioner had once been examined concerning the acts, conduct and property of said bankrupt, no further examination of your petitioner could lawfully be made; (5) that if there were jurisdiction in the Court to order a second examination of your petitioner such an order could not be made except upon a written petition or a written application for the same, to which application your petitioner should be allowed an opportunity to answer and offer evidence, which evidence your petitioner then requested leave to offer. No evidence was offered in support of the application for said second examination. The said Honorable Referee thereupon overruled your petitioner's objections, refused to permit your petitioner to offer evidence in opposition to the application for said examination and orally directed your petitioner to be sworn and to submit to a second examination, although no written application for the same was made or filed.

Subsequently thereto and after a petition by your petitioner herein was duly made to the Honorable the Judges of said District Court, and to said Referee, said Referee certified to said Court the objections of your petitioner made at said examination and the rulings of him, the said Referee, and his directions thereon as aforesaid. And a motion having been duly made by your petitioner to review said findings and the said rulings of the said Referee, said motion duly came on to be heard before the Honorable George C. Holt, one of the Judges of said District Court. Said motion was on or about January 19, 1904, denied by said Judge and the findings of the said Referee were confirmed by said Judge, and by an order duly entered on the 27th day of January, 1904.

III.—Your petitioner respectfully submits that the said directions and findings of the said Referee and the said order of said Judge were and each of them was erroneous.

Wherefore, your petitioner prays that the said directions and findings of the said Referee and the confirmation thereof of the said order by the said Honorable Judge of said District Court be reviewed by this Court and that your petitioner may be granted such other and further relief in the premises as may to this Court seem just, and your petitioner will ever pray, &c.

ROGER FOSTER,
Petitioner's Attorney,
35 Wall Street,
New York.

[Affidavit.]

APPELLATE FORM XV.—PETITION OR REVIEW OF ORDER OF FEDERAL TRADE COMMISSION.

[Order set aside, 273 Fed. 478.]

[Title.]

To the Honorable Judges of the United States Circuit Court of Appeals for the Second Circuit:

Your petitioner, Standard Oil Company of New York, respectfully represents:

I. That your petitioner is a corporation organized, existing and doing business under the laws of the State of New York, with its principal office and place of business at No. 26 Broadway, Borough of Manhattan, City, County and State of New York, within the jurisdiction of the United States Circuit Court of Appeals for the Second Circuit.

II. That heretofore and on or about the 29th day of June, 1918, the Federal Trade Commission, the Respondent herein, at its Docket No. 134, filed and issued its complaint against your petitioner, alleging that petitioner was doing certain acts in the conduct of its business alleged to be unfair methods of competition in interstate commerce, in violation of the provisions of Section 5 (five) of an Act of Congress approved September 26, 1914, entitled "An Act to create the Federal Trade Commission, define its powers and duties and for other purposes," and also in violation of Section 2 (two) of an Act of Congress approved October 15, 1914, entitled "An Act to supplement existing laws against unlawful restraints and monopolies and for other purposes," usually known as the Clayton Act.

III. That thereafter petitioner filed its answer to said complaint, and after hearings had, on or about the 27th day of April, 1920, said respondent made its report, findings and conclusions, and directed this petitioner for-

ever to cease and desist from certain acts and to do certain things, which order is as follows: [Here order of commissioner was inserted.]

IV. That petitioner, being aggrieved by the making of said report, findings and conclusions and by the issuance of said order, desires to obtain a review thereof by this Honorable Court.

WHEREFORE your petitioner prays this Honorable Court to review said order, report, findings and conclusions and reverse and set aside the same.

And your petitioner will ever pray.

STANDARD OIL COMPANY OF NEW YORK.

By H. L. PRATT,
Vice-President.

MARTIN CAREY,
PETER M. SPEER,
Attorneys for Petitioner,
26 Broadway,
New York, N. Y.

[Affidavit]

APPELLATE FORM XVI.—ORDER EXTENDING TIME TO SERVE BILL OF EXCEPTIONS.

[Simons v. Cromwell, 262 Fed. 680. Judgment reversed.]

[Title.]

This cause having duly come on for trial at common law, and the Court having directed a verdict in favor of the defendant, and plaintiff having taken a number of exceptions in the course of a trial including an exception to such direction, and the plaintiff wishing to obtain a bill of exceptions and to sue out a writ of error to the judgment which will be entered upon said verdict; and the plaintiff having in open court in the presence of the trial counsel for both defendants moved for the relief granted in this order, on motion of Roger Foster, plaintiff's attorney, it is hereby ORDERED that the time of the plaintiff to prepare, serve, settle and file a bill of exceptions herein and her time to have the same sealed and filed and signed be and the same is hereby extended for ninety days from January 9th, 1919, and that the present term of this Court be and the same hereby is extended for said purpose until the expiration of said ninety days.

Enter.

AUGUSTUS N. HAND,
United States District Judge.

APPELLATE FORM XVII.—BILL OF EXCEPTIONS.

[Copied from Heidritter v. Elizabeth Oil Cloth Co., 112 U. S. 294.]

[*District*] *Court of the United States, District of New Jersey.*

AUGUST HEIDRITTER
vs.
THE ELIZABETH OIL CLOTH COMPANY. } In Ejectment.

Be it remembered that afterward, to wit, on the fifth day of May, in the year of our Lord one thousand eight hundred and eighty, at a stated term of the said court begun and holding in Trenton in and for the District of New Jersey, before his Honor, John T. Nixon, District Judge, the issue joined in the above stated cause between the said parties (*pro ut* the pleadings) came on to be tried before the said judge without the intervention of a jury, the parties aforesaid by their counsel having, according to the statute in such case made and provided, waived a jury; the plaintiff being represented by Edward A. Day, Esquire, his attorney, and William C. Corbin, Esquire, of counsel; and the defendant by William R. Wilson, Esquire, its attorney, and Benjamin Williamson, J. Tredwell Richards, and Alfred S. Brown, of counsel; and upon the trial of that issue the attorneys of the said August Heidritter, plaintiff, to maintain and prove the said issue on his part (it first having been admitted by the counsel for the said defendant that the erection of the building upon the premises in controversy, and for the erection of which the mechanic's lienors mentioned in plaintiff's bill of particulars supplied materials, was commenced June 25th, 1872) offered in evidence the following deeds and records, viz.:—

An exemplified copy of the following deed, viz.: Edward G. Brown and wife to Charles L. Sicher, war. deed, dated August 20, 1872; received August 20, 1872; in Book 73 of Deeds for Union Co., pp. 10, etc., conveys premises in controversy.

An exemplified copy of the judgment roll in the following cases, viz.: In the office of the clerk of the County of Union; August Heidritter v. Charles L. Sicher, builder and owner; lien claim and judgment; (*pro ut* the same.)

An exemplified copy of the judgment roll in the following case, viz.: In the office of the clerk of the County of Union; Ferdinand Blancke and others, partners, etc., as Ferdinand Blancke v. Charles L. Sicher, builder and owner; lien, claim, and judgment; (*pro ut* the same.)

An exemplified copy of the following deed, viz.: Seth B. Ryder, sheriff, to August Heidritter, deed dated September 24th, 1873; received December 1, 1873; in Book 84 of Deeds for Union Co., p. 582, conveys the premises in controversy under and by virtue of the judgment and executions in the two cases last above named; (*pro ut* the same.)

Also certain other deeds and records by which a four-thirteenths interest

in the premises in question was conveyed away by the said plaintiff, and subsequently thereafter reconveyed to him.

And thereupon said plaintiff rested his case.

Whereupon the attorneys for the said The Elizabeth Oil Cloth Company, the defendant, to maintain and prove the said issue on its part, called as a witness John C. Baily, who being duly sworn, testified among other things as follows:—

"I was a United States deputy marshal for the district of New Jersey in 1873, under Samuel Plummer, United States marshal, and as such took possession of the premises in controversy, among other things, in the condemnation or forfeiture proceeding brought by the United States against Charles L. Sicher for illicit distilling, in February, 1878, and held such position until the sale of the premises was made by the United States marshal to Edward G. Brown. While in possession of said premises, a gentleman came there whose name and appearance I cannot remember, and told me that he had a claim against the premises."

Whereupon the counsel for the plaintiffs did then and there insist before the said judge that the said testimony should not be allowed, on the ground that the same was incompetent, irrelevant and immaterial, and prayed the said court not to admit and allow the same; and the said judge did then and there allow and admit the said testimony to be introduced. Whereupon the counsel for the said plaintiff did then and there propose his aforesaid objection to the ruling of the said court, and prayed that this bill of exceptions might be sealed, and it is sealed accordingly.

JNO. T. NIXON, J. [L. S.]

And thereupon under the above ruling the witness further testified:

"I told the gentleman that the place for him to go and defend his claim was at Trenton, and told him also of the notice, viz.: the proclamation, which had been set up; I also published that notice in the Jersey City Times.

"I saw the same gentleman on the day of sale. He was with Mr. M. E. G. Brown, and I had conversation with them both there."

And being cross-examined, said:—

"I remember that there was an announcement made at the marshal's sale in regard to certain lien claims on the premises. A paper relating to said claims was also served upon me. Mr. Alward appeared as the attorney for the lien claimants on that day."

And thereupon the counsel for the defendant offered in evidence the following records, viz.:—

An exemplified copy of the following deed, viz.: Edward G. Brown and wife, to Charles L. Sicher, war. deed, dated August 20, 1872; received August 20, 1872; in Book 73 Deeds for Union Co., pp. 10, etc., conveys the premises in question.

The record in full of the decree and proceedings in the following case, viz.: U. S. District Court, District of New Jersey; the United States of America v. Eighty-nine Hogsheads of Molasses, etc.; (*pro ut* the same.)

And also an exemplified copy of the following deed, viz.: Samuel

Plummer, U. S. marshal, to Edward G. Brown; deed dated May 29, 1873; received June 7, 1873; in Book 81 of Deeds for Union Co., pp. 301, etc.; conveys the premises in controversy under and by virtue of the decree and execution in the last above named case; (*pro ut* the same).

Whereupon the counsel for the said plaintiff then and there, and in each instance on the production thereof, interposed and insisted that the said evidence so offered to be given by the defendant, to wit, the decree and proceedings on forfeiture and the deed of the United States marshal to Brown thereunder, was not good or admissible at law upon the issue aforesaid, and ought not to be admitted in bar of plaintiff's title to the premises in controversy, for the reason that the plaintiff's title acquired under the mechanic's lien proceedings, as aforesaid, was by law prior to the title of the said defendants acquired under the said condemnation proceedings; also for the reason that the said condemnation proceedings in no wise condemned or forfeited the interests of the said lienors in said premises, and that their said interest had not been affected by said proceedings; also for the reason that by the several acts of Congress, and the supplements thereto under which said proceedings were had and maintained, only the right, title, and interest of the said Charles L. Sicher in the premises could have been seized and condemned to be forfeited, and that the interests of the said lienors could have in no wise been affected thereby, and also as only the interest of said Sicher in the premises had been seized and condemned, said Brown acquired only that interest at the marshal's sale, and took his title, therefore, subject to the mechanic's liens on the premises; also for the reason that as under the laws of New Jersey the title of the said plaintiff to the premises upon the sale to him by the sheriff of Union county reverted back to the date of the commencement of the buildings, viz.: June 25, 1872, long prior to the time when the business of distilling was carried on by the said Sicher on the premises, and long prior to the time when the United States acquired its lien thereto, the same condemnation proceedings were ineffectual to cut off or affect said plaintiff's title; also for the reason that by the acts of Congress, and the supplements thereto, under which said proceedings were had, only the right, title and interest of Charles L. Sicher in the premises, and the right, title and interest of every person who knowingly suffered and permitted the business of a distillery to be there carried on, or who connived at the same, could be forfeited to the United States, and no proof has been made, either in the condemnation proceedings or in the trial of this cause, that the lienors had knowingly suffered and permitted the business of a distillery to be carried on on the premises, or that they had connived at the same, and therefore that the interests of such lienors had not been forfeited to the United States and were not affected by the decree; also for the reason that the district court never had jurisdiction to pronounce the said decree in that the United States internal revenue collector had not seized the said premises prior to the filing of the information; also for the reason that the information did not pronounce in distinct articles the causes of forfeiture, and did not aver that the same were

contrary to the form of the statutes in such case made and provided, and that the allegations therein did not conform strictly to the statutes under which the proceedings were had, and therefore the said decree was void and no title could be acquired thereunder; also for the reason that the said decree was void in that the court in said proceedings did not have proof made of the allegations in the libel of information, and therefore said Brown acquired no title to the premises in question, and also on the ground that by the terms of said deed all that said Brown acquired was the right, title and interest of said Sicher of, in, and to the premises in controversy, and therefore took the same subject to said mechanic's liens.

But his honor, the said judge, held and affirmed that the said evidence so offered to be given by the defendant, as aforesaid, was good and admissible in law, and thereupon the same was read and given in evidence. To which ruling of his honor, the said judge, the plaintiff then and there prayed a bill of exceptions, and his honor, the said justice, sealed the exception accordingly.

JNO. T. NIXON, J. [L. S.]

And thereupon the said defendant, further to prove and maintain the said issue on its part, offered in evidence certain records and mesne conveyances by which the title to the premises in controversy passed from said Brown and became finally vested in the said defendant; and thereupon the said defendant, further to prove and maintain the said issue on its part, called as a witness—

Edward G. Brown, who, being duly sworn, testified, among other things, as follows:

"I have heard the testimony of the witness, John C. Bailey, in reference to the gentleman who was present with me at the marshal's sale; that gentleman was Frederick L. Heidritter, a son of the plaintiff."

Whereupon the counsel for the plaintiff then and there objected to the admission of the said testimony, for the reason that the same was incompetent, immaterial, and irrelevant, and the said judge did then and there allow and admit the said testimony to be introduced.

Whereupon the counsel for the said plaintiff did then and there propose his aforesaid objection to the ruling of the said court, and prayed that his bill of exception might be sealed, and it is sealed accordingly.

JNO. T. NIXON, J. [L. S.]

Thereupon, under the above ruling, this witness further testified, and being cross-examined, said:

"I remember a paper being read at the sale; Mr. Alward was present; the paper was in regard to certain lien claims on the seized premises; also had a conversation with said Frederick L. Heidritter in relation to the liens; I knew at the time I purchased the premises, at said sale, of the existence of the liens."

And thereupon the defendant, further to prove and maintain the issue on its part, called—

James Ray, who, being duly sworn, testified, among other things, as follows:—

"I am a government storekeeper, and remember the seizure of the premises in controversy. I saw Mr. Frederick L. Heidritter at the distillery shortly after the seizure."

Whereupon the counsel for plaintiff did then and there object to the admission of the testimony, and insisted that the same be not allowed in evidence, for the reason that it was incompetent, immaterial, and irrelevant, and his honor, the said judge, then and there admitted and allowed the said testimony to be introduced.

Whereupon the counsel for the said plaintiff did then and there propose his aforesaid objection to the ruling of the said court, and prayed that his bill of exception might be sealed, and it was sealed accordingly.

JNO. T. NIXON, J. [L. S.]

Thereupon under the above ruling, the witness testified further, as follows:

"Said Heidritter said he had a claim against the building, and that he thought his claim came in ahead of the government. He wanted permission to put a paper on the building, and he did post such a paper." And being cross-examined, said:——

"That paper was the same as was read at the sale."

And said defendant, further to prove and maintain the issue on its part, called as a witness—

Frederick L. Heidritter, who, being duly sworn, among other things, said:—

"I reside and do business at Elizabeth; I am a lumber dealer, and am now a partner of my father, the plaintiff in this case. I have been connected with my father's business for fifteen years last past, and was in business with him at the time of the seizure, and was then his managing clerk."

Whereupon the counsel for the plaintiff did then and there interpose and object to the admission of said testimony, for the reason that the same was immaterial and irrelevant, and the said judge did then and there allow and admit the said testimony to be introduced.

Whereupon the counsel for the said plaintiff did then and there propose his aforesaid objection to the ruling of the said court, and prayed that his bill of exception might be sealed, and it is sealed accordingly.

JNO. T. NIXON, J. [L. S.]

And said witness, being cross-examined, said:—

"The building seized was the same for which the materials were supplied by my father, and mentioned in the lien claims."

And thereupon the defendant closed its case, and this concluded the testimony in the case.

APPELLATE FORM XVIII.—BILL OF EXCEPTIONS.

[Judgment reversed, 262 Fed. 680.]

[Title in District Court with name of trial Judge.]

New York, January 6, 1919.

APPEARANCES:

ROGER FOSTER, Attorney for Plaintiff.

SULLIVAN & CROMWELL, Attorneys for Defendant CROMWELL, Executor, &c., Clarke M. Rosecrantz, P. L. Miller, of Counsel.

EDGAR T. BRACKETT, Attorney for Defendant CRAMER, Executor, &c., Edgar T. Brackett, Hiram C. Todd, of Counsel.

A jury was impanelled and sworn.

Opening for plaintiff.

[Here insert abstract of testimony exhibits and proceedings on trial prior to verdict, together with exceptions as noted in stenographers' minutes.]

The foregoing bill of exceptions contains all the evidence received upon the trial of this action or relating to the foregoing exceptions.

The attorney for the plaintiff in error, the plaintiff below, having thereupon tendered this as the plaintiff's bill of exceptions to the rulings of the Court upon the trial of this action and having requested that the signature and seal of the Trial Judge aforesaid should be annexed to the same pursuant to the statute in such case made and provided; and forasmuch as none of such matters and exceptions so offered and made to the rulings and directions of said judge, and none of the evidence and other things do appear upon the record of said case, the said Judge pursuant to said request did put his signature and seal to this bill of exceptions this 1st day of April, 1919, and orders the same on file.

AUGUSTUS N. HAND,
Trial Judge.

(Court Seal)

APPELLATE FORM XIX.—PRAECIPE INDICATING PORTIONS OF THE RECORD TO BE INCORPORATED INTO THE TRANSCRIPT UPON APPEAL.

[232 Fed. 35.]

[Title in District Court.]

Sirs: PLEASE TAKE NOTICE that the appellant's statement of the evidence in this cause was this day lodged in the office of the Clerk of the United States District Court for the Southern District of New York for your examination; and that on the 23rd day of March, 1915, in the United

States Court rooms, Borough of Manhattan, City of New York, at 10 o'clock in the forenoon of that day or as soon thereafter as counsel can be heard, I shall ask the Hon. CHARLES M. HOUGH, United States District Judge, to approve said statement; and you and each of you are hereby requested to serve upon me, on or before the 19th day of March, 1915, your objections and proposed amendments, if any, to said statement.

PLEASE TAKE FURTHER NOTICE that the appellant designates the following as the portions of the record in this cause to be incorporated into the transcript on his appeal: 1. Bill of complaint, verified September 22, 1913. 2. Answer of the defendant, Ball, omitting the counterclaims. 3. Statement that the answers of the defendant General Realty & Mortgage Company, and O'Donohue are identical with the answer of the defendant, Ball, except as to the name of the defendant in each case. 4. Answer of the defendant, Corn. 5. Answer of the defendant, Dowling. 6. Answer of the defendant, Barlow. 7. Statement of the evidence approved pursuant to Rule LXXV. 8. Opinion of the Hon. CHARLES M. HOUGH, United States District Judge, dated December 8, 1914. 9. Decree filed January 11, 1915. 10. Summons and severance. 11. Petition of appeal. 12. Assignments of error. 13. Order allowing appeal. 14. Citation.

Dated, New York, March 12, 1915.

Yours, etc.,
WILLIAM M. CHADBOURNE,
Solicitor for Silas W. Howland, as Receiver of Improved Property Holding Company of New York.
Office and Post Office Address,
32 Liberty Street,
Borough of Manhattan,
New York City.

To ROGER FOSTER, Esq.,
Solicitor for Defendant Dowling,
55 Liberty Street,
New York City.

[and to the other attorneys for the respondents and to the clerk of the District Court.]

APPELLATE FORM XX.—ORDER AS TO CONTENTS OF RETURN TO WRIT OF ERROR.

[Judgment reversed, Simons v. Cromwell, 262 Fed. 680.]

[Title.]

After hearing Roger Foster, Esq., on behalf of the plaintiff in support of a motion that the Trial Judge determine how much of the record should be included in the return to the writ of error to review the judgment herein, and Philip L. Miller, Esq., on behalf of the defendants, in partial opposition thereto, on motion of Roger Foster, plaintiff's attorney, it is hereby

ORDERED that said return shall contain copies of the following papers, and no others; in addition to writ of error, assignment of errors and citation:

Summons; return by Marshal of service of same; appearance of defendant Cromwell; appearance of defendant Cramer; amended complaint; amended answer of defendant Cramer to amended complaint; amended answer of defendant Cromwell to amended complaint; copy opinion of Supreme Court; order of Hough, J., thereupon; extract from clerk's minutes; order extending time to serve bill of exceptions as resettled; judgment; bill of exceptions; such stipulations and clerk's certificate as may be obtained, and upon the Court's own motion, it is further

ORDERED that the postscript to the letter by the defendant to plaintiff's husband marked Exhibit 33 for Identification, be added to the bill of exceptions herein when the same is printed provided that a copy thereof be furnished by defendants' attorneys to the plaintiff's attorney within three days after the entry of this order.

AUGUSTUS N. HAND,
United States District Judge.

APPELLATE FORM XXI.—STIPULATION AUTHORIZING CERTIFICATE TO RETURN.

It is hereby stipulated and agreed by and between the attorneys for the respective parties hereto that the record herein numbered from pages 1 to 225, inclusive, contains all of the records, papers, and documents in this action that are necessary and material upon the review of this judgment by the Circuit Court of Appeals for the Second Circuit, and that the same may be certified by the Clerk of the United States District Court as the complete return herein which shall constitute full compliance with the requirements of the writ of error herein.

Dated, New York, May 3d, 1919.

ROGER FOSTER,
Attorney for Plaintiff in Error.
SULLIVAN & CROMWELL,
Attorneys for William Nelson Cromwell, Defendant in Error.
EDGAR T. BRACKETT,
Attorney for Louis H. Cramer, Defendant in Error.

APPELLATE FORM XXII.—CERTIFICATE BY CLERK TO TRANSCRIPT.

Southern District of New York. } ss.
UNITED STATES OF AMERICA, }

I, Alexander Gilchrist, Jr., Clerk of the [District] Court of the United States of America, for the Southern District of New York, in the Second Circuit, by virtue of the foregoing Writ of Error, and in obedience thereto, do hereby certify, that the following pages, numbered from —— to ——, inclusive, contain a true and complete transcript of the record and proceedings had in said Court in the cause of —— ——, plaintiff in error, against —— ——, defendant in error, as the same remain of record and on file in said office.

In testimony whereof, I have caused the seal of the said Court to be hereunto affixed, at the City of New York, in the Southern District of New York, in the Second Circuit, this 11th day September, in the year of our Lord, one thousand eight hundred and ninety-one, and of the Independence of the United States the one hundred and fifteenth.

[Seal of U. S. [District] Court.] ALEXANDER GILCHRIST, JR., Clerk.

APPELLATE FORM XXIII.—MEMORANDUM TO BE INSERTED IN A COMMON LAW CASE AS PROVIDED BY SECTION 7 OF RULE 14 OF THE CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT.

[233 Fed. xxv.]

(1) Petition for writ of error filed ——— day of ———, 19——.
(2) Writ of error granted ——— day of ———, 19——.
(3) Writ of error issued ——— day of ———, 19——.
(4) Copy of writ of error lodged for adverse party ——— day of ———, 19——.
(5) Writ of Error Bond: Dated ——— day of ———, 19——.
Penalty $———.
Obligors:.....
.....
.....
Conditioned for costs and damages (or for costs).
(6) Citation. Dated ——— day of ———, 19——.
Return, dated ——— day of ———, 19——, (or waiver of service, dated ——— day of ———, 19——).
Note: Similar memorandum mutatis mutandis to be used in admiralty and equity cases.

The petition for writ of error or appeal, the order granting writ of error

or appeal, the writ of error, the appeal bond, the citation, the return of service or waiver of service should not be copied into the record, but the originals thereof shall be sent up and accompany the transcript of the record.

In transcribing bills of exceptions into the record in cases at law, clerks will carefully inspect such bills of exceptions and wherever the words "here insert" occur, the paper or matter called for should be bodily incorporated into the record at that place.

In making up records in admiralty cases the following should be omitted (see rule 52 of the Supreme Court, in admiralty):

1. The continuances.

2. All motions, rules and orders not excepted to which are merely preparatory for trial.

3. The commissions to take depositions, notices therefor, their captions, and certificates of their being sworn to, unless some exception to a deposition in the district court was founded on some one or more of these; in which case, so much of either of them as may be involved in the exception shall be set out. In all other cases it shall be sufficient to give the name of the witness and to copy the interrogatories and answers, and to state the name of the commissioner, and the place where and the date when the deposition was sworn to; and, in copying all depositions taken on interrogatories, the answer shall be inserted immediately following the question.

APPELLATE FORM XXIV.—ORDER FOR APPEARANCE IN SUPREME COURT.

File No. ————.

SUPREME COURT OF THE UNITED STATES.

No. ————, October Term, 19——.

vs.

.....

.....

The Clerk will enter my appearance as Counsel for the .....

(Name) .....

(P. O. Address) .....

Note.—Must be signed by a member of the Bar of the Supreme Court United States. Individual and not firm names must be signed.

APPELLATE FORM XXV.—MOTION TO DISMISS APPEAL.

In the Supreme Court of the United States.

PERE ALFREDO LUIS BAGLIN, Superior-General of the Order of Carthusian Monks, for Himself and all other Members of said Order. Complainant Appellant, *against* CUSENIER COMPANY, Respondent. | No. 614. October Term, 1908.

And now comes the Cusenier Company, the respondent above named, by A. L. Pincoffs and Roger Foster, its counsel, and moves to dismiss, with costs, the appeal taken herein by the above-named Pere Alfredo Luis Baglin, Superior-General of the Order of Carthusian Monks, for Himself and all other Members of said Order, upon the ground that this Court has no jurisdiction of the same, and because the said appeal is otherwise informal, irregular and insufficient, for the reason that the decree which the said appeal seeks to bring up for review is not a final decree, and for other reasons apparent upon the face of said papers.

In the Supreme Court of the United States.

PERE ALFREDO LUIS BAGLIN, Superior-General of the Order of Carthusian Monks, for Himself and all other Members of said Order. Complainant Appellant, *against* CUSENIER COMPANY, Respondent. | No. 614. October Term, 1908.

Sir:

Please take notice that upon the affidavit of Jules Aubry, hereto annexed, sworn to on the 27th day of February, 1909, and upon the copy of the bill in equity in the [District] Court of the United States for the Southern District of New York, in the suit above entitled, and the decree of said Court upon said bill in equity, and upon the order and mandate of the Circuit Court of Appeals for the Second Circuit, upon the appeal from said decree, and the order thereupon of said [District] Court, copies of which are hereto annexed, and upon all the papers and proceedings herein, and upon the printed brief, a copy of which is herewith served upon you, we shall on Monday, the 22d day of March, 1909, and if motions are not then heard, at the next succeeding motion day of this Court, make and submit to the Supreme Court of the United States, at a stated term thereof, to be held in the Capitol, in the City of Washington, District of Columbia, the motion, a copy of which is hereto annexed; and that we shall also then and there move said Court for an order dismissing the appeal herein for want of jurisdiction, and because the same is otherwise irregular, informal and insufficient, for the reason that the decree which the

said appeal seeks to bring up for review is not a final decree, and for other reasons which are apparent upon the face of said papers, and that we shall then and there move for such other and further relief in the premises as may be just.

New York, February 27, 1909.

Yours, &c.,
A. L. PINCOFFS,
ROGER FOSTER,
Of Counsel for Cusenier Company, Respondent.

To PHILIP MAURO, Esq.,
Of Counsel for Complainant Appellant,
154 Nassau Street,
New York.

In the Supreme Court of the United States.

PERE ALFREDO LUIS BAGLIN, Superior-General of the Order of Carthusian Monks, for Himself and all other Members of said Order. Complainant Appellant,
against
CUSENIER COMPANY, Respondent.

No. 614. October Term, 1908. (No. 21,410.)

UNITED STATES OF AMERICA,
Southern District of New York, } ss.
State of New York.

JULES AUBRY, being duly sworn, deposes and says: I reside in the City, County and State of New York. I am the vice-president of the Cusenier Company, which is the respondent above named.

On or about the 7th day of January, 1905, a bill in equity by the above-named complainant, appellant, against the Cusenier Company, was filed in the Clerk's office of the [District] Court of the United States for the Southern District of New York. A copy of said bill in equity is hereto annexed, marked A. Said bill prays injunctive relief and an accounting as follows: "That said defendant may be compelled to account for all the profits, gains, savings and advantages derived or received by it by reason of the unlawful acts herein complained of." An appearance and answer traversing the material allegations thereof were duly filed by the said Cusenier Company to said bill. The general replication was thereafter filed by complainant. Testimony was taken by both parties in support of the issues raised by said answer and replication. On or about the 26th day of November, 1907, a decree was entered thereupon, after a hearing, a copy of which decree is hereunto annexed, marked B. Said decree enjoined the said Cusenier Company from using certain alleged trade-marks, also from selling or offering for sale any liqueur or cordial not manufactured by complainant, in any dress or package like or simulating in any material respects the dress or package theretofore used by complainant. Said decree concluded as follows: "5. It is further adjudged,

ordered and decreed, that the matter be referred to John A. Shields, Esq., as Master, to take the usual accounting and report to this Court with all convenient speed the amount of defendant's profits by reason of the infringements and wrongs above referred to, together with the quantity of the infringing article now in possession or control of defendant or of any of its officers, servants or privies. 6. And it is further adjudged, ordered and decreed, that complainants do recover from defendant their taxable costs herein; and that execution issue for the same and for the amounts found due on the accounting."

Subsequently thereto, the said Cusenier Company duly appealed from said decree to the Circuit Court of Appeals of the United States for the Second Circuit. Said appeal duly came on to be heard. Subsequently thereto, and on or about the 21st day of August, 1908, the said Circuit Court of Appeals, after argument on behalf of both parties thereto, duly rendered its decision modifying the injunctive part of said decree and in other respects affirming the same and affirming so much thereof as directed an accounting. The said modification consisted in inserting in said decree after the words "or any of the trade-marks above referred to or any colorable imitation thereof" in the fourth paragraph of the said decree the following words: "unless so used as clearly to distinguish such liqueur or cordial from the liqueur or cordial manufactured by the complainants," and by striking out from the words in the same paragraph "from making use of any bottle or label or package," the words "bottle or," and by substituting therein for the word "package" the word "symbol," and by inserting in the same paragraph between the words "similar to" and "complainant's exhibit" the words "those appearing on." The order of said Circuit Court of Appeals therein is recited in its mandate. A mandate thereupon was duly issued from said Circuit Court of Appeals on or about the 22d day of August, 1908, a copy of which mandate is hereunto annexed, marked C. A copy of the order upon said mandate, which correctly recites the decision of said Circuit Court of Appeals, is hereunto annexed, marked D. On or about October 16, 1908, the said complainant obtained from the Honorable E. Henry Lacombe, United States Circuit Judge, an order allowing an appeal from the order for the mandate of the said Circuit Court of Appeals for the Second Circuit, made and entered on October 21, 1908. Said appeal has been docketed and is now pending on the calendar of this court and is number 614 on the calendar for the October Term 1908. Its file number is 4410. A citation thereunder has been served upon the Cusenier Company.

JULES AUBRY.

Sworn to before me this 27th day of February, 1909.

JAMES A. ALLEN,
Notary Public,
New York County.

[NOTARIAL SEAL.]

APPELLATE FORM XXVI.—MOTIONS TO DISMISS AND TO AFFIRM.

THE NORTHERN PACIFIC RAILROAD COMPANY, Plaintiff in Error,
against
DOMINICK AMATO, Defendant in Error.

Now comes Dominick Amato, the defendant in error, by Roger Foster, his counsel, and moves this Court to dismiss and quash the paper purporting to be a writ of error herein for want of jurisdiction and because the paper purporting to be a writ of error is informal, irregular and insufficient on the grounds stated in the annexed argument and upon other grounds; and the said defendant in error also moves this Court to affirm the judgments of the Circuit Court of Appeals and of the [District] Court herein upon the ground that it is manifest that the paper purporting to be a writ of error herein was taken for delay only, and that the question upon which it is claimed that the jurisdiction depends is so frivolous as not to need further argument.

ROGER FOSTER,
Attorney and Counsel for Defendant in Error.

APPELLATE FORM XXVII.—NOTICE OF SUBMISSION OF MOTIONS TO DISMISS AND TO AFFIRM.

Sir—Please take notice that on the annexed verified statement of facts herein, and on all the papers and proceedings herein, I shall submit to the Supreme Court of the United States, at a Stated Term thereof, on Monday, February 29th, 1892, at the Capitol, in the City of Washington, in the District of Columbia, at the opening of the court on that day, or as soon thereafter as counsel can be heard, the motions of which the foregoing are copies; and that I shall submit with said motions and in support of the same the arguments annexed to said statement of facts.

New York City, New York, February 6, 1892.

Yours, &c.,
ROGER FOSTER,
Attorney and of Counsel for Defendant in Error,
35 Wall Street, New York.

TO JAMES MCNAUGHT, Esq.,
Attorney for Plaintiff in Error,
15 Broad Street, New York.

APPELLATE FORM XXVIII.—ORDER OF AFFIRMANCE.

[Northern Pacific R. R. Co. v. Amato, 144 U. S. 465.]

This cause having come on to be heard on a writ of error to the judgment entered herein on the verdict of a jury in the clerk's office of the [District] Court of the United States for the southern district of New York on the 28th day of May, 1891, and a motion having been made on behalf of the defendant in error to dismiss the writ of error for want of jurisdiction, now, after hearing Roger Foster, Esq., of counsel for the defendant in error, in support of said motion to dismiss said writ of error, and Henry Stanton, Esq., of counsel for the plaintiff in error, in opposition to said motion and in support of the jurisdiction of this court, and after hearing Henry Stanton, Esq., of counsel for the plaintiff in error, in support of said writ of error, and Roger Foster, Esq., of counsel for the defendant in error in opposition to said writ of error, and due deliberation having been had, on motion of Henry Stanton, Esq., attorney for the plaintiff in error, it is—

Ordered that said motion to dismiss said writ of error be, and the same hereby is, denied;

And on motion of Roger Foster, Esq., attorney for the defendant in error, it is—

Ordered that said judgment be, and the same hereby is, in all things affirmed, with disbursements of the [District] Court and the costs and disbursements of this Court, to be taxed, and that a mandate issue to the [District] Court of the United States for the southern district of New York directing that court to proceed in accordance with the decision and order of this court.

W. J. W.
E. H. L.

APPELLATE FORM XXIX.—MANDATE.

Dancel v. Goodyear Shoe Machinery Co. [106 Fed. 551.]

Mandate.

UNITED STATES OF AMERICA, *ss:*

The President of the United States of America, to the Honorable, the Judges of the Circuit Court of the United States for the Southern District of New York, Greeting:

Whereas, lately in the Circuit Court of the United States for the Southern District of New York, before you, or some of you, in a cause between Christian Dancel and another against the Goodyear Shoe Machinery Company of Portland, Maine, judgment was entered in the office of the Clerk of said Court on the 2nd day of December, 1901, in the words and figures following, to wit:

"The issues in this action having been duly brought on for trial at a jury Term of this Court before the Hon. Hoyt H. Wheeler, United States Circuit Judge, and the parties hereto having duly waived a jury and con-

sented to the trial of the issues by the Court; the Court after hearing the counsel for the plaintiffs and counsel for the defendant, having found in favor of the plaintiffs, and assessed the plaintiffs' damages as follows: Amount found due from November 1, 1898, to the time of the commencement of this action nine thousand five hundred and eighty-three and 33/100 dollars, and the interest thereon to the date of trial amounting to one thousand one hundred and ninety-seven dollars, making a total of ten thousand seven hundred and eighty 33/100 dollars and the costs having been duly taxed in the sum of twenty-nine 70/100 dollars:

Now, on motion of J. Philip Berg, attorney for the plaintiffs, it is hereby adjudged that the plaintiffs, Christian Dancel and Mary Dancel, administrators of the goods, chattels and credits of Christian Dancel, deceased, recover of the defendant, The Goodyear Shoe Machinery Company of Portland, Maine, the sum of ten thousand seven hundred and eighty and 33/100 dollars damages and the sum of twenty-nine and 70/100 dollars as costs, in the aggregate the sum of ten thousand eight hundred and ten 3/100 dollars and that the plaintiffs have execution against the defendant accordingly.

Judgment signed this 2nd day of October, 1901.

JOHN A. SHIELDS, Clerk."

as by the inspection of the transcript of the record of the said Court which was brought into the United States Circuit Court of Appeals for the Second Circuit, by virtue of a writ of error agreeably to the act of Congress, in such case made and provided, fully and at large appears.

And whereas, in the present term of October, in the year of our Lord one thousand nine hundred and two, the said cause came on to be heard before the said United States Circuit Court of Appeals for the Second Circuit, on the said transcript of record, and was argued by counsel. On consideration whereof, it is hereby

Ordered, adjudged and decreed, that the judgment of said Circuit Court be and it hereby is reversed with costs, taxed at the sum of $124.07, without prejudice to an application by plaintiff for leave to reframe the complaint into a bill in equity. You, therefore, are hereby commanded that such further proceedings be had in said cause, in accordance with the opinion of this Court as according to right and justice, and the laws of the United States, ought to be had, the said writ notwithstanding.

Witness, the Honorable Melville W. Fuller, Chief Justice of the United States, the 30th day of December, in the year of our Lord one thousand nine hundred and two.

Costs of Plaintiff in Error:

Clerk	$20.95
Printing Record	83.12
Attorney	20.00
	$124.07

[SEAL.]

WM. PARKIN,
Clerk of the United States Circuit Court of
Appeals for the Second Circuit.

APPELLATE FORM XXX.—JUDGMENT UPON MANDATE.

[Title in District Court.]

Judgment having been entered on the 7th day of April, 1921, in favor of the plaintiff, Annie S. Simons, and against the defendants, William Nelson Cromwell and Louis H. Cramer as executors under the last will and testament of Frank Leslie, deceased, for fifty-three thousand eight hundred and ninety-eight ($53,898.84) dollars and eighty-four cents and said cause having been taken by writ of error to the United States Circuit Court of Appeals and said court having affirmed said judgment with interest thereupon, and with costs taxed at the sum of thirty-seven ($37.00) dollars, and the mandate of the United States Circuit Court of Appeals dated February 3, 1922, having been filed herein.

Now, on motion of Roger Foster, attorney for Annie S. Simons, the plaintiff, it is ORDERED and ADJUDGED that said mandate be and the same hereby is made the order and judgment of this court and that said judgment of the 7th day of April, 1921, be and the same hereby is affirmed with interest thereupon, and with the costs of said writ of error taxed as aforesaid and with the costs in this Court after the receipt of said mandate and upon the entry of this judgment which amounts to one and 05/100 dollars ($1.05), and that the plaintiff, Annie S. Simons recover of the defendants, William Nelson Cromwell and Louis M. Cramer as executors under the last will and testament of Frank Leslie, deceased, said costs in both courts in the aggregate the sum of thirty-eight and 05/100 dollars ($38.05) and have execution therefor.

LEARNED HAND,
United States District Judge.

FORMS IN CRIMINAL PROCEDURE

UNITED STATES COMMISSIONER'S FORMS.

[From Roe's Criminal Procedure in United States courts.]

FORM I.—COMPLAINT FOR WARRANT.

UNITED STATES OF AMERICA,
—— District of ——. } ss.

Before —— ——, a United States commissioner for the —— district of ——, to take bail, etc.

—— ——, of ——, in the county of —— and state of ——, on oath, deposes and says that —— ——, late of the district aforesaid, heretofore, to wit, on the —— day of ——, A. D. 19—, at said district, did [*here insert the ground of complaint, stating facts necessary to constitute an offense against United States*] contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States.

Wherefore, the said deponent prays that the said —— —— may be apprehended and dealt with according to law.

And furthermore, the said deponent prays that —— ——, whom he has reason to believe and does believe are material witnesses to the subject-matter of this complaint, may be duly summoned to appear and give evidence thereto.

—— ——.

Subscribed and sworn before me this —— day of ——, A. D. 19—.

—— ——, Commissioner of the [District] Court.

[OFFICIAL SEAL.]

FORM II.—WARRANT OF ARREST.

UNITED STATES OF AMERICA,
—— District of ——. } ss.

The United States of America to the Marshal of the —— District of ——, GREETING:

Whereas, —— —— has made complaint in writing under oath to me, the undersigned, a commissioner appointed by the [District] Court of the United States for the —— district of ——, to take bail, charging that

—— —— did, on, to wit, the —— day of ——, A. D. 19—, at —— [*here set forth the offense charged in the complaint*] contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States of America.

Now, therefore, you are hereby commanded, in the name of the United States of America, to apprehend the said —— —— wherever found in your district, and bring his body forthwith before [*any proper officer having jurisdiction in the district*] at —— office in ——, that he may then and there be dealt with according to law for said offense.

And have you then and there this writ.

Given under my hand and seal, this —— day of ——, A. D. 19—.

—— ——,

Commissioner of the [District] Court for the —— District of ——.

[OFFICIAL SEAL.]

FORM III.—MITTIMUS PENDING EXAMINATION.

UNITED STATES OF AMERICA,
—— District of ——. } ss.

The United States of America to the Marshal of said District and to the Keeper of the Jail of the County of —— in said District, GREETING:

Whereas, —— —— has been arrested and brought before me, —— ——, a United States commissioner for said district, to take bail, for examination, by virtue of a warrant issued by me, upon the complaint of —— ——, made before me in writing, on oath, charging the said —— —— with having on the —— day of ——, A. D. 19—, at said district —— [*here state the offense charged*] and said examination having been by me continued until the —— day of ——, A. D. 19—, at —— o'clock ——, for the races that —— you the said marshal are hereby commanded that you receive the said —— —— and commit him to the custody of the jailer of said county, and you the keeper of the said jail of said county, are hereby commanded to receive the said —— —— into your custody, there to remain until discharged by due course of law.

In witness whereof, I have hereunto set my hand and seal at my office in said district this —— day of ——, A. D. 19—.

—— ——, Commissioner as aforesaid.

[OFFICIAL SEAL.]

FORM IV.—FINAL MITTIMUS.

UNITED STATES OF AMERICA,
—— District of ——. } ss.

The United States of America, to the Marshal of the —— District ——, and to the keeper of the jail of the county of ——, in said District, GREETING:

Whereas, —— —— has been charged in writing, on oath, before me, the undersigned, a United States commissioner of said district, to take

bail, with having committed an offense against the United States, in this: that on the —— day of ——, A. D. 19—, at ——, in said district, did ——, and after an examination being this day had by me, it appearing to me that said offense had been committed, and probably cause being shown to believe that said —— —— committed said offense as charged, I have directed that the said —— —— be held to bail in the sum of $—— to appear at the first day of the —— term, A. D. 19—, of the district court of the United States for the —— district of ——, and he having failed to give the required bail, now you, the said marshal, are commanded to commit him, the said —— —— to the custody of the keeper of said jail of the said county of ——, and you the keeper of said jail of the said county of ——, are hereby commanded to receive the said —— —— and him safely keep until discharged by due course of law.

In witness whereof, I have hereunto set my hand and seal, at my office in said district, this —— day of ——, A. D. 19—.

—— ——, Commissioner as aforesaid.

[OFFICIAL SEAL.]

FORM V.—RECOGNIZANCE OF ACCUSED PENDING EXAMINATION.

UNITED STATES OF AMERICA,
—— District of ——. } ss.

Before me, —— ——, a United States commissioner for the —— district of ——, to take bail, personally appeared —— ——, and entered into recognizance as follows:

We —— ——, as principal, and —— ——, as sureties, of the county of —— and state of ——, acknowledge ourselves to owe and be indebted to the United States of America in the penal sum of $——, subject, however, to the following condition, to wit:

Whereas, the said —— —— has been charged on oath, in writing before me, commissioner as aforesaid, with having committed an offense against the United States, in this, that on the —— day of ——, A. D. 19—, at —— in the —— district of ——, the said —— did ——, and upon said charge being made as aforesaid, the said ——, commissioner as aforesaid, did issue his warrant for the arrest of the said —— ——.

And whereas, the said ——, one of the parties above named, has been brought before me, the said —— ——, commissioner as aforesaid, to answer to the said charge, and the examination of the said —— —— has been continued by me until the —— day of ——, A. D. 19—, at —— o'clock ——.

Now, therefore, if the said —— —— shall be and appear before me, the said commissioner, at my office in the city of ——, in the said district, on the —— day of ——, A. D. 19—, at —— o'clock ——, and from day to day thereafter until discharged by the order of said commissioner, then and there to answer to the United States of America on said charge, abide the order of said commissioner and not depart from his presence without

leave, then this recognizance to be void, otherwise to remain in full force and effect.

Witness our hand and seals this —— day of ——, A. D. 19—.

—— ——. [SEAL.]
—— ——. [SEAL.]
—— ——. [SEAL.]

Taken and acknowledged before me, this —— day of ——, A. D. 19—.

—— ——, Commissioner.

[OFFICIAL SEAL.]

FORM VI.—FINAL RECOGNIZANCE OF ACCUSED.

UNITED STATES OF AMERICA, }
—— District of ——. } ss.

Before me —— ——, a United States commissioner of the —— district of ——, to take bail, personally appeared —— —— and entered into recognizance as follows:

We, —— ——, as principal, and —— ——, as sureties, of the county of —— and state of ——, acknowledge ourselves to owe and be indebted to the United States of America, in the penal sum of $——, to be levied of our respective goods and chattels, lands and tenants subject, however, to the following condition, to wit:

Whereas the said —— —— has been charged on oath, in writing, before the said —— ——, commissioner as aforesaid, with having committed an offense against the United States, in this, that on the —— day of ——, A. D. 19—, at —— in the ——district of ——the said —— —— did —— and upon said charge being made as aforesaid, the said —— ——, commissioner as aforesaid did issue his warrant for the arrest of the said —— ——.

And whereas, the said —— ——, one of the parties above named, has been brought before the said —— ——, commissioner as aforesaid, to answer to the said charge, and witnesses have been duly sworn and examined in relation to said charge, in presence of said —— —— and upon such examination, it appearing to the said commissioner that the offense with which the said —— —— stood charged as aforesaid, had been committed, and that there was probable cause to believe the said —— —— to be guilty thereof [*or*, the said —— —— having waived the examination] the said commissioner thereupon ordered the said —— —— to find sufficient bail in the sum of $——, for his appearance at the —— term of the district court of the United States for the —— district of ——, to be holden at the city of ——, on the —— day of ——, A. D. 19—, to answer all such matters and things pertaining to said charge as should be objected against him, and that in default of finding such bail the said —— —— should stand committed for trial.

Now, therefore, if the said —— —— shall personally be and appear before the said district court of the United States for the said district, at the —— term thereof, on the —— day of ——, A. D. 19—, to answer

all such matters and things pertaining to the said charge as shall be objected against him, and abide the order of the court, and not depart the said court without leave, and make like appearance at each successive term of said court, until the charge shall have been duly disposed of, then this recognizance to be void, otherwise to remain in full force and virtue.

Witness our hands and seals this —— day of ——, A. D. 19—.

—— ——. [SEAL.]
—— ——. [SEAL.]
—— ——. [SEAL.]

Taken and acknowledged before me, this —— day of ——, A. D. 19—.

—— ——, Commissioner.

[OFFICIAL SEAL.]

FORM VII.—RECOGNIZANCE OF WITNESSES.

UNITED STATES OF AMERICA, } ss.
—— District of ——. }

Be it remembered that on this —— day of ——, A. D. 19—, before me, —— ——, a United States commissioner of the —— district of ——, to take bail, personally come —— —— and acknowledge themselves to owe and be indebted to the United States of America in the full and just sum of $—— to be levied of their goods and chattels, lands and tenements, if default be made in the conditions following:

The conditions of this recognizance are such that if the above bounden —— —— shall personally appear before the district court of the United States for the —— district of ——, on the first day of the next term thereof, to be and held at ——, in the said district, then and there to testify on behalf of the United States, in a cause wherein the said United States is plaintiff and —— —— is defendant, and shall not at any time be absent from said court without leave, then this recognizance to be void; otherwise to remain in full force and virtue.

In testimony whereof, the said obligors have hereunto set their hands and seals the day and year above written.

—— ——. [SEAL.]
—— ——. [SEAL.]
—— ——. [SEAL.]

Signed, sealed and acknowledged before me, this —— day of ——, A. D. 19—.

—— ——, Commissioner.

[OFFICIAL SEAL.]

FORM VIII.—CERTIFICATE OF PROCEEDINGS.

THE UNITED STATES OF AMERICA
vs.
—— ——
} Charge:——

I, —— ——, a United States commissioner for the —— district of ——, to take bail, do hereby certify that on the —— day of ——, A. D. 19—, —— —— came before me and made oath in writing, charging that on the —— day of ——, A. D. 19—, at ——, the defendant, —— ——, did ——; that I filed said affidavit and issued warrant for the arrest of the defendant and subpœnas for the following named witnesses in behalf of the United States, to wit, —— ——; that said warrant was returned served by arrest of said defendant at —— in said district, on the —— day of ——, A. D. 19—; that subpœnas were returned served on —— —— at ——, in said district; that defendant and witnesses being present an examination was had and defendant required to give bail for his appearance at the —— term of the United States district court for said district, to be held on the —— day of ——, A. D. 19—, at ——, and that the witnesses were recognized to said term of said court. Copies of the process and the recognizances of the defendant and witnesses are herewith returned into the clerk's office of said court.

In witness whereof I hereunto set my hand and seal, at my office in said district, this —— day of ——, A. D. 19—.

[OFFICIAL SEAL.] —— ——, Commissioner.

FORM IX.—COMPLAINT OF EXTRADITION WARRANT.

UNITED STATES OF AMERICA,
Southern District of New York.
} ss.

Be it remembered, that on this —— day of ——, A. D. 19—, before me the undersigned, a United States commissioner for the —— district of ——, to take bail, and duly authorized by the said court to issue warrants for the extradition of fugitives from justice of foreign governments, personally appeared —— ——, of ——, who being by me first duly sworn, upon oath states that —— —— did on the —— day of ——, A. D. 19—, at ——, within the jurisdiction and government of ——, commit the crime of ——, in that he did on the day and year last aforesaid at the place last aforesaid [*here state facts constituting the offense charged in terms covered by the treaty*], against the peace and government of the said ——; that the said —— —— is now a fugitive from justice of said ——, and that he did on or about the —— day of ——, flee into, and is now found within the limits of this judicial district.

Sworn to, and subscribed before me this —— day of ——, A. D. 19—, at my office, located at —— on —— street, in the city of ——, in said district.

[OFFICIAL SEAL.] —— ——, Commissioner.

FORM X.—EXTRADITION WARRANT.

[Fed. in which the author was counsel.]

UNITED STATES OF AMERICA, } ss.
—— District of ——. }

In the matter of the application for the extradition of WALTER KONRAD GEISSLER, under the Treaty between the United States and Prussia of June 16, 1852.

To the United States Marshal for the Southern District of New York, and to his Deputies, or either of them:

WHEREAS: A warrant for the apprehension of Walter Konrad Geissler under the Treaty between the United States and the Kingdom of Prussia and other States of the Germanic Confederation was issued on the 22nd day of January, 1912, charging the said Walter Konrad Geissler with the crime of forgery within the jurisdiction of the Kingdom of Saxony.

WHEREAS: The said Walter Konrad Geissler was afterwards arrested and brought before me, and the said Walter Konrad Geissler having been duly informed of his rights, and the charge explained to him and that he was entitled to an examination on the charge and to the assistance of counsel, and having demanded an examination and such examination having been had,

I hereby commit the said Walter Konrad Geissler to the custody of the United States Marshal for the Southern District of New York, to be by him held in the proper jail until a warrant for the surrender of the said Walter Konrad Geissler shall issue according to the stipulations of the treaty or he shall be otherwise dealt with according to law.

IN TESTIMONY WHEREOF, I have hereunto subscribed my name and affixed my seal this 21st day of February, 1912.

THOS. ALEXANDER.

Commissioner's Seal.

U. S. Commissioner for the Southern District of New York, and duly appointed and authorized by the District Court of the United States for the Southern District of New York, to act as Commissioner under the laws of the United States concerning the extradition of fugitives from the justice of a foreign country under a treaty between the United States and any foreign country.

FORM XI.—CERTIFICATE OF EXTRADITION PROCEEDINGS.

THE UNITED STATES OF AMERICA, —— District of ——. } In the matter of ——.

I, —— ——, a United States commissioner for the —— district ——, being duly authorized by the said court to issue warrants for the extradition of fugitives from justice of foreign governments, do hereby certify that, pursuant to a complaint of —— ——, duly made on oath before me, charging —— —— with having committed the crime of —— within the jurisdiction and government of ——, and with being a fugitive from justice of said country, I issued my warrant for the arrest of the said —— ——, and by virtue thereof he was by the marshal of the United States for said district arrested and brought before me for examination and hearing upon said charges, and that said examination and hearing was held on the —— day of ——, A. D. 19—, —— —— Esq., appearing as counsel for the [*foreign government*], and —— —— Esq., appearing as counsel for the prisoner, and that I deem the evidence adduced before me sufficient to sustain the charges under the law, and the provisions of the treaty of extradition between the government of the United States and that of the [*foreign government*], and that I have accordingly, by my warrant under my hand and official seal dated this —— day of ——, A. D. 19—, committed him to the —— jail, to await the order of the president of the United States in the premises.

I further certify that the following is a true copy of all the testimony taken before me on said hearing and examination ——.

Witness my hand and seal this —— day of ——, A. D. 19—.

—— ——,

[OFFICIAL SEAL.] Commissioner of the [District] Court of the United States for the —— District of ——.

FORM XII.—PROCEEDINGS UPON APPLICATION OF POOR CONVICT FOR DISCHARGE.

[From Roe's Criminal Procedure in United States Courts.]

UNITED STATES OF AMERICA.

—— DISTRICT OF ——.

UNITED STATES *vs.* —— ——.

Application for Discharge from Imprisonment under the Provisions of Section 1042 of the Revised Statutes of the United States.

To —— ——, a United States Commissioner for said district:

I hereby make application for discharge from imprisonment in —— county jail, under the provision of section 1042 of the Revised Statutes

of the United States; and in support thereof state that I was sentenced to pay a fine of —— dollars and costs by the district court of the United States for the —— district of ——; that I have been imprisoned for thirty days solely for non-payment of fine and costs, and that I am unable to pay the same.

—— ——, *Applicant.*

—— Dist. of ——.

FORM XIII.—MANDATE TO JAILER FOR THE PRODUCTION OF POOR CONVICT.

UNITED STATES OF AMERICA, } ss.
—— Dist. of ——. }

The United States of America, to the Jailer of ——, GREETING:

Whereas, application has this day been made before —— ——, a commissioner of the [District] Court of the United States for said district, by —— ——, for a discharge from imprisonment in the jail of ——, under the provision of section 1042 of the Revised Statutes of the United States.

This is therefore to command you to produce the body of said —— —— before said commissioner forthwith.

To the Marshal of said District to execute.

In testimony whereof, I hereunto set my hand at my office in ——, in said district, this —— day of ——, A. D. 19—.

[OFFICIAL SEAL.] United States Commissioner for the —— District of ——.

FORM XIV.—OATH OF POOR CONVICT.

UNITED STATES OF AMERICA.

—— DISTRICT OF ——.

UNITED STATES } vs. —— ——. }

Application for discharge from imprisonment under the provisions of section 1042 of the Revised Statutes.

I, —— ——, do solemnly swear that I have not any property, real or personal, to the amount of twenty-five dollars, except such as is by law exempt from being taken on civil precept for debt by the law of ——; and that I have no property in any way conveyed or concealed, or in any way disposed of, for my future use or benefit. So help me God.

Subscribed and sworn before me this —— day of——, A. D. 19—.

[OFFICIAL SEAL.] United States Commissioner for the —— District of ——.

FORM XV.—CERTIFICATE OF DISCHARGE OF POOR CONVICT.

UNITED STATES OF AMERICA, —— District of ——. } Sct.

UNITED STATES *vs.* —— —— }

Application for discharge from imprisonment under section 1042 *of the Revised Statutes.*

It appearing to the commissioner that —— ——, the above-named defendant, has been imprisoned in the Sangamon county jail for the period of thirty days, solely for the non-payment of a fine and costs adjudged against him by the district court of the United States for the —— district of ——, that he is unable to pay the same, and has complied with all the requirements of law.

It is therefore ordered, that said —— —— be discharged from further imprisonment and go hence without day.

United States Commissioner for the —— District of ——.

—— day of ——, A. D. 19—.

FORM XVI.—BENCH WARRANT ON CAPIAS.

DISTRICT COURT OF THE UNITED STATES OF AMERICA, —— District of ——. } ss.

The United States of America, to the Marshal of the —— District of ——, GREETING:

We command you to take —— ——, if —— be found in your district, and —— safely keep, so that you have —— before our judge of our district court of the United States for the —— district of ——, at the —— term thereof —— holden at ——, in the district aforesaid —— to answer unto the United States of America, in an indictment for ——, and have you then and there this writ.

Witness, the Hon. —— ——, Judge of our said Court, at ——, aforesaid, this —— day of ——, in the year of our Lord one thousand nine hundred and —— and of our Independence the one hundred and ——.

[OFFICIAL SEAL.]

—— ——, Clerk.

FORM XVII.—RETURN TO BENCH WARRANT OR CAPIAS.

I certify, that on the —— day of ——, A. D. 19—, at ——, in my district, I arrested the within named —— —— and have him in my custody, as I am within commanded; and that I am unable to find the within named —— —— in my district.

Dated this —— day of ——, A. D. 19—.

—— ——, United States Marshal,
by —— ——, Deputy.

FORM XVIII.—SEARCH WARRANT UNDER PROHIBITION LAW.

[Form sustained in seizure of oleomargarine. Kercheval v. Allen, C. C. A., 8th Ct., 220 Fed. 262, 265. Approved for use in seizure of intoxicating liquors, U. S. v. Borkowski, D. C. S. D. Ohio E. D., 268 Fed. 408. See *supra*, §§ 487, 487a.]

THE UNITED STATES OF AMERICA, }
Southern District of New York. } *ss.*

To [insert official title of officer] and to his deputies or any of them:

Whereas complaint has this day been made before me upon oath of [name of affiant], charging and alleging that he has good reason to believe that one Leslie Brown in the Southern Judicial District of New York in a certain three-story and basement brick house, otherwise used for the storage of rags known as number of 16 Morton Street in the Borough of Manhattan, City, County and State of New York, and a stable of brick and wood in the rear of said house unlawfully, without a permit from the Commissioner of Internal Revenue has in his possession for sale for beverage purposes certain intoxicating liquors, namely two or more barrels of whiskey containing more than one-half of one percent of alcohol, contrary to the statute of the United States in such case made and provided; and whereas said [name of affiant] has upon oath stated such facts as lead me to believe and find that the said Leslie Brown unlawfully has such intoxicating liquors containing more than one-half of one percent of alcohol in his possession in said house and stable for sale, certain intoxicating liquors namely, two or more barrels of whiskey containing more than one-half of one percent of alcohol, contrary to the statute of the United States in such case made and provided:

Now, therefore, this is to command you and any of said deputies to enter and search the said premises known as number 16 Morton Street, and the stable of wood and brick in the rear thereof, in the Borough of Manhattan, City, County and State of New York, and to take possession of and secure all of the intoxicating liquors containing more than one-half of one percent of alcohol in said premises and to hold and dispose of the same according to and as directed by law.

Witness the Honorable Learned Hand, United States District Judge for the Southern District of New York, on this —— day of ——, 1922.

FORM XIX.—CAPIAS PRO FINE.

DISTRICT COURT OF THE UNITED STATES OF AMERICA,
—— District of ——. } ss.

The United States of America, to the Marshal of the —— district of ——, GREETING:

We command you that you take —— ——, if —— be found in your district, and —— safely keep, so that you have —— before our judge of our district court of the United States for the —— district of ——, at the —— term thereof —— holden at ——, in the district aforesaid —— to answer unto the United States of America, —— for —— dollars fine, and —— dollars and —— cents costs, lately in said court adjudged against him for —— together with —— dollars and —— cents accrued clerk's fees, and have you then and there this writ.

Witness, the Hon. —— ——, Judge of our said Court at ——, aforesaid, this —— day of —— in the year of our Lord one thousand nine hundred and —— of our Independence the one hundred and ——.

[OFFICIAL SEAL.]

—— ——, Clerk.

FORM XX.—RETURN TO CAPIAS PRO FINE.

I certify that on the —— day of ——, A. D. 19—, at —— in my district, I arrested the within named —— —— and have him here in my custody, as I am within commanded; [*or in case of payment of fine and costs to marshal*] and the within mentioned fine and costs, being on the —— day of ——, A. D. 19—, at ——, paid by him in full he was then and there discharged from custody, and the amount of said fine and costs ($——) is herewith returned into court.

Dated this —— day of ——, A. D. 19—.

—— ——, United States Marshal,
by —— ——, Deputy.

FORM XXI.—WARRANT FOR REMOVAL OF PRISONER TO ANOTHER DISTRICT.

The United States of America, to the Marshal of the —— District of ——, GREETING:

Whereas, it appearing to me that —— —— has been duly committed by —— ——, a United States commissioner for the —— district of ——, upon the charge of having on the —— day of ——, A. D. 19—, at ——, in the —— district of ——, committed an offense against the United States in this, that the said —— —— did then and there, at said district ——, and still remains and now is in the jail of —— county, within the —— district of ——, there to remain under said commitment, until he shall be discharged by due course of law, or be removed into the district where

said offense was committed; and whereas, the said —— —— is unable to give bail, you are therefore hereby commanded to take the body of the said —— —— and deliver him into the custody of the marshal of the United States for the said —— district of ——, to be there dealt with according to law; and do you then and there make return of this writ into the clerk's office of the said —— district of ——.

In testimony whereof, I have hereunto set my hand and the seal of the said district court for the —— district of ——, this —— day of ——, A. D. 19—, and of the Independence of the United States the one hundredth and ——.

[OFFICIAL SEAL.] —— ——, District Judge.

FORM XXII.—RETURN TO WARRANT FOR REMOVAL OF PRISONER.

I received the within writ on the —— day of ——, A. D. 19—, and in obedience thereto, did, on the —— day of ——, A. D. 19—, take the within named —— —— and transport and deliver him into the custody of the United States marshal for the —— district of ——, at ——.

—— ——, United States Marshal,
by —— ——, Deputy.

FORM XXIII.—RECEIPT OF MARSHAL FOR PRISONER.

Received of —— ——, United States marshal for the —— district of ——, this —— day of ——, A. D. 19—, the body of the within named —— ——.

—— ——, United States Marshal for the —— district of ——.

FORM XXIV.—VENIRE FACIAS.

DISTRICT COURT OF THE UNITED STATES, —— District of ——. } ss.

THE UNITED STATES OF AMERICA.

To the Marshal of the —— District of ——, GREETING:

We command you to summon —— ——, if they be found in your district, to be and appear before our judge of our district court of the United States for the —— district of ——, at the next term thereof, to be holden at ——, in the district aforesaid, on the —— day of —— next, to serve as —— jurors for said court, and have you then and there this writ.

Witness, the Hon. —— ——, Judge of our said Court, at —— aforesaid, this —— day of ——, in the year of our Lord one thousand nine hundred and ——, and of our Independence the one hundred and ——.

[OFFICIAL SEAL.] —— ——, Clerk.

FORM XXV.—COMMITMENT TO PENITENTIARY.

At a session of the —— Court of the United States of America for the —— district of ——, held at ——, in the said district, on the —— day of ——, in the year of our Lord one thousand nine hundred and —— were had the following proceedings:

UNITED STATES OF AMERICA, } ss.
—— District of ——. }

In the —— Court, —— Term, 19—.

Present: The Honorable —— ——, Judge.

THE UNITED STATES }
vs. } Indictment.
—— ——. }

The prisoner, ——, having been indicted and arraigned, and having here been tried and convicted of the offense of ——, and having nothing to say why sentence should not be pronounced against him, the court does now adjudge and sentence the said —— —— for the said offense by him committed, to be imprisoned in the —— at —— (and confined at hard labor) for the term of ——, and to pay the costs of this prosecution, amounting to the sum of —— dollars and —— cents, and to stand committed until the amount of said costs shall have been fully paid.

And it is further ordered and adjudged that the marshal transport the said —— —— to the said ——, and deliver him the said —— to the keeper of the said ——, and that the said keeper detain the said —— —— according to this sentence; and that the clerk of this court immediately certify under the seal of the court, and deliver to the marshal of the district, a copy of this judgment, sentence and order, to accompany the body of the said —— —— and to be left therewith at the said —— the said copy to be warrant and authority for the transportation and imprisonment of the said ——, as hereinbefore provided.

I, —— ——, clerk of the —— Court of the United States for the —— district of ——, do hereby certify the foregoing to be a true copy of an original judgment, sentence and order of the said court, as filed in my office.

In testimony whereof, I have hereunto set my hand and affixed the seal of the said court, at —— in said district, this —— day of ——, in the year of our Lord one thousand nine hundred and ——, and of the Independence of the United States the one hundred and ——.

[OFFICIAL SEAL.] —— ——, Clerk.

FORM XXVI.—MARSHAL'S RETURN TO COMMITMENT TO PENITENTIARY.

I have executed the within writ by transporting the within named —— —— to ——, and delivering him to the keeper of the —— together with a certified copy of the within mentioned judgment, sentence and order, as I am therein commanded, this —— day of ——, A. D. 19—.

—— ——, United States Marshal,
by —— ——, Deputy.

FORM XXVII.—CRIMINAL INFORMATION.

[From Roe's Criminal Procedure in United States Courts.]

UNITED STATES OF AMERICA, } ss.
—— District of ——. }

At the —— term of the —— Court of the United States for the —— district of ——, in the year of our Lord one thousand nine hundred and ——, leave being first had and obtained, comes —— ——, attorney for the United States for said district, and informs the court that, as appears from a complaint, under oath, now placed on file herewith, one —— ——, late of the district aforesaid, heretofore, to wit; on the —— day of ——, A. D. 19—, within the said district, unlawfully did then and there, on the day and year last aforesaid, —— contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States of America.

—— ——, United States Attorney.[1]

FORM XXVIII.—INDICTMENT.—GENERAL FORM.

[From Roe's Criminal Procedure in United States Courts.]

UNITED STATES OF AMERICA, } ss.
—— District of ——. }

Of the —— term of the —— court of the United States of America, within and for the —— district of ——, in the year of our Lord one thousand nine hundred and ——.

The grand jurors of the United States of America, chosen, selected, and sworn, within and for the —— district of ——, in the name and by the authority of the United States of America, upon their oaths do find and present that —— ——, late of the district aforesaid, heretofore, to wit: On the —— day of ——, in the year of our Lord one thousand nine hundred and ——, and within the said —— district of ——, unlawfully did then and there ——, contrary to the form of the statute in such case made

[1] For Form of Information for Criminal Contempts see Contempt Form IV. supra.

and provided, and against the peace and dignity of the United States of America.

2d. And the grand jurors aforesaid, upon their oaths aforesaid, in the name and by the authority of the United States aforesaid, do further find and present that —— ——, late of the district aforesaid, heretofore, to wit: On the —— day of ——, in the year of Our Lord one thousand nine hundred and ——, and within said —— district of ——, unlawfully then and there, on the day and year last aforesaid, at said district, did ——, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States of America.

—— ——, United States Attorney.

[Endorsement.]

A true bill.

—— ——, Foreman of Grand Jury.

FORM XXIX.—INDICTMENT FOR OFFENSE ON THE HIGH SEAS.

[From Roe's Criminal Procedure in United States Courts.]

UNITED STATES OF AMERICA,
—— District of ——. } ss.

Of the —— term of the —— court of the United States of America, within and for the —— district of —— in the year of our Lord one thousand nine hundred and ——.

The grand jurors of the United States of America, chosen, selected and sworn within and for the —— district of ——, in the name and by the authority of the United States of America, upon their oaths do find and present that ——.——, late of the district aforesaid, heretofore, to wit: On the —— day of ——, in the year of our Lord one thousand nine hundred and ——, on the high seas, within the admiralty and maritime jurisdiction of the United States, and out of the jurisdiction of any particular state, and within the jurisdiction of this court, in and on board a certain vessel, to wit: the ship called —— [*or* a vessel the name whereof is to the jurors aforesaid unknown], the same being then and there owned by and belonging in whole or in part to a citizen or citizens of the United States, to wit: —— ——, late of the district aforesaid [*or* to the jurors aforesaid unknown], did ——, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States of America.

—— ——, United States District Attorney.

[Endorsement.]

A true bill.

—— ——, Foreman of the Grand Jury.

FORM XXX.—INDICTMENT FOR OFFENSE COMMITTED AT A PLACE WITHIN EXCLUSIVE JURISDICTION OF THE UNITED STATES.

[From Roe's Criminal Procedure in United States Courts.]

UNITED STATES OF AMERICA, } ss.
—— District of ——. }

Of the —— term of the —— court of the United States of America, within and for the —— district of ——, in the year of our Lord one thousand nine hundred and ——.

The grand jurors of the United States of America, chosen, selected and sworn within and for the —— district of ——, in the name and by the authority of the United States of America, upon their oaths do find and present that —— ——, late of the district aforesaid, heretofore, to wit: On the —— day of ——, in the year of our Lord one thousand nine hundred and ——, within the (navy yard) in the city of ——, in the district aforesaid, the site of which said (navy yard) had been before the said —— day of ——, in the year last aforesaid, ceded to the United States, and which said (navy yard) was then and there a place under the sole and exclusive jurisdiction of the United States, and out of the jurisdiction of any particular state, and within the jurisdiction of this court, did ——, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States of America.

—— ——, United States District Attorney.

[Endorsement.]

A true bill.

—— ——, Foreman of the Grand Jury.

FORM XXXI.—CONSOLIDATED INDICTMENT FOR VIOLATION OF NATIONAL BANKING LAWS.

[U. S. v. Morse, 161 Fed. 419.]

FOR THE SOUTHERN DISTRICT OF NEW YORK.

Of the January Term, in the year nineteen hundred and eight.

Southern District of New York, ss.: The Grand Jurors for the United States of America, empanelled and sworn in the Circuit Court of the United States for the Southern District of New York, and inquiring for that district, upon their oath present, that before and during the three years last past, under the laws of the United States, all banking associations organized, established and existing, and in operation and doing business, under and by virtue of the laws of the United States concern-

ing national banks have been subjected to visitation, and their books, papers and records to examination and security, by agents appointed in accordance with law by the Comptroller of the Currency of the United States to examine the affairs of such associations and report in detail to him the condition of the same, and whether any improper investments or uses were made of the moneys, funds and credits of such associations, in order that he might approve or disapprove of the management of the affairs of such associations and take appropriate action in the performance of his duties under the various provisions of the said laws in that behalf made; that under such laws, every such association, upon request being made therefor from time to time by the said Comptroller, has been required to make and transmit to him not less than five reports during each year, according to the form prescribed by him, which reports were required to be verified and attested in accordance with law, and to exhibit in detail and under appropriate heads, the resources and liabilities of each such association at the close of business on past days specified by the said Comptroller in making his several requests for the same, and particularly the total amounts of money loaned by each such association respectively upon promissory notes, and the total amounts of bonds, securities, etc., including corporate stocks, owned by such association; that inasmuch as each such association established and doing business in the Borough of Manhattan, in the City of New York, has done such a great volume of business that it has been required to employ numerous clerks and bookkeepers to keep the books of account of the same and make up the aforesaid reports for verification, attestation and transmittal to the said Comptroller, the work of keeping such books and making such reports has been to a certain extent necessarily mechanical, and entries once made in such books have in due course of business appeared in or been the basis of other entries which appeared in and have necessarily affected the said reports so made by the said agents to the said Comptroller, as well as those made by the said association to the said Comptroller, and those made as hereinafter set forth by the Comptroller to Congress, without such clerks or bookkeepers necessarily having any knowledge of the truth or falsity of such entries or of the true circumstances underlying the making of the same, or pertaining to the transactions upon which they were respectively based that in so examining the affairs of any such association in the said borough, the said agents so appointed by the said Comptroller for that purpose have been compelled, by reason of the great volume of business transacted by such associations, to accept the said books and the entries so made in the same as true, when the same appeared to be consistent and regular, and especially when entries showing loans were accompanied by entries, records or share-certificates showing the possession by the said association of apparent collateral security for such loans—it having been impracticable for such agents to inquire into the circumstances underlying the making of each such entry or pertaining to the transactions upon which they were based; and that the said Comptroller by law has been required to make

an annual report to the Congress of the United States, at the commencement of its session, exhibiting, amongst other things, a summary of the state and condition of every such association from which such reports have been received by him during the year preceding the making of each such report; which said reports to Congress have necessarily been compiled from and based upon the reports so made to the said Comptroller by the said agents and by the said associations, and have been and are of great importance and indispensable as aids to the performance by the Government of the United States, through the said banking associations, of its official functions pertaining to the borrowing of money on the credit of the United States, to the obtaining of money, through taxes, duties, imposts, and excises, for its use, and to the providing of agencies for its fiscal operations and a stable and uniform currency for the use of its people.

And so the Grand Jurors aforesaid, upon their oath aforesaid, do say, that the said agents appointed to examine the affairs of the said associations in the said borough have, in manner and form aforesaid, been charged with the execution of a governmental duty in ascertaining the true state and condition of the affairs of such associations, and reporting the same to the said Comptroller; and the said Comptroller has been charged with the execution of a governmental duty in receiving and considering such reports from the said agents and associations and approving or disapproving of the management of the affairs of such associations, as shown by such reports, and acting as required by law in either case, and also in reporting to the Congress a summary of the state and condition of such associations as they appear from such reports and the United States has had important fiscal and other governmental functions to perform in the premises.

And the Grand Jurors aforesaid, upon their oath aforesaid, do further present, that Charles W. Morse and Alfred H. Curtis, each late of the said Borough of Manhattan, in the said City of New York and in the said Southern District of New York, at all times from March 28th, 1905, to October 21st, 1907, at and within the said Borough, City and District, were Directors and were officers, to wit, Vice-President and President respectively, of The National Bank of North America, in New York, which then and there was a banking association theretofore organized and established, and then and there existing and in operation and doing business, under and by virtue of the laws of the United States concerning national banks; that the said Charles W. Morse and Alfred H. Curtis, so being such officers of said association, and well knowing all the premises aforesaid, there and then, to wit, on the eighth day of December, in the year nineteen hundred and five, at and within the borough, city and district aforesaid, unlawfully did conspire, combine, confederate and agree together, and with divers other persons to the said Grand Jurors unknown, knowingly, wickedly and corruptly to defraud the United States of, concerning and in respect to its governmental functions aforesaid, in the manner and for the purpose in this indictment next set forth, that is to say:

Notwithstanding, as they the said Charles W. Morse and Alfred H. Curtis and said other conspirators then and there well knew, the said association then was not, by the said laws, permitted to deal in shares of the capital stock of corporations or banking associations, and was not permitted to invest its moneys, funds and credits in or to hold such shares upon speculation, but was, on the contrary, by those laws, prohibited from so doing; and notwithstanding, as they the said Charles W. Morse and Alfred H. Curtis and said other conspirators also then well knew, such dealings, holdings, and investments would involve an unlawful and improper disposition and use of such moneys, funds and credits of the said association, and be calculated to injure the business and credit of the same, and impair its capital; and notwithstanding, as they the said Charles W. Morse and Alfred H. Curtis and said other conspirators also then well knew, the books and records of the said association and its said reports to the said Comptroller should truly show such dealings, purchases, holdings and investments according to the fact, if they were made or existed to the end that the said agents and the said Comptroller might perform their said governmental duties and the United States its said governmental functions in the premises; and notwithstanding, also, as they the said Charles W. Morse and Alfred H. Curtis and said other conspirators then well knew, the making of false, deceitful and untrue entries pertaining to such dealings, purchases, investments and holdings, in the said books and reports would, if discovered, subject the affairs and management of the said association to the criticism and adverse official action of the said Comptroller and be calculated to injure the said association, the said Charles W. Morse and Alfred H. Curtis, being then actively engaged in the management of the business and affairs of the said association and possessed of a power of control, direction and management over the said moneys, funds and credits of the same, and well knowing all the premises set forth in this indictment, as aforesaid, were, under the terms of the said unlawful conspiracy, combination, confederation and agreement, to apply certain large sums of the moneys, funds and credits of the said association to the purchase from time to time thereafter, on behalf of the said association, and upon speculation, of large numbers of the shares of the capital stock of various corporations and associations, and to invest these moneys, funds and credits in the same, for holding by the said association of which they were officers as aforesaid, until a favorable opportunity for selling and disposing of the same should arise; and were to cause the said association to deal in such shares; and, in order to conceal the fact that such transactions were made, and to deceive the said Comptroller and the agents appointed by him to examine the affairs of the said association, and procure the unwitting approval of the said agents and of the said Comptroller of such transactions, and thereby deceive and mislead such agents the said Comptroller and the Congress, and defraud the United States of its aforesaid governmental functions, the said Charles

W. Morse and Alfred H. Curtis and said other conspirators under the terms of the said unlawful conspiracy, combination, confederation and agreement, were, at the several times of so applying the said sums to the purchase of the shares of stock aforesaid, to procure financially irresponsible persons from time to time to make and execute promissory notes in favor of the said association in the several amounts of the moneys, funds and credits so applied to the purchase of and investment in such shares of stock, and were to purchase such shares of stocks in the names of such individuals or firms as should be found convenient (so that it was not done in the name of the said association), and place those notes and the shares of stock so obtained among the records and assets of the said association as though the said notes were true and *bona fide* promissory notes made in due course of and representing legitimate banking transactions and as though the said shares of stock were in fact collateral security for such notes, and were thereby to cause the transactions pertaining to such purchases and investments to be entered upon the books and records of the said association in due course of business, by its clerks and bookkeepers, as loans of money upon such promissory notes and collateral, to the persons so making and executing the said notes, in such manner as (by reason of the facts pertaining to the due course of business herein above set forth) to cause and ensure such transactions being considered by such agents, and reported by such agents and by the said association to the Comptroller, as *bona fide* loans of the moneys, funds and credits of the said association upon such notes and security, when no such loans were in fact made and when such shares of stock were in truth the property of the said association and there by to that extent vitiate the said annual reports of the said Comptroller to Congress covering such transactions, and to prevent the due performance of his other duties in the premises and to render impossible the due performance in the premises of the respective official functions of the Congress and of the Government of the United States.

And the jurors aforesaid, upon their oath aforesaid, do further present, that none of the dealings, investments and purchases of the shares of the capital stock aforesaid, with the moneys, funds and credits of the said banking association under the terms of the said unlawful conspiracy, combination, confederation and agreement, were to be necessary to prevent loss upon any debt or debts to the said association contracted in good faith previous to the making of such purchases.

OVERT ACTS.

1. And the Grand Jurors aforesaid, upon their oath aforesaid, do further present, that in pursuance of the said unlawful conspiracy, combination, confederation and agreement, and to effect the object of the same, the said Alfred H. Curtis afterwards, to wit, on the said eighth day of December, in the year nineteen hundred and five, at and within the borough, city and district aforesaid, unlawfully did sign his name, to wit, A. H. Curtis, to a

certain cashier's check, that is to say, a cashier's check which, with his said signature, then and there was and is of the tenor following:

No. 33971 New York Dec. 8 1905 190

The National
Bank of North America

Pay to the order of John F. Carroll Twenty thousand seven hundred & seven 17-100 dollars

A. H. Curtis,
President Cashier

$20707 17

Cashier's check

2. And the Grand Jurors aforesaid, upon their oath aforesaid, do further present, that in pursuance of the said unlawful conspiracy, combination, confederation and agreement, and to effect the object of the same, the said Charles W. Morse, afterwards, to wit, on the fifteenth day of January, in the year nineteen hundred and six, at and within the borough, city and district aforesaid, unlawfully did write, upon the back of a certain paper envelope then bearing upon its face, written in ink, the following direction and address, to wit:

Mr. Alfred H. Curtis
National Bank of North America
New York City;

a certain pencil memorandum containing the following words and figures, to wit:

R. W. Poor
1000 43,500—
W. M. Oler
1000 43,500—
Whiting
2000 87,000—

$174,000—
135

$39,000—
500

$38,500—
25

$13,500—

3. And the Grand Jurors aforesaid, upon their oath aforesaid, do further present, that in pursuance of the said unlawful conspiracy, combination, confederation and agreement, and to effect the object of the same, the

said Alfred H. Curtis, afterwards, to wit, on the said fifteenth day of January, in the year nineteen hundred and six, at and within the borough, city and district aforesaid, unlawfully did write upon the back of the said envelope a certain pencil memorandum of the tenor following, to wit:

Jessie Brown.

1006
5th Ave

4. And the Grand Jurors aforesaid, upon their oath aforesaid, do further present, that in pursuance of the said unlawful conspiracy, combination, confederation and agreement, and to effect the object of the same, the said Alfred H. Curtis, afterwards, to wit, on the said fifteenth day of January, in the year nineteen hundred and six, at and within the borough, city and district aforesaid, unlawfully did deliver to one Frank C. Pringle, who was then and there a clerk of and in the said banking association, the said paper envelope so containing the said direction and address and the said memoranda.

5. And the Grand Jurors aforesaid, upon their oath aforesaid, do further present, that in pursuance of the said unlawful conspiracy, combination, confederation and agreement, and to effect that the object of the same, the said Alfred H. Curtis afterwards, to wit, on the said fifteenth day of January, in the year nineteen hundred and six, at and within the borough, city and district aforesaid, unlawfully did sign his name, to wit, A. H. Curtis, to a cashier's check which with his said signature, then and there was and is of the tenor following:

No. 34443 New York Jan 15 1906 190

The National
Bank of North America

Pay to the order of credit of
Jessie Brown
Thirty-eight thousand eight
hundred & sixty-five dollars

A. H. Curtis
President Cashier

$38,865$

Cashier's check

6. And the Grand Jurors aforesaid, upon their oath aforesaid, do further present, that in pursuance of the said unlawful conspiracy, combination, confederation and agreement, and to effect the object of the same, the said Alfred H. Curtis afterwards, to wit, on the eleventh day of January, in the year nineteen hundred and six, at and within the borough, city and district aforesaid, unlawfully did sign his name, to wit, A. H. Curtis, to a certain other cashier's check upon the said association, that is to say,

a cashier's check which, with his said signature, then and there was and is of the tenor following:

No. 34600 New York Jan 26, 1906 190
The National
Bank of North America
Pay to the order of John F. Carroll Esq
or C. W. Morse Esq
Twelve thousand six hundred &
seventy-eight dollars
A. H. Curtis,
$12,678$ President Cashier
Cashier's check

7. And the Grand Jurors aforesaid, upon their oath aforesaid, do further present, that in pursuance of the said unlawful conspiracy, combination, confederation and agreement, and to effect the object of the same, the said Charles W. Morse afterwards, to wit, on the said eleventh day of January, in the year nineteen hundred and six, at and within the borough, city and district aforesaid, having then and there in his hands the cashier's check last above mentioned, unlawfully did stamp and place upon the back of the same an endorsement in the following words, to wit:

Pay to The National Bank of North America in New York,
N. Y., or order. C. W. Morse.

8. And the Grand Jurors aforesaid, upon their oath aforesaid, do further present, that in pursuance of the said unlawful conspiracy, combination, confederation and agreement, and to effect the object of the same, the said Charles W. Morse afterwards, to wit, on the twenty-sixth day of January, in the year nineteen hundred and six, at and within the borough, city and district aforesaid, having then and there in his hands a certain check of the tenor following:

No. 34600 New York Jan 26, 1906 190
The National
Bank of North America
Pay to the order of K. A. Wilson Eighty-seven hundred &
fifty dollars. J. F. Sweasy
$8,750$ A Cashier
Cashier's check

which check bore an endorsement by the payee thereof, to wit, the written matter following: K. A. Wilson,—unlawfully did stamp and place upon the back of the same check an endorsement in the words which here follows, that is to say:

Pay to The National Bank of North America in New York,
N. Y., or order. C. W. Morse.

9. And the Grand Jurors aforesaid, upon their oath aforesaid, do further present, that in pursuance of the said unlawful conspiracy, combination, confederation and agreement, and to effect the object of the same, the said Charles W. Morse afterwards, to wit, on the thirtieth day of March, in the year nineteen hundred and six, at and within the borough, city and district aforesaid, having then and there in his hands a certain other check, to wit, a check of the tenor following:

No. 35255 New York Mar 30 1906 190

The National
Bank of North America

Pay to the order of C. W. Morse Esq Forty four thousand and four hundred & sixty six 04 dollars

E. B. Wire
Cashier

$44,466 04/100

Cashier's check

unlawfully did stamp and place upon the back of the last mentioned check his endorsement thereof in the words which here follow, to wit:

Pay to The National Bank of North America in New York, N. Y., or order.
C. W. Morse.

10. And the Grand Jurors aforesaid, upon their oath aforesaid, do further present, that in pursuance of the said unlawful conspiracy, combination, confederation and agreement, and to effect the object of the same, the said Charles W. Morse afterwards, to wit, on the first day of April, in the year nineteen hundred and six, at and within the borough, city and district aforesaid, having then and there in his hands a certain other check, to wit, a check of the tenor following:

No. 35410 New York Apr 10 1906 190

The National
Bank of North America

Pay to the order of C. W. Morse One hundred & six thousand dollars
E. B. Wire
Cashier

$236,500$

A. Rado
L. C.

Cashier's check

unlawfully did stamp and place his endorsement upon the said check in the words which here follow, to wit:

Pay to the National Bank of North America in New York, N. Y., or order.
C. W. Morse.

11. And the Grand Jurors aforesaid, upon their oath aforesaid, do further present, that in pursuance of the said unlawful conspiracy, combi-

nation, confederation and agreement, and to effect the object of the same, the said Charles W. Morse afterwards, to wit, on the tenth day of April, in the year nineteen hundred and six, at and within the Borough, City and district aforesaid, having then and there in his possession a certain other to wit, a check of the tenor following:

Pay to The National Bank of North America in New York,
thousand $ Dollars J. F. Sweasy
$84,000$ A Cashier
A. Rado
L. C.
Cashier's check

unlawfully did stamp and place his endorsement upon the last mentioned check in the words following, that is to say:

Pay to The National Bank of North America in New York,
N. Y., or order. C. W. Morse.

12. And the Grand Jurors aforesaid, upon their oath aforesaid, do further present, that in pursuance of the said unlawful conspiracy, combination, confederation and agreement, and to effect the object of the same, the said Charles W. Morse afterwards, to wit, on the ninth day of May, in the year nineteen hundred and six, at and within the borough, city and district aforesaid, having then and there in his hands a certain other check of the tenor following:

No. 35700 New York May 1 1906 190
The National
Bank of North America
Pay to the order of C. W. Morse Esq Two hundred
& thirty-six thousand five hundred $ Dollars
E. B. Wire,
106000 Cashier
A. Rado
L. C.
Cashier's check

unlawfully did stamp and place his endorsement upon the said check in the words following:

Pay to The National Bank of North America in New York,
N. Y., or order. C. W. Morse.

13. And the Grand Jurors aforesaid, upon their oath aforesaid, do further present, that in pursuance of the said unlawful conspiracy, combination, confederation and agreement, and to effect the object of the same, the said Charles W. Morse afterwards, to wit, on the first day of October, in the year nineteen hundred and six, at and within the borough, city and

district aforesaid, having then and there in his possession a certain other check, to wit, a check of the tenor following:

No. 37284 New York Oct 1 1906 190
The National
Bank of North America
Pay to the order of C. W. Morse Esq One hundred & eighty thousand $ Dollars
J. F. Sweasy
$18,000$ A. Cashier
A. Rado
L. C.
Cashier's check

unlawfully did stamp and place his endorsement upon the same check in the following words, to wit:

Pay to The National Bank of North America in New York, N. Y., or order. C. W. Morse.

14. And the Grand Jurors aforesaid, upon their oath aforesaid, do further present, that in pursuance of the said unlawful conspiracy, combination, confederation and agreement, and to effect the object of the same, the said Charles W. Morse afterwards, to wit, on the eighteenth day of April, in the year nineteen hundred and seven, at and within the borough, city and district aforesaid, having then and there in his hands a certain other check, to wit, a check of the tenor following:

No. 39789 New York Apr 18 1907 190
The National
Bank of North America
Pay to the order of C. W. Morse Esq One hundred & sixty thousand $ Dollars
A. Rada
$160,000$ A Cashier
Cashier's check

unlawfully did endorse upon the last mentioned check the following words, to wit:

Pay to The National Bank of North America in New York, N. Y., or order. C. W. Morse.
G.

And so the Grand Jurors aforesaid, upon their oath aforesaid, do say, that the said Charles W. Morse and Alfred H. Curtis, at the time and place and in manner and form aforesaid, unlawfully did conspire together, and with others, to defraud the United States, and did each do acts to effect the object of the conspiracy; against the peace and dignity of the

United States, and contrary to the form of the statute of the same in such case made and provided.

[Sustained on demurrer. United States v. Morse, 161 Fed. 419, 436, subsequently dismissed.]

THIRD COUNT.

And the Grand Jurors aforesaid, upon their oath aforesaid do further present, that the said Charles W. Morse and Alfred H. Curtis, at all times from March 28, 1905, to October 21, 1907, at and within the said Borough of Manhattan, City of New York, and Southern District of New York, were directors and were officers, to wit, the said Charles W. Morse was vice-president, and the said Alfred H. Curtis was president, of the National Bank of North America in New York, which then and there was a banking association therefore organized and established, and then and there existing and in operation and doing business under and by virtue of the laws of the United States concerning national banks, and that the said Charles W. Morse and Alfred H. Curtis, so being such officers of the last-mentioned banking association, then and there, well knowing the existence of all the circumstances and conditions in the first count of this indictment set forth, as to the examination of reports by and the course of business in such banking associations (which are now here again alleged to exist), and intending to take advantage of the same, unlawfully did, on the eighth day of December, in the year nineteen hundred and five, at and within the borough, city and district aforesaid, conspire, combine, confederate and agree together, and with divers other persons to the said Grand Jurors unknown to commit an offense against the United States, that is to say, the offense of knowingly making a false entry in a certain book of the said association with intent to injure said association and to deceive the agents who should be appointed by the Comptroller of the Currency of the said United States to examine the affairs of the same.

And the Grand Jurors aforesaid, upon their oath aforesaid, do further present, that the unlawful conspiracy, combination, confederation and agreement in this count of this indictment mentioned was so entered into by the said Charles W. Morse and Alfred H. Curtis and the other conspirators aforesaid under the circumstances and conditions in this count next set forth, and the said false entry was to be made by them, with the intent and knowledge last aforesaid in a book of the said association, for purposes, under circumstances, and in the manner and by the means, now here described; that is to say:

By reason of the said Charles W. Morse and Alfred H. Curtis being as such vice-president and president, respectively, actively engaged in the management of the business and affairs of the said association and possessed of a power of control, direction and management over the moneys, funds and credits of the same, and over the other officers, clerks and employees of the same, they were to make use of the moneys, funds and credits of the said association in the purchase of and dealing in on behalf

of the said association a large number, to wit, four thousand, of the shares of the capital stock of the American Ice Securities Company, a corporation theretofore organized under the laws of the State of New Jersey, and in investing such moneys, funds and credits in those shares on speculation, notwithstanding, as they the said Charles W. Morse and Alfred H. Curtis and said other conspirators then and there well knew, the said association then and there was not by law allowed to purchase, or invest its moneys, funds or credits in, such corporate stocks, for the purpose of speculation therein or to deal in such stocks, and such purchase and investment would not be approved by the said Comptroller, and would be an unlawful and improper use of such moneys, funds and credits, and one calculated to injure the business and credit of the said association and impair its capital; and thereupon were to procure a financially irresponsible person named Davison Brown to make and execute a certain promissory note in a large amount, in favor of the said association, to wit, a note for $135,420.00, and were to cause the said association to apply its moneys, funds and credits in the said amount of $135,420.00 to the purchase of the said four thousand shares of the stock of the said American Ice Securities Company, and were to place such promissory note and the certificates of ownership of the shares of the stock so purchased among the assets of the said association, as though the said stock were collateral security for the payment of the said promissory note, without in any way transferring any of such moneys, funds or credits to the person so executing such promissory note, and without that person being the true owner, or in any way interested in the ownership, of such shares of stock; and in this way cause an entry to be (as in due course of business it would be), made upon the book of the said association, known as "General Ledger No. 555" by its clerks and bookkeepers, showing a charge to the "Call Loans" account of the said association of the sum called for in the said promissory note, as though the said promissory note was a *bona fide* promissory note, and as though the said shares of stock were in truth being held by the said association as collateral security for the said promissory note, and as though such moneys, funds and credits were paid out on account of the said promissory note, and as the proceeds thereof, and notwithstanding the facts would be as they the said Charles W. Morse and Alfred H. Curtis and said other conspirators would well know, that such promissory note would merely be a fictitious promissory note, and such shares of stock would in truth be the property of the said association and not collateral security for the payment of the said note, and the said moneys, funds and credits would, as aforesaid, be applied to the purchase of and dealing in and investment in the said shares of stock for the said association in the manner and for the purposes aforesaid and the said entries would accordingly be false.

And the Grand Jurors aforesaid, upon their oath aforesaid, do further present, that the purchase of the shares of capital stock aforesaid, with the moneys, funds and credits of the said banking associations under the terms of the said unlawful conspiracy, combination, confederation and

agreement, was not to be a purchase necessary to prevent loss upon any debt or debts to the said association contracted in good faith previous to the making of such purchase.

OVERT ACT.

And the Grand Jurors aforesaid, upon their oath aforesaid, do further present, that in pursuance of the said unlawful conspiracy, combination, confederation and agreement, and to effect the object of the same, the said Alfred H. Curtis afterwards, to wit, on the said eighth day of December, in the year nineteen hundred and five, at and within the borough, city and district aforesaid, unlawfully did sign his name, to wit, A. H. Curtis, to a certain cashier's check upon the said association, that is to say, a cashier's check which, with his said signature, then and there was and is of the tenor following:

No. 33971 New York Dec 8 1905 190

The National
Bank of North America

Pay to the order of John F. Carroll Twenty thousand seven hundred & seven $^{17}/_{100}$ dollars

A. H. Curtis
President Cashier

$20707.17

Cashier's check

And so the Grand Jurors aforesaid, upon their oath aforesaid, do say, that the said Charles W. Morse and Alfred H. Curtis, at the time and place in manner and form aforesaid, unlawfully did conspire together, and with others, to commit an offense against the United States, and one of them did an act to effect the object of the conspiracy; against the peace and dignity of the said United States, and contrary to the form of the statute of the same in such case made and provided.

[Sustained on demurrer, U. S. v. Morse, 161 Fed. 419, 436.]

SEVENTEENTH COUNT.

And the Grand Jurors aforesaid, upon their oath aforesaid, do further present, that the said Charles W. Morse and Alfred H. Curtis, before and on the 6th day of April, nineteen hundred and six, and thenceforth until on and after the 11th day of April, nineteen hundred and six, at and within the said Borough of Manhattan, City of New York, and Southern District of New York, were directors and were officers, to wit, the said Charles W. Morse was vice-president and the said Alfred H. Curtis was president of The National Bank of North America in New York, which then and there was a banking association theretofore organized and established and then and there existing and in operation and doing business under and by virtue of the laws of the United States concerning national banks; and

that the said association, on the 11th day of April in the year nineteen hundred and six, there made and transmitted to the then Comptroller of the Currency of the United States a certain report of the condition of the said association at the close of business on the 6th day of April, nineteen hundred and six, according to a certain form theretofore prescribed by the Comptroller of the Currency of the United States for the time being:—the same being a report which it was there and then, to wit, on the said 11th day of April, in the year nineteen hundred and six, by law the duty of the said association to make and transmit to the said Comptroller, to wit, one of the five reports before that time and then required by law to be made each year by every such association, and which said report was then and there verified by the oath of the cashier of the said association and attested by the signature of three of the then directors thereof of which three said attesting directors, the said Charles W. Morse was one, and the said Alfred H. Curtis was one.

And the Grand Jurors aforesaid, upon their oath aforesaid, do further present, that the said Charles W. Morse and Alfred H. Curtis being directors and so being also such vice-president and president respectively of the said association, on the said 11th day of April, in the year nineteen hundred and six, within the borough, city and district aforesaid, unlawfully did knowingly make a certain false entry in the said report so made as aforesaid, that is to say: a false entry to the effect that at the close of business on the said 6th day of April, in the year nineteen hundred and six, the amount of "Bonds, Securities, etc., including premium on same (see schedule)" was Five hundred and sixty-four thousand, three hundred and thirty dollars ($564,330);—whereas, in truth as they the said Charles W. Morse and Alfred H. Curtis at the time of so making the said false entry well knew by reason of the fact that the said association was at the close of business on the said 6th day of April, in the year nineteen hundred and six, the owner of three hundred and thirty-one (331) shares of its own capital stock, to wit, three hundred and thirty one (331) shares of the capital stock of The National Bank of North America in New York, and that the value of said shares of stock amounting to Ninety-six thousand, seven hundred and eighty-three dollars and twenty-five cents ($96,783.25) was not included in said entry, nor were said shares of stock set forth in the schedule referred to in said entry, the amount of such "Bonds, Securities, etc., including premium on same (see schedule)" was a different and much greater sum of money, to wit, Six hundred and sixty-one thousand, one hundred and thirteen dollars and twenty-five cents ($661,113.25); they, the said Charles W. Morse and Alfred H. Curtis then and there, to wit, at the time and place of so making the said false entry in the said report as aforesaid, thereby intending to injure and defraud the said The National Bank of North America in New York and one Charles A. Briggs, one Emma Brokaw, one Frances C. Brown, one Charles C. Burke, one Louise T. Miner, one Cornelia M. Mead and divers other persons (too numerous to be here named) then

shareholders thereof and to deceive the other officers of the said association and to deceive any agent who might thereafter be appointed by the Comptroller of the Currency to examine the affairs of said association; against the peace and dignity of the United States and contrary to the form of the statute of the same in such case made and provided.

[Sustained on demurrer, U. S. v. Morse, 161 Fed. 419, 438.]

TWENTY-FOURTH COUNT.

And the Grand Jurors aforesaid upon their oath aforesaid, do further present that the said Charles W. Morse and the said Alfred H. Curtis on the 16th day of October, in the year nineteen hundred and seven, at and within the said Borough of Manhattan, City of New York, and the Southern District of New York, were directors and were officers, to wit, the said Charles W. Morse was vice-president and the said Alfred H. Curtis was president of The National Bank of North America in New York, which then and there was a banking association theretofore organized and established and then and there existing and in operation and doing business under and by virtue of the laws of the United States concerning national banks, and that the said Charles W. Morse and the said Alfred H. Curtis so being such officers of the said banking association then and there unlawfully and wilfully and with intent to injure and defraud the said association for the use, benefit and advantage of the said Charles W. Morse, did misapply certain of the moneys, funds and credits of the said association, to wit, the sum of Fifty thousand dollars ($50,000), in the manner and by the means following, that is to say: the said Charles W. Morse then and there did make and draw a certain check of the tenor following, that is to say:

New York, Oct. 16, 1907. No. 6140
The National Bank of North America
Pay to the order of Shoemaker, Bates & Co.
$50,000.00/100 Dollars
Fifty thousand & 00/100 Dollars
C. W. Morse.

C. W. Morse.

And did deliver the same to the said Shoemaker, Bates & Co., a copartnership then and there existing composed of individuals whose names are to the Grand Jurors unknown; he, the said Charles W. Morse, at the time that he made, drew and delivered the said check well knowing that he did not then have on deposit with the said association an amount of money equal to the amount specified in said check, and that the said Charles W. Morse as such vice-president, and the said Alfred H. Curtis as such president, as aforesaid, did there on the 16th day of October, in the year nineteen hundred and seven, cause to be paid to and upon said check the said sum of Fifty thousand dollars ($50,000) of the

moneys, funds and credits of the said association in excess of all sums and amounts which the said Charles W. Morse was then and there entitled to draw and have paid out of the moneys, funds and credits of the said association; they, the said Charles W. Morse and the said Alfred H. Curtis then and there unlawfully, wickedly and fraudulently devising and intending that the said Charles W. Morse should appropriate and convert to his own use the said sum of Fifty thousand dollars ($50,000), although as they, the said Charles W. Morse and the said Alfred H. Curtis, then and there well knew the said sum of Fifty thousand dollars ($50,000) so paid as aforesaid had not been deposited and was not then on deposit with the said association by the said Charles W. Morse, and was not then and there due and owing by and from the said association to the said Charles W. Morse, and the repayment thereof to the said association was not then and there in any way secured, and the said Charles W. Morse had no manner of right and title to the same; against the peace and dignity of the United States and contrary to the form of the statute of the same in such case made and provided.

TWENTY-NINTH COUNT.

And the Grand Jurors aforesaid, upon their oath aforesaid, do further present, that the said Charles W. Morse and the said Alfred H. Curtis, on the 16th day of October, in the year nineteen hundred and seven, were directors and were officers, to wit, the said Charles W. Morse was vice-president and the said Alfred H. Curtis was president of The National Bank of North America in New York, which then and there was a banking association theretofore organized and established and then and there existing and in operation and doing business under and by virtue of the laws of the United States concerning national banks; and being such officers as aforesaid, then and there unlawfully and wilfully and with intent to injure and demand the said association for the use, benefit and advantage of the said Charles W. Morse, did misapply certain of the moneys, funds and credits of the said association, to wit, the sum of Two hundred and ten thousand six hundred and eighty-one and forty-seven one-hundredths dollars ($210,681.47), in the manner and by the means following, that is to say, that they, the said Charles W. Morse, as such vice-president, and the said Alfred H. Curtis, as such president, as aforesaid, did then and there cause to be paid to and upon divers checks and orders made and drawn on the said association by the said Charles W. Morse, the said sum of Two hundred and ten thousand six hundred and eighty-one and forty-seven one-hundredths dollars ($210,681.47) in excess of all sums and amounts which the said Charles W. Morse was then and there entitled to draw and have paid out of the moneys and funds of the said association; they, the said Charles W. Morse and the said Alfred H. Curtis then and there knowingly, wickedly and fraudulently devising and intending that the said Charles W. Morse should appropriate and convert to his own use the said sum of Two hundred and ten thousand six hundred and eighty-one

and forty-seven one-hundredths dollars ($210,681.47), although as they, the said Charles W. Morse and the said Alfred H. Curtis then and there well knew the said sum of Two hundred and ten thousand six hundred and eighty-one and forty-seven one-hundredths dollars ($210,681.47), so paid as aforesaid, had not been deposited and was not then on deposit with the said association by the said Charles W. Morse, and was not then and there due and owing by and from the said association to the said Charles W. Morse, and the repayment thereof to the said association was not then and there in any way secured, and the said Charles W. Morse had no manner of right and title to the same; against the peace and dignity of the United States and contrary to the form of the statute of the same in such case made and provided.

[Endorsed] A true bill.

JAMES BROWN, Foreman.

HENRY L. STIMSON,
United States Attorney.

IN THE CIRCUIT COURT OF THE UNITED STATES OF AMERICA,

FOR THE SOUTHERN DISTRICT OF NEW YORK.

Of the May Term, in the year nineteen hundred and eight.

COUNT 4A.

Southern District of New York, ss.:

The Grand Jurors for the United States of America, empaneled and sworn in the Circuit Court of the United States for the Southern District of New York, and inquiring for that district, upon their oath present, that before and during the three years past, under the laws of the United States, all banking associations organized, established and existing, and in operation and doing business, under and by virtue of the laws of the United States concerning national banks have been subjected to visitation, and their books, papers and records to examination and scrutiny, by agents appointed in accordance with the law by the Comptroller of the Currency of the United States to examine the affairs of such national banking associations and report in detail to him the condition of the same, and whether any improper investment or uses were made of the moneys, funds and credits of such national banking associations, in order that he might approve or disapprove of the management of the affairs of such national banking associations and take appropriate action in the performance of his duties under the various provisions of the said laws in that behalf made; that under such laws every such national banking association, upon request being made therefor from time to time by the said Comptroller, has been required to make and transmit to him not less than five reports during each year, according to the form prescribed

by him, which reports were required to be verified and attested in accordance with law, and to exhibit in detail and under appropriate heads, the resources and liabilities of each such national banking association at the close of business on past days specified by the said Comptroller in making his several requests for the same, and particularly the total amounts of money loaned by each such national banking association respectively upon promissory notes, and the total amounts of bonds, securities, etc., including corporate stocks, owned by such national banking association; that inasmuch as each such national banking association established and doing business in the Borough of Manhattan, in the City of New York, has done such a great volume of business that it has been required to employ numerous clerks and bookkeepers to keep the books of accounts of the same and make up the aforesaid reports for verification, attestation and transmittal to the said Comptroller, the work of keeping such books and making such reports has been to a certain extent necessarily mechanical, and entries once made in such books have in due course of business appeared in or been the basis of other entries which appeared in and have necessarily affected the said reports so made by the said agents to the said Comptroller, as well as those made by the said national banking association to the said Comptroller, and those made as hereinafter set forth by the Comptroller to Congress, without such clerks or bookkeepers necessarily having any knowledge of the truth or falsity of such entries or of the true circumstances underlying the making of the same, or pertaining to the transactions upon which they were respectively based; that in so examining the affairs of any such national banking association in the said borough, the said agents so appointed by the said Comptroller for that purpose have been compelled, by reason of the great volume of business transacted by such national banking associations, to accept the said books and the entries so made in the same as true, when the same appeared to be consistent and regular, and especially when entries showing loans were accompanied by entries, records or share-certificates showing the possession by the said national banking association of apparent collateral security for such loans,—it having been impracticable for such agents to inquire into the circumstances underlying the making of each such entry or pertaining to the transactions upon which they were based; and that the said Comptroller by law has been required to make an annual report to the Congress of the United States, at the commencement of its session, exhibiting, amongst other things, a summary of the state and condition of every such national banking association from which such reports have been received by him during the year preceding the making of each such report; which said reports to Congress have necessarily been compiled from and based upon the reports so made to the said Comptroller by the said agents and by the said national banking associations, and have been and are of great importance and indispensable as aids to the performance by the Government of the United States, through the said national banking associations, of its official functions pertaining to the borrowing of money on the credit of the United States, to the obtaining

of money, through taxes, duties, imposts, and excises, for its use, and to the providing of agencies for its fiscal operations and a stable and uniform currency for the use of its people.

And so the Grand Jurors aforesaid, upon their oath aforesaid, do say, that the said agents appointed to examine the affairs of the said national banking associations in the said borough have, in manner and form aforesaid, been charged with the execution of a governmental duty in ascertaining the true state and condition of the affairs of such national banking associations, and reporting the same to the said Comptroller; and the said Comptroller has been charged with the execution of a governmental duty in receiving and considering such reports from the said agents and associations and approving or disapproving of the management of the affairs of such national banking associations, as shown by such reports, and acting as required by law in either case, and also in reporting to the Congress a summary of the state and condition of such national banking associations as they appear from such reports; and the United States has had important fiscal and other governmental functions to perform in the premises.

And the Grand Jurors aforesaid, upon their oath aforesaid, do further present, that Charles W. Morse, and Alfred H. Curtis, each late of the said Borough of Manhattan, in the said City of New York, and in the said Southern District of New York, at all times from the twenty-eighth day of March, in the year nineteen hundred and five, to the twenty-first day of October, in the year nineteen hundred and seven, at and within the said borough, city and district, were directors and were officers, to wit, vice-president and president respectively, of The National Bank of North America in New York, which then and there was a national banking association theretofore organized and established, and then and there existing and in operation and doing business, under and by virtue of the laws of the United States concerning national banks; that the said Charles W. Morse and the said Alfred H. Curtis, so being such officers of the said national banking association, and well knowing all the premises aforesaid, and intending to take advantage of the same, unlawfully did, on the eleventh day of January, in the year nineteen hundred and six, at and within the borough, city and district aforesaid, conspire, combine, confederate and agree together, and with divers other persons to the said Grand Jurors unknown, to commit an offense against the United States, that is to say, the offense of knowingly making a false entry in a certain book of the said national banking association with intent to injure and defraud the said national banking association and to deceive the agents who should be appointed by the Comptroller of the Currency of the said United States to examine the affairs of the same.

And the Grand Jurors aforesaid, upon their oath aforesaid, do further present, that the unlawful conspiracy, combination, confederation and agreement in this count of this indictment mentioned was so entered into by the said Charles W. Morse and the said Alfred H. Curtis and the other conspirators aforesaid under the circumstances and conditions in this

count next set forth, and the said false entry was so to be made by them, with the intent and knowledge last aforesaid, in a book of the said national banking association, for purposes, under circumstances, and in the manner and by the means, now here described, that is to say:

By reason of the said Charles W. Morse and the said Alfred H. Curtis being, as such directors and as such vice-president and president respectively, actively engaged in the management of the business and affairs of the said national banking association and possessed of a power of control, direction and management over the moneys, funds and credits of the same, and over the other officers, clerks and employees of the same, they were to make use of the moneys, funds and credits of the said national banking association in the purchase of and dealing in, on behalf of the said national banking association, of a large number, to wit, two thousand, of the shares of the capital stock of the American Ice Securities Company (a corporation theretofore organized and then existing under and by virtue of the laws of the State of New Jersey), and in investing such moneys, funds and credits in those shares on speculation, notwithstanding as they the said Charles W. Morse and the said Alfred H. Curtis and said other conspirators then and there well knew, the said national banking association then and there was not by law allowed to purchase, or invest its moneys, funds or credits in such corporate stocks for the purpose of speculation therein or to deal in such stocks, and such purpose and investment would not be approved by the said Comptroller, and would be an unlawful and improper use of such moneys, funds and credits, and one calculated to injure the business and credit of the said national banking association and impair its capital; and thereupon were to provided.

False Entry.
Report, March 28, 1907.
Knickerbocker Loan Transaction.

COUNT 12C.

And the Grand Jurors aforesaid, on their oath aforesaid, do further present, that the said Charles W. Morse and the said Alfred H. Curtis, before and on the twenty-second day of March, in the year nineteen hundred and seven, and thenceforth until and on the twenty-eighth day of March, in the same year, at and within the said Borough of Manhattan, City of New York and Southern District of New York, were directors and were officers, to wit, the said Charles W. Morse was vice-president and the said Alfred H. Curtis as president, of The National Bank of North America in New York, which then and there was a national banking association theretofore organized and established and then and there existing and in operation and doing business under and by virtue of the laws of the United States concerning national banks, and that the said national banking association on the said twenty-eighth day of March, in the year nineteen hundred and seven, did there make and transmit to the then Comptroller of the Currency of the United States a certain report of the

condition of the said national banking association at the close of business on the twenty-second day of March, in the year nineteen hundred and seven, according to a certain form theretofore prescribed by the said Comptroller of the Currency of the United States for the time being, the same being a report which it was then and there, to wit, on the said twenty-eighth day of March, in the year nineteen hundred and seven, by law the duty of the said national banking association to make and transmit to the said Comptroller of the Currency, to wit, one of the five reports before that time, and then required by law to be made each year by every such national banking association, and which said report was then and there verified by the oath of the cashier of the said national banking association and attested by the signatures of three of the then directors thereof.

And the Grand Jurors aforesaid, upon their oath aforesaid, do further present, that the said Charles W. Morse and the said Alfred H. Curtis, so being directors and so being also vice-president and president, respectively, of the said national banking association on the twenty-eighth day of March, in the year nineteen hundred and seven within the Borough, City and District aforesaid, unlawfully, knowingly and fraudulently did wilfully make a certain false entry in said report, aforesaid, that is to say, a false entry to the effect that at the close of business on the said twenty-second day of March in the year nineteen hundred and seven the amount of "Liabilities other than those above stated" was "None," whereas in truth, as they, the said Charles W. Morse and the said Alfred H. Curtis, at the time of so making the said false entry, well knew, by reason of the fact that the said national banking association was at the close of business on the said twenty-second day of March, in the year nineteen hundred and seven, liable for the payment of a certain loan, in the amount of Two hundred thousand dollars ($200,000), made to the said national banking association, on the fifteenth day of February, in the year nineteen hundred and seven, by the Knickerbocker Trust Company (a corporation then and there organized and existing under and by virtue of the laws of the State of New York), the amount of "Liabilities other than those above stated" was Two hundred thousand dollars ($200,000); they, the said Charles W. Morse and the said Alfred H. Curtis, then and there, to wit, at the time and place of so making said false entry in the said report as aforesaid, thereby intending to injure and defraud the said national banking association and one Charles A. Briggs, one Emma Brokaw, one Frances C. Brown, one Charles C. Burke, one Louise T. Miner and one Cornelia M. Mead, and divers other persons (too numerous to be here named), then shareholders thereof, and to deceive the other officers of the said national banking association, and to deceive any agent appointed by the Comptroller of the Currency to examine the affairs of the said national banking association, against the peace and dignity of the United States and contrary to the form of the statute of the same in such case made and provided. And that the said national banking association on the said twenty-third day of May, in the year nineteen hundred and seven, did there make and transmit to the then Comptroller of the Currency of the United States a certain re-

port of the condition of the said national banking association at the close of business on the twentieth day of May, in the year nineteen hundred and seven, according to a certain form theretofore prescribed by the Comptroller of the Currency of the United States for the time being, the same being a report which it was there and then, to wit, on the said twenty-third of May, in the year nineteen hundred and seven, by law the duty of the said national banking association to make and transmit to the said Comptroller of the Currency, to wit, one of the five reports before that time and then required by law to be made each year by every such national banking association, and which said report was then and there verified by the oath of the cashier of the said national banking association and attested by the signatures of three of the then directors thereof.

And the Grand Jurors aforesaid, upon their oath aforesaid, do further present, that the said Charles W. Morse and the said Alfred H. Curtis so being directors and so being also such vice-president and president, respectively, of the said national banking association on the said twenty-third day of May, in the year nineteen hundred and seven, within the Borough, City and District aforesaid, unlawfully, knowingly and fraudulently did wilfully make a certain false entry in said report aforesaid, that is to say, a false entry to the effect that at the close of business on the said twentieth day of May, in the year nineteen hundred and seven, the amount of "Bonds, Securities, etc., including premium on same (see schedule)" was Eight hundred and thirty-nine thousand, eight hundred and ninety dollars and fifty cents ($839,898.50), whereas in truth, as they, the said Charles W. Morse and the said Alfred H. Curtis at the time of so making the said false entry well knew, by reason of the fact that the said national banking association was at the close of business on the said twentieth day of May, in the year nineteen hundred and seven, the owner of eight thousand shares of the capital stock of the New York & Cuba Mail Steamship Company (a corporation theretofore organized and then existing under and by virtue of the laws of the State of Maine), and that the value of said shares, amounting to Two hundred thousand dollars was not included in said entry, nor were the said shares of stock set forth in the schedule referred to in said entry, the amount of "Bonds, Securities, etc., including premium on same (see schedule)" was a different and much greater sum of money, to wit, One Million, thirty-nine thousand, eight hundred and ninety-eight dollars and fifty cents ($1,039,898.50); they, the said Charles W. Morse and the said Alfred H. Curtis, then and there, to wit, at the time and place of so making said false entry in the said report as aforesaid, thereby intending to injure and defraud the said national banking association and one Charles A. Briggs, one Emma Brokaw, one Frances C. Brown, one Charles C. Burke, one Louise T. Miner, and one Cornelia M. Mead, and divers other persons (too numerous to be here named) then shareholders thereof, and to depease and dignity of the United States and contrary to the form of the statute of the same in such case made and provided.

Misapplication, $102,920.
December 8, 1905.
Whiting Transaction.

COUNT 30.

And the Grand Jurors aforesaid, upon their oath aforesaid, do further present, that the said Charles W. Morse and the said Alfred H. Curtis, on the eighth day of December, in the year nineteen hundred and five, at and within the said Borough of Manhattan, City of New York, and Southern District of New York, were directors and were officers, to wit, the said Charles W. Morse was vice-president and the said Alfred H. Curtis was president, of The National Bank of North America in New York, which then and there was a national banking association theretofore organized and established, and then and there existing and in operation and doing business under and by virtue of the laws of the United States concerning national banks, and that the said Charles W. Morse and the said Alfred H. Curtis, so being such directors and officers, respectively, of the said national banking association, then and there unlawfully, knowingly and fraudulently and with intent to injure and defraud the said national banking association, did wilfully misapply certain of the moneys, funds and credits of the said national banking association then and there being to the amount and value of One hundred and two thousand, nine hundred and twenty dollars ($102 920), (a more particular description of which said moneys, funds and credits is to the Grand Jurors unknown and therefore cannot here be set forth), by unlawfully, knowingly, wilfully, fraudulently and without the knowledge or consent of the said national banking association, and not for any use, benefit or advantage of the said national banking association, converting and applying the said moneys, funds and credits to the use, benefit and advantage of the said Charles W. Morse, which said conversion and application of the said moneys, funds and credits was then and there accomplished by the said Charles W. Morse and the said Alfred H. Curtis in the manner following, that is to say: By virtue of the power of control, direction and management which the said Charles W. Morse and the said Alfred H. Curtis, as such directors and officers, respectively, of the said national banking association, as aforesaid, then and there possessed over the moneys, funds and credits of the same, the said Charles W. Morse and the said Alfred H. Curtis at the time and place in this count of this indictment aforesaid, with the intent aforesaid, and as aforesaid, without the knowledge or consent of the said national banking association, unlawfully, knowingly and fraudulently did wilfully apply the sum of One hundred and thirty-five thousand, four hundred and twenty dollars ($135,420) of the moneys, funds and credits of the said national banking association to the purchase from the said Charles W. Morse and other persons to the Grand Jurors unknown, for the said national banking association of four thousand shares of the capital stock of American Ice Securities Company (a corporation theretofore organized and then existing under and by virtue of the laws of the State of New Jersey), said shares of stock being of the par value of One hundred dollars each, when, as they, the said Charles W.

Morse and the said Alfred H. Curtis, then and there well knew the price at which the said shares of stock were purchased, as aforesaid, was wholly arbitrary and artificial, and did not represent the real value of such shares, but, on the contrary, was an inflated price fixed by the contrivances, manipulations and operations of the said Charles W. Morse upon the stock market for his own personal benefit, and the said shares were really together worth much less than the sum applied to the purchase thereof, to wit, only the sum of Thirty-two thousand five hundred dollars ($32,500), whereby the said sum of One hundred and two thousand nine hundred and twenty dollars ($102,920) then and there was wholly lost to the said national banking association, and its moneys, funds and credits were and are depleted in that amount; against the peace and dignity of the United States, and contrary to the form of the statute of the same in such case made and provided.

Misapplication, $106,000.
April 9, 1906.
Whiting Transaction.

COUNT 34B.

And the Grand Jurors aforesaid, upon their oath aforesaid, do further present, that the said Charles W. Morse and the said Alfred H. Curtis, on the ninth day of April, in the year nineteen hundred and six, at and within the said Borough of Manhattan, City of New York, and Southern District of New York, were directors and were officers, to wit, the said Charles W. Morse as vice-president and the said Alfred H. Curtis was president, of The National Bank of North America in New York, which then and there was a national banking association theretofore organized and established and then and there existing and in operation and doing business under and by virtue of the laws of the United States concerning national banks; and that the said Charles W. Morse and the said Alfred H. Curtis, so being such directors and officers of the said national banking associations, then and there unlawfully, knowingly and fraudulently and with intent to injure and defraud the said national banking association, did wilfully misapply certain of the moneys, funds and credits of the said national banking association then and there being to the amount and value of One hundred and six thousand dollars ($106,000) (a more particular description of which said moneys, funds and credits is to the Grand Jurors unknown and therefore cannot be here set forth) by unlawfully, willfully and fraudulently and without the knowledge or consent of the said national banking association, and not for any use, benefit or advantage of the said national banking association, converting and applying the said moneys, funds and credits to the use, benefit and advantage of the said Charles W. Morse in the manner and by the means following, that is to say: By virtue of the power of control, direction and management which the said Charles W. Morse and the said Alfred H. Curtis, as such directors and officers, respectively, of the

said national banking association, then and there possessed over the moneys, funds and credits of the same, they, the said Charles W. Morse and the said Alfred H. Curtis, did then and there cause to be credited upon the books of the said banking association, to the said Charles W. Morse, the said sum of One hundred and six thousand dollars ($106,000), the said Charles W. Morse not being entitled to be then and there credited upon the said books with the said sum or any part thereof, as they, the said Charles W. Morse and the said Alfred H. Curtis, then and there well knew, and did thereby falsely and fraudulently represent to the Board of Directors, the other officers, the clerks and the tellers of the said national banking association that the said Charles W. Morse was entitled to draw and have paid out the moneys, funds and credits of the said national banking association the said sum of One hundred and six thousand dollars ($106,000), and did thereby place at the disposal and subject to the order of the said Charles W. Morse certain of the moneys, funds and credits of the said national banking association, to wit, the said sum of One hundred and six thousand dollars ($106,000), they, the said Charles W. Morse and the said Alfred H. Curtis, then and there unlawfully, knowingly and fraudulently devising and intending that the said Charles W. Morse should be enabled to draw and have paid out of the moneys, funds and credits of the said national funds and credits and should appropriate and convert to his own use, without right and without being justly entitled thereto, the said sum of banking association and should draw and have paid out of the said moneys, One hundred and six thousand dollars ($106,000); and that thereafter, to wit, at the time and place in this count of this indictment aforesaid, the checks of the said Charles W. Morse drawn upon the said national banking association for the said sum of One hundred and six thousand dollars ($106,000), being then and there presented to the said national banking association for payment, were by reason of the credit so made upon the books of the said national banking association as aforesaid and by the order and authority of the said Charles W. Morse and the said Alfred H. Curtis, as expressed in the said credit and in pursuance of the intent as aforesaid of the said Charles W. Morse and the said Alfred H. Curtis then and there drawn and paid out of the moneys, funds and credits of the said national banking association and appropriated to the use of the said Charles W. Morse, although as they, the said Charles W. Morse and the said Alfred H. Curtis, then and there well knew the said sum of One hundred and six thousand dollars ($106,000) so drawn out, paid and appropriated had not been deposited with the said national banking association by the said Charles W. Morse, and was not then and there due and owing by and from the said national banking association to the said Charles W. Morse, and the repayment thereof to the said national banking association was not then and there in any way secured and the said Charles W. Morse had no manner of right and title to the same; against the peace and dignity of the United States and contrary to the form of the statute of the same in such case made and provided.

COUNT 38B.

And the Grand Jurors aforesaid, upon their oath aforesaid, do further present, that the said Charles W. Morse and the said Alfred H. Curtis, on the eighteenth day of April, in the year nineteen hundred and seven, at and within the said Borough of Manhattan, City of New York, and Southern District of New York, were directors and were officers, to wit, the said Charles W. Morse was vice-president and the said Alfred H. Curtis was president, of The National Bank of North America in New York, which then and there was a national banking association theretofore organized and established and then and there existing and in operation and doing business under and by virtue of the laws of the United States concerning national banks; and that the said Charles W. Morse and the said Alfred H. Curtis, so being such directors and officers of the said national banking association, then and there unlawfully, knowingly and fraudulently and with intent to injure and defraud the said national banking association, did wilfully misapply certain of the moneys, funds and credits of the said national banking association, then and there being to the amount and value of One hundred and sixty thousand dollars ($160,000), (a more particular description of which said moneys, funds and credits is to the Grand Jurors unknown and therefore cannot be set forth) by unlawfully, wilfully and fraudulently and without the knowledge or consent of the said national banking association, and not for any use, benefit or advantage of the said national banking association, converting and applying the said moneys, funds and credits to the use, benefit and advantage of the said Charles W. Morse in the manner and by the means following, that is to say: By virtue of the power of control, direction and management which the said Charles W. Morse and the said Alfred H. Curtis, as such directors and officers, respectively, of the said national banking association, then and there possessed over the moneys, funds and credits of the same, they, the said Charles W. Morse and the said Alfred H. Curtis, did then and there cause to be credited upon the books of the said national banking association, to the said Charles W. Morse the said sum of One hundred and sixty thousand dollars ($160,000), the said Charles W. Morse not being entitled to be then and there credited upon the said books with the said sum or any part thereof, as they, the said Charles W. Morse and the said Alfred H. Curtis, then and there well knew and did thereby falsely and fraudulently represent to the Board of Directors, the other officers, the clerks and the tellers of the said national banking associations that the said Charles W. Morse was entitled to draw and have paid out of the moneys, funds and credits of the said national banking association the sum of One hundred and sixty thousand dollars ($160,000), and did thereby place at the disposal and subject to the order of the said Charles W. Morse certain of the moneys, funds and credits of the said national banking association, to wit, the said sum of One hundred and sixty thousand dollars ($160,000), they, the said Charles W. Morse and the said Alfred H. Curtis, then and there unlawfully, knowingly and fraudulently devising and intending that the said Charles W.

Morse should be enabled to draw and have paid out of the moneys, funds and credits of the said national banking association and should draw and have paid out of the said moneys, funds and credits, and should appropriate and convert to his own use, without right and without being justly entitled thereto, the said sum of One hundred and sixty thousand dollars ($160,000); and that thereafter, to wit, at the time and place in this count of this indictment aforesaid, the checks of the said Charles W. Morse drawn upon the said national banking association for the said sum of One hundred and sixty thousand dollars ($160,000), being then and there presented to the said national banking association for payment, were by reason of the credit so made upon the books of the said national banking association as aforesaid and by the order and authority of the said Charles W. Morse and the said Alfred H. Curtis, as expressed in the said credit and in pursuance of the intent as aforesaid of the said Charles W. Morse and the said Alfred H. Curtis then and there drawn and paid out of the moneys, funds and credits of the said national banking association and appropriated to the use of the said Charles W. Morse, although as they, the said Charles W. Morse and the said Alfred H. Curtis then and there well knew the said sum of One hundred and sixty thousand dollars ($160,000) so drawn out, paid and appropriated had not been deposited with the said national banking association to the said Charles W. Morse and was not then and there due and owing by and from the said national banking association to the said Charles W. Morse, and the repayment thereof to the said national banking association was not then and there in any way secured and the said Charles W. Morse had no manner of right and title to the same; against the peace and dignity of the United States and contrary to the form of the statute of the same in such case made and provided.

[Endorsed] A true bill.

JAMES BROWN, Foreman.

HENRY L. STIMSON,
U. S. Attorney.

FORM XXXII.—COUNT IN INDICTMENT FOR VIOLATION OF NATIONAL BANKING LAWS.

[Sustained, U. S. v. Heinze, 218 U. S. 532 reversing judgment sustaining demurrer. This was drawn by Henry A. Wise, Esq., U. S. District Attorney.]

SECOND COUNT.

And the grand jurors aforesaid, upon their oath aforesaid, do further present, that the said Fritz Augustus Heinze, on the said fourteenth day of October, in the same year nineteen hundred and seven, at the Borough of Manhattan aforesaid, in the said City of New York and Southern District of New York, was an officer, to wit, the president, of The Mercantile National Bank of the City of New York, which was a banking association

theretofore organized and established, and then and there existing and in operation and doing business, under and by virtue of the laws of the said United States concerning national banks; and that the said Fritz Augustus Heinze then and there was lawfully authorized as such officer of the said banking association to certify checks drawn upon the same.

And the grand jurors aforesaid, upon their oath aforesaid, do further present, that the said Fritz Augustus Heinze, so being such officer of the said banking association and authorized to certify checks drawn upon the same as aforesaid, then and there, to wit, on the said fourteenth day of October, in the year nineteen hundred and seven, at and within the said Borough of Manhattan, City of New York, and Southern District of New York, unlawfully did willfully and knowingly, as such officer, certify a certain other check which had on that day been drawn upon the said banking association by one of its depositors and dealers, to wit, the said firm of Otto Heinze & Co., then consisting of certain persons, to wit, Otto C. Heinze, Arthur P. Heinze and Max H. Schultze, for the payment, to the order of H. T. Carey & Co., a co-partnership then and there existing, composed of individuals whose names are to the said grand jurors unknown, of the sum of twenty-one thousand four hundred and sixty-nine dollars and six cents, that is to say, a check of the tenor following:

OTTO HEINZE & Co.

No. 1037. NEW YORK, October 14-1907.

THE MERCANTILE NATIONAL BANK
OF THE CITY OF NEW YORK.

Pay to the order of H. T. Carey & Co. Twenty-one thousand four hundred & sixty nine & 06/100 dollars

$21469 06/100 OTTO HEINZE & Co.

before the amount of the check in this count of this indictment mentioned had been regularly entered to the credit of the said dealer upon the books of the said banking association, and when, as he the said Fritz Augustus Heinze, when so certifying the same as aforesaid, there well knew, the said dealer, at the time when the said check was so certified, did not have on deposit with the said banking association an amount of money equal to the amount specified in the said check; and, further, that the said check was thereupon immediately delivered to the said H. T. Carey & Co., and the amount thereof in moneys, funds and credits of the said association was drawn from the said association in due course of business upon the same check; against the peace and dignity of the said United States, and contrary to the form of the statute of the same in such case made and provided.

FORM XXXIII.—APPEARANCE BOND ON WRIT OF ERROR IN CRIMINAL CASES.

[Contained in the Rules of the Circuit Court of Appeals for the Fifth Circuit 150 Fed. lxxxv.]

Know all men by these presents:

That we, —— ——, as principal, and —— ——, as sureties, are held and firmly bound unto the United States of America in the full and just sum of —— dollars, to be paid to the said United States of America, to which payment well and truly to be made we bind ourselves, our heirs, executors and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this —— day of ——, in the year of our Lord one thousand nine hundred and ———.

Whereas, lately at the —— term, A. D. 19—, of the district court of the United States for the —— district of ——, in a suit pending in said court between the United States of America, plaintiff, and —— ——, defendant, a judgment and sentence was rendered against the said —— ——, and the said —— —— has obtained a writ of error from the United States circuit court of appeals for the fifth circuit, to reverse the judgment and sentence in the aforesaid suit, and a citation directed to the said United States of America, citing and admonishing the United States of America to be and appear in the United States circuit court of appeals for the fifth circuit, at the city of New Orleans, Louisiana, thirty days from and after the date of said citation, which citation has been duly served.

Now, the condition of the above obligation is such that if the said —— —— shall appear in the United States circuit court of appeals for the fifth circuit on the first day of the next term thereof, to be held at the city of ——, on the first Monday in ——, A. D. 19—, and from day to day thereafter during said term, and from term to term, and from time to time, until finally discharged therefrom, and shall abide and obey all orders made by the said United States circuit court of appeals for the fifth circuit in said cause, and shall surrender himself in execution of the judgment and sentence appealed from as said court may direct, if the judgment and sentence of the said —— court against him shall be affirmed by the said United States circuit court of appeals for the fifth circuit, then the above obligation to be void; else to remain in full force, virtue and effect.

—— ——. [SEAL.]
—— ——. [SEAL.]
—— ——. [SEAL.]

Approved: —— ——,
Judge of the ——.

149

COURT OF CLAIMS FORMS

COURT OF CLAIMS FORM I.—PETITION.

[TITLE.]

To the Honorable, the Court of Claims:

The claimant, Meyer Scale & Hardware Company, a corporation organized under the laws of the State of New Jersey, having its principal office and place of business at Newark, in said State, respectfully represents:

I. CONTRACT. On the 31st day of January, 1919, the claimant, by its vice-president duly authorized in that behalf, entered into a contract with the United States, acting through the Chief of the Bureau of Supplies and Accounts, the Paymaster-General of the Navy, whereby it undertook and agreed to make and deliver, and the United States agreed to accept and pay for, eleven hundred eighty-five (1,185) suspension crane scales at a price of one hundred and fifty-five dollars ($155.00) per scale, delivered f. o. b. at specified navy yards and stations. A copy of said contract is annexed hereto as Exhibit "A."

II. READINESS TO PERFORM. Immediately following the making of said contract the claimant, in order to insure performance thereof within the limited time agreed upon for such performance, placed necessary orders with various subcontractors and material men for the production and fabrication of the various parts for the full number of scales covered by the contract and also proceeded on its own account to purchase and install necessary jigs, fixtures and machinery and to make other necessary expenditures for labor and materials, all of which were reasonable, proper, and necessary in the performance of the contract in its entirety.

III. WORK SUSPENDED. By letter of February 25, 1919, the Navy Department notified the contractor that owing to changes in equipment of all ships of the Navy, most of the scales called for by the contract of January 31, 1919, would not be desired, and asked, pending further investigation by it as to its requirements for scales, that the contractor not proceed further with the manufacture of the scales. The contractor suspended operations in accordance with such request pending further instructions but had already made the necessary commitment and had incurred other and large expenses in the necessary preparation to perform the contract. The suspension of the work thus directed greatly damaged the

contractor and added greatly to what would otherwise have been the cost of the scales that were later made.

IV. WORK PARTIALLY CANCELLED. Thereafter, on or about March 21, 1919, the Navy Department decided, and on that day so advised the contractor, that of the scales contracted for only four hundred ninety-seven (497) would be required and then and thereafter failed and refused to accept delivery of or pay for scales in excess of that number, though the contractor was at all times ready and willing to deliver the full contract quantity and at no time assented or agreed to the suspension of work or partial cancellation of the contract, but, to the contrary, made frequent and repeated demands to be permitted to complete the contract by the delivery of the full quantity of scales covered thereby.

V. MATERIALS ON HAND. Prior to the receipt of directions that four hundred ninety-seven (497) scales only would be required claimant had, in addition to the materials and parts necessary for that number of scales, acquired or contracted to acquire in good faith the machinery, materials and parts necessary and required for the production of eleven hundred eighty-five (1,185) scales which said machinery, materials and parts, being of a special design and not suitable for use in claimant's regular business, and could not be used except as required and used in making the four hundred and ninety-seven (497) scales that were made and delivered to the government and are of no use or value to the claimant except as scrap. The claimant had reasonably and necessarily laid out and expended in pursuance of binding commitments theretofore made on the accounts stated the sum of twelve thousand eight hundred eighty-seven dollars and twenty-eight cents ($12,887.28), including labor and handling, storage and interest charges, and the then and present worth to claimant of all materials and things so acquired and not used because of the breach of agreement by the government was about nine hundred ninety dollars and thirty-four cents ($990.34). Claimant therefore asks to be paid the actual loss on the account stated, amounting to eleven thousand eight hundred eight-six dollars and ninety-four cents ($11,886.94).

VI. PROFITS LOST. Claimant could and would, but for the failure of the government to accept delivery thereof, have completed and delivered the six hundred eighty-eight (688) scales covered by the contract, but not taken by the government, at a total cost of not to exceed twenty-eight thousand two hundred thirty-one dollars and fifty-four cents ($28,231.54), including the expenditures made before partial cancellation and would thus have earned and been paid a profit of seventy-eight thousand four hundred eight dollars and forty-six cents ($78,408.46) for the making and delivery of six hundred eighty-eight (688) scales that were not taken by the government. The failure of the government to accept and take the six hundred eighty-eight (688) scales, which by the contract it was obliged to take, deprived the claimant of earning profits in the full sum stated, and resulted in damage to the claimant in the full sum of seventy-eight thousand four hundred eight dollars and forty-six cents ($78,408.46), for which sum claim is now made.

VII. DAMAGES FOR DELAYS. The action taken by the government in suspending the work under the contract for a long period of time as set forth in Paragraph III resulted in compelling the claimant to retain skilled mechanics and other employees when no profitable work was available and also on adding greatly to the overhead and other expenses as well as increasing the cost of making the scales that were later authorized to be made. The damage caused the claimant by the unauthorized act of the government in thus suspending the work amounted to four thousand nine hundred sixty-six dollars and sixty-five cents ($4,966.65), for which sum claim is made.

VIII. SUMMARY. No other action has been had on said claim in Congress or by any of the departments; no person other than the claimant is the owner thereof or interested therein; no assignment or transfer of this claim, or of any part thereof or interest therein, has been made; the claimant is justly entitled to the amount herein claimed from the United States, after allowing all just credits and offsets; the claimant has at all times borne true allegiance to the Government of the United States and has not in any way voluntarily aided, abetted, or given encouragement to rebellion against the said Government. The claimant is a citizen of the United States. And the claimant claims judgment as follows:

Loss on materials on hand, Par. V	$11,886.94
Loss of profits on scales cancelled, Par. VI	78,408.46
Damages from suspension, Par. VII	4,966.65
	$95,262.05

KING & KING,
Attorneys for Claimant.

COURT OF CLAIMS FORM II.—FINDINGS AND JUDGMENT.

[TITLE.]

MEYER SCALE & HARDWARE COMPANY
vs.
THE UNITED STATES.

This case having been heard by the Court of Claims, the court, upon the evidence, makes the following:

FINDINGS OF FACT.

I. On January 31, 1919, the plaintiff, a corporation with its principal office and place of business in Newark, in the State of New Jersey, entered into a contract with the United States represented by the Paymaster General of the Navy, whereby it undertook to make and deliver 1,185 suspension crane scales to various navy yards and stations at a price of $155 per scale, delivery to begin within 60 days and to be completed within 100 days from the date of said contract. Said scales were intended for use on ships of the Navy.

II. The scales to be made were of a special design and different from any type of scale customarily made by the contractor. They consisted of about 95 separate parts, most of which the contractor had to procure from outside sources, its plant being equipped only for doing the finer machine work, engineering, adjusting and fitting of parts.

Prior to making the contract, the contractor had made tentative arrangements for the procurement of all necessary special machinery, parts, forgings, and materials required fully to perform the contract, and immediately after the contract was made, it placed orders with subcontractors for all such machinery, parts, forgings, and materials and made every necessary preparation to perform the contract fully in strict accordance with its terms.

III. On February 14, 1919, the Navy Department wrote the contractor as follows:

"Subject: Contract 45987, crane suspension scales.

"SIRS: Due to a change which has recently been made in the equipment of ships of the Navy, the 300 crane suspension scales for delivery at the navy yard, Boston, as called for by above-mentioned contract, are not needed. Investigation is being made to ascertain whether or not the scales for the other points noted are still desired.

"As this contract is of recent date it is presumed that you will be willing to cancel item 1 for the 300 crane suspension scales for delivery at the navy yard, Boston, without claim for damages. As soon as reply is received from the other points you will be advised whether it is desired to cancel the entire contract."

Personal interviews developed that the scale as designed was considered too large for use on destroyers and that the question of decrease in quantity raised in letter of February 14, 1919, was occasioned by this fact. The contractor thereupon agreed to reduce the size of the scale, which could be done in its own plant without additional cost, so as to accommodate the same to the requirements for use on destroyers, and having thus obviated the difficulty it proceeded with the work as before.

By letter dated February 25, 1919, the Bureau of Supplies and Accounts again wrote the contractor as follows:

"Subject: Contract 45987, crane suspension scales.

"Reference: (*a*) S. and A. letter 45987-PQ, dated 14 February, 1919.
(*b*) Your letter dated 19 February, 1919.

"SIRS: It is regretted that due to changes which have recently been made in equipment of ships for the Navy, most of the crane suspension scales called for by the above-mentioned contract are not desired. Investigation is being made to ascertain the exact quantity that will be required, but in the meantime it is requested that you do not proceed with the manufacture of these scales, and that you notify subcontractors accordingly.

"It is requested that you advise this office whether or not you could make a reduction in quantity without incurring any damages."

The contractor understood this letter to be occasioned by the same circumstances that had prompted the previous letter of February 14, 1919,

and as the question of size had already been adjusted by negotiations with the supply officer at Boston, no further attention was paid to the letter of February 25.

By a further letter dated March 21, 1919, the Bureau of Supplies and Accounts wrote the contractor as follows:

"Subject: Contract 45987, crane suspension scales.

"Reference: S. and A. letter dated 25 February.

"SIRS: As stated in above reference, due to changes which have recently been made in the equipment of ships for the Navy, many of the crane suspension scales called for by contract 45987 are not now desired. The quantities called for by the various navy yards are as follows:

"Item 1: Boston, 60 now required. Item 2: Appraisers' stores bldg., Boston, 25 now required. Item 3: Fleet supply base, So. Brooklyn, 200 now required. Item 4: Philadelphia, 125 now required. Item 5: Norfolk, 75 still required. Item 6: Charleston, 12 now required.

"In addition to the above 25 crane suspension scales will be required for the navy yard, Mare Island, California, and it is requested that you advise promptly the price for these scales delivered, as the prices noted in the contract are based on east coast delivery. Your cooperation with the Navy in making these reductions will be appreciated; and it is requested that information be furnished with regard to the status of this contract and whether or not the reductions noted can be made without incurring any damages. Upon receipt of your reply supplementary agreement will be prepared."

This was followed by telegram of April 3, 1919, as follows: "Navy letters, twenty-five Feby. and twenty-six March, requested you not to proceed with manufacture of scales under contract forty-five nine eighty-seven, and to notify subcontractors accordingly. If not agreeable to reduce quantities without claim for damages, request you forward immediately suggestions for adjustment and detailed statement of condition of contract covering material and labor incurred prior twenty-five Feby."

On receipt of these communications the contractor suspended all operations and work on the contract and made every effort to induce its subcontractors to accept cancellation of the contract with them for parts and materials. On March 28, 1919, the contractor advised the Bureau of Supplies and Accounts as follows: "Replying to your favor of March 21, relative to our contract 45987, we regret that it will be impossible for us to accept any reduction on our contract owing to the present status of material, as well as to other conditions of same. We would be pleased to take this matter up in person with you, if you will advise when you will be able to see our representative."

The work remained suspended until June 7, 1919, on which day the plaintiff wrote the Bureau of Supplies and Accounts stating that they had since May 12 endeavored to obtain some definite statement allowing them to proceed with the shipment of the scales mentioned in the Bureau's letter of March 21, 1919, without prejudice to them on the total number of scales called for in the original contract, that the scales were in their factory occupying considerable room, that they were being inconvenienced

and suffering considerable damage through this congestion, that it would be to mutual advantage to have the 497 scales mentioned in the letter shipped out, that they would ship them in accordance with directions provided by so doing they did not in any way prejudice themselves on the balance of the original order, which would come up on final adjustment, and requesting that authority to make the shipment be given.

Under the same date, but without any showing as to whether it was before or after the receipt of plaintiff's letter to the Bureau, last above referred to, the Bureau wrote the plaintiff as follows:

"Subject: Contract 45987.

"References: S. and A. letter having subject 'Contract 45987, crane suspension scales,' dated 21 March, 1919.

"SIRS: Instructions are hereby given for shipment of scales required under contract 45987 in quantities stated in above reference under items 1 to 6, inclusive. No shipment, however, will be made to the navy yard, Mare Island, pending further instructions."

On August 18, 1919, the Bureau of Supplies and Accounts wrote the plaintiff stating that "no further addition will be made to the reduced quantity as now called for under contract 45987."

IV. The contractor thereafter completed and delivered as required by the Navy Department the reduced quantity of scales indicated in the bureau's letter of March 21, 1919, totaling 497 suspension crane scales and was paid therefor the contract price. The contractor could and would have completed the number of scales required at the rate and within the time prescribed by the contract, or by May 5, 1919. The total suspension of the work from March 21, 1919, to June 8, 1919, resulted in delaying the completion of the scales until October 1, 1919. The general administration and overhead expenses, applicable to Navy crane-scale work, incurred after May 5, 1919, amounted to $4,966.65 and would not have been incurred had the scale work been allowed to proceed without interruption, or, if incurred, could have been absorbed by commercial work.

V. The materials, machinery, jigs., etc., obtained by the contractor for necessary use on the contract which were almost entirely of special design had all been procured or contracted for prior to receipt of definite instructions as to the quantity of scales required and were of no value for use in the regular business of the contractor. Those on hand for use in making 1,185 suspension crane scales, excluding those used in making the 497 scales that were made and delivered, are still in the contractor's plant. The contractor tried to cancel its orders with subcontractors, but was unable to do so. The contractor was ready, willing and fully prepared to make the full number of crane scales contracted to be made and delivered and to deliver same as specified and required, and could and would have done so had the Navy Department permitted it. At the time the letter of March 21, 1919, was received, the contractor had completed all engineering, designing, and drafting work; had on hand or in course of delivery all materials necessary to perform the contract in its entirety,

and had all necessary tools, dies, jigs, fixtures, and machinery required for the complete performance of the contract.

VI. The number of scales required by the Navy Department and accepted under the contract was 497. The contractor had another order for 72 of the same type and design of scale and it actually made and delivered to the Government a total of 575 suspension crane scales.

The actual cost to the contractor of producing and delivering 575 suspension crane scales including all labor, material and overhead was $24,264.28, or $40,087 per scale, exclusive of freight charges for delivering same. The actual cost of producing and delivering the 497 scales that were made and delivered under the contract was $20,496.58, including delivery charges. The remaining 688 scales which the Government failed and refused to accept could and would have been made and delivered at the same or a lesser unit cost, or for $28,231.54, including freight costs of delivery. Had the contractor been permitted to make and deliver the full quantity of scales called for by its contract, it could and would have earned and received a profit of $78,408.46 over and above the profits earned on the scales that were made and delivered.

VII. The actual cost of the materials which the contractor had on hand for making the full number of scales contracted to be made but not used because of the reduction in quantity by the Navy Department was $11,774.40 and the reasonable value of same at the time of reduction of the order was not exceeding $886.34. The contractor's actual loss on this account was $10,888.06. The actual cost of the special machine tools, etc., required for making the 1,185 crane scales was $2,024 62 and their value after the contract was terminated was $104. The part of this loss applicable to the 688 crane scales not made and delivered amounts to $998.88.

VIII. On April 6, 1920, a claim having been theretofore filed with the Bureau of Supplies and Accounts for damages on account of the partial cancellation of the contract, the Bureau wrote the plaintiff as follows:

"Subject: Contract 45987, relative to partial cancellation.

"Reference: Letter from King and King, attorneys, to Supplies and Accounts, 20 March, 1920.

"SIRS: By letter above referenced it was requested that the claim for damages based on the partial cancellation of the above contract be considered and that your company be advised as to the decision of the department in connection with same. Careful consideration has been given to the statements contained in said letter and all the facts and circumstances connected with the cancellation of the above contract. It is not the policy of the Navy to allow anticipated profits, as anticipated profits are too vague, uncertain, indefinite, and problematical. The completion of the contract might have resulted in loss instead of profit to your company. Under the war powers of the President, which were delegated to the Secretary of the Navy by appropriate executive orders, the right was given 'to modify, suspend, cancel, or requisition any existing or future contract for the building, production, or purchase of ships or material,' with the proviso

that in case of such cancellation just compensation should be made. All war-time contracts were made subject to this provision. A long line of decisions is to the effect that, where the right of cancellation is reserved, either by the contract or by statute, 'just compensation' does not include anticipated profits. Just compensation for actual loss is, however, allowed, but in order to determine the amount of actual loss, the Navy has in each and every instance where partial cancellations of contracts have been made detailed cost inspector to make an examination of the accounts and records kept by the contractor. Inasmuch as your company refused to permit the inspector to make an examination at your plant, it has so far been impossible for the Navy to intelligently make a proper cancellation settlement.

"It is noted from the letter above referenced that statement is made to the effect that the completion of the remaining 688 scales canceled would cost a total of $106,640.00. For your information it might be stated that the Navy has 40 of these scales at the navy yard, Mare Island; 33 at the navy yard, Boston; and 150 at the Fleet Supply Base, which are now offered for sale as surplus stock. The highest offer made for the above excess scales so far has been approximately $45.00 per scale. Unless the Navy is able to obtain a better price than the above offer, it will be seen that the loss on each scale will be $110.00. To accept the above-mentioned 688 scales at the price of $155.00 per scale, and to dispose of same in accordance with the above offer, it will be seen that the Navy's loss would exceed $75,000.00. After careful consideration of the claim submitted with letter above referenced, it has been decided to submit the following offer, which it is believed is fair and just to all parties concerned:

Labor cost	$ 1,138.56
Freight	191.06
Materials	13,717.655
Total	$15,047.275
10 per cent on material	1,371.765
Total	$16,419.04

"In case the above proposition is accepted, all materials for which payment is made will become the property of the Navy. If, however, your company will submit an acceptable salvage offer for said materials, same will be deducted from the amount to be paid. An early reply will be appreciated."

The record does not disclose the claim referred to in the above letter, the reply thereto, if any, or that any further procedure was had in the matter until the commencement of this action on August 17, 1920.

CONCLUSION OF LAW.

Upon the facts found the court concludes that the plaintiff is entitled to recover the sum of four thousand nine hundred sixty-six dollars

and sixty-five cents ($4,966.65) as set out in Finding IV and the sums of ten thousand eight hundred eighty-eight dollars and six cents ($10,888.06) and nine hundred ninety-eight dollars and eighty-eight cents ($998.88) as set out in Finding VII, in all the sum of sixteen thousand eight hundred fifty-three dollars and fifty-nine cents ($16,853.59), and it is ordered that the plaintiff recover of and from the defendant the said sum of sixteen thousand eight hundred fifty-three dollars and fifty-nine cents ($16,853.59), and that the petition otherwise be dismissed.

INTERSTATE COMMERCE FORMS

Forms for use before Interstate Commerce Commission prepared by the Commission.

APPROVED FORMS.

These forms may be used in cases to which they are applicable, with such alterations as the circumstances may render necessary.

No. 1.

COMPLAINT.

BEFORE THE INTERSTATE COMMERCE COMMISSION.

COMPLAINT.

———— ————
v.
THE ———— RAILROAD COMPANY,
———— ———— RAILWAY COMPANY.

[*Insert without abbreviation corporate title of carrier or carriers defendant.*]

The complaint of the above-named complainant– respectfully shows:

I. That [*complainant or complainants should here state nature and place of business, also whether a corporation, firm, or partnership, and if a firm or partnership, the individual names of the parties composing the same.*]

II. That the defendant– above named is a/are common carrier– engaged in the transportation of [passengers and] property, wholly by railroad [*or*, partly by railroad and partly by water], between points in the State of ———— and points in the State ————, and as such common carrier– is/are subject to the provisions of the interstate commerce act.

III. That [*state in this and subsequent paragraphs to be numbered IV, V, etc., the matter or matters intended to be complained of, naming every rate, fare, charge, classification, regulation, or practice the lawfulness of which is challenged, and also, if practicable, each point of origin and point of destination between which the rates, etc., complained of are applied. Where it is impracticable to designate each point, defined territorial or rate groups and typical points should be designated. Whenever practicable tariff references should be given.* See rule III.

Where unlawful discrimination is charged, the facts constituting the

basis of the charge should be clearly stated; that is, if the unlawful discrimination be under section 2, the person or persons claimed to be favored and the person or persons claimed to be injured should be named, and the kind of service and kind of traffic, together with the claimed similarity of circumstances and conditions of transportation, should be set forth. See rule III(l). *If the discrimination be under section 3, the particular persons, company, firm, corporation, locality, or traffic claimed to be accorded undue or unreasonable preference or advantage, or subjected to undue or unreasonable prejudice or disadvantage, should be stated.* See rule III(m). *If the discrimination be under section 4, the particular provision of the section claimed to be violated—that is, whether the long-and-short-haul provision or the aggregate of intermediate rates provision—as well as the facts constituting such violation, should be stated.* See rule III(o).]

X. That by reason of the facts stated in the foregoing paragraphs complainant– has/have been subjected to the payment of rates [fares *or* charges, etc.] for transportation which were when exacted and still are (1) unjust and unreasonable in violation of section 1 of the interstate commerce act, and/or (2) unjustly discriminatory in violation of section 2, and/or (3) unduly preferential or prejudicial in violation of section 3, and/or (4) in violation of the long-and-short-haul [*or*, aggregate of intermediate rates] provision of section 4 thereof. [*Use one or more of the allegations numbered 1, 2, 3, 4, according to the facts as intended to be charged.*] That complainant– has/have been injured thereby to his/their damage in the sum of ———— dollars.

Where complainant– pray– that defendant– may be [severally] required to answer the charges herein; that after due hearing and investigation an order be made commanding said defendant– [and each of them] to cease and desist from the aforesaid violations of said act, and establish and put in force and apply in future to the transportation of ———— between the origin and destination points named in paragraph ——— hereof, in lieu of the rates [fares, *or* charges, etc.] named in said paragraph, such other rates [fares, or charges, etc.] as the Commission may deem reasonable and just [and also pay to complainant– by way of reparation for the unlawful charges hereinbefore alleged the sum of ————, or other sum as, in view of the evidence to be adduced herein, the Commission shall determine that complainant– is/are entitled to as an award of damages under the provisions of said act for violation thereof], and that such other and further order or orders be made as the Commission may consider proper in the premises.

Dated at ———— ————, 19——.

———— ————,
[*Complainant's signature.*]
———— ————,
[*Office and P. O. address.*]
———— ————,
[*Attorney's signature.*]
———— ————,
[*Office and P. O. address.*]

No. 2.

ANSWER.

BEFORE THE INTERSTATE COMMERCE COMMISSION.

ANSWER.

———— ————
v.
THE ———— RAILROAD COMPANY. } DOCKET NO. ———.

The above-named defendant–, for answer to the complaint in this proceeding, respectfully state–:

I. [*Here follow appropriate and responsive admissions, denials, and averments, answering the complaint, paragraph by paragraph.*]

Wherefore defendant– pray– that the complaint in this proceeding be dismissed.

Dated ———— —, 19—

THE ———— RAILROAD COMPANY,
BY ———— ————.

————— ————,
[*Title of officer.*]
————— ————,
[*Office and P. O. address.*]

No. 3.

PETITION FOR LEAVE TO INTERVENE.

BEFORE THE INTERSTATE COMMERCE COMMISSION.

PETITION.

————— ————
v. } DOCKET NO. ——.
————— ————

Come– now your petitioner–, ———— ————, and respectfully represent– that he has/they have an interest in the matters in controversy in the above-entitled proceeding and desire– to intervene in and become a party/parties to said proceeding, and for grounds of the proposed intervention say–:

I. That [*petitioner or petitioners should here state nature and place of business, and whether a corporation, firm, or partnership, etc., as in form No. 1.*]

II. [*Petitioner or petitioners should here set out specifically his/their position and interest in the above-entitled proceeding in accordance with rule II (e).*]

Wherefore said ——— ——— pray- leave to intervene and be treated as a party/parties hereto with the right to have notice of and appear at the taking of testimony, produce and cross-examine witnesses, and be heard in person or by counsel upon brief and at the oral argument, if oral argument is granted.

Dated at ——— ———, 19——.

———— ————,
[*Petitioner's signature.*]
———— ————,
[*Office and P. O. Address.*]
———— ————,
[*Attorney's signature.*]
———— ————,
[*Office and P. O. address.*]

No. 4.

PETITION FOR REHEARING OR REARGUMENT.

BEFORE THE INTERSTATE COMMERCE COMMISSION.

PETITION.

———— ————
v. } DOCKET NO. ——.
———— ————

Come- now the complainant- [*or* defendant-] in the above-entitled proceeding and respectfully petition- the Commission to grant a rehearing [or reargument] therein, and in support of said petition respectfully show-:

I. [*Here set out specifically the matters claimed to be erroneously decided, with a brief statement of the alleged errors, in conformity with rule XV of the rules of practice.*]

Wherefore petitioner- pray- that a rehearing [or reargument] be granted in the above-entitled case and that the Commission enter such further order or orders in the premises as to it may seem reasonable and just.

Dated at ——— ———, 19——.

———— ————,
[*Petitioner's signature.*]
———— ————,
[*Office and P. O. address.*]
———— ————,
[*Attorney's signature.*]
———— ————,
[*Office and P. O. address.*]

IMPORTANT.—Before making out statement read rule V carefully.

No. 5.

FORM OF REPARATION STATEMENT UNDER RULE V.

Claim No. —— *of Richard Roe under the decision of the Interstate Commerce Commission in Docket No.* —.

Date of shipment.	Date of delivery or tender of delivery.	Date charges were paid.	Car initials.	Car No.	Origin.	Destination.	Route.	Commodity.	Weight.	As charged.		Should be—		Reparation on basis of the Commission's decision.
										Rate.	Amount.	Rate.	Amount.	
Oct. 7, 1918	Oct. 20, 1918	Oct. 25, 1918	N. P.	41585	Pittsburgh, Pa.	Dallas, Tex.	B. & O.; M., K. & T.; M., K. & T. of Tex.	Jelly glasses	30,000	$1.25	$375.00	$1.16	$348.00	$27.00
Oct. 10, 1918	Oct. 23, 1918	Oct. 23, 1918	I. C.	6769	do	do	do	do	33,000	1.25	412.50	1.16	382.80	29.70
Dec. 10, 1918	Dec. 23, 1918	Dec. 24, 1918	C. & E. I.	60288	do	do	do	do	32,500	1.25	406.25	1.16	377.00	29.25
Mar. 29, 1919	Apr. 13, 1919	Apr. 13, 1919	U. P.	19248	do	do	do	do	31,200	1.25	390.00	1.16	361.92	28.08
Total											1,583.75		1,469.72	114.03

The undersigned hereby certifies that this statement has been checked against the records of this company and found correct.

MARCH 30, 1920.

X. Y. Z. RY. CO.,
Collecting Carrier, Defendant,[1]
BY JOHN SMITH, *Auditor.*

Concurred in:[2]
A. B. C. RY. CO., *Defendant,*
BY WILLIAM JONES, *Auditor.*

RICHARD ROE, *Claimant,*
BY JOHN DOE, *Attorney.*
—— STREET, CHICAGO, ILL., *March 15, 1920.*

[1] If not a defendant, strike out word "defendant."

[2] For concurring certificate in case collecting carrier is not a defendant.

No. 6.

FORM OF ORIGINAL COMPLAINT IN REPARATION CASES AGAINST THE AGENT APPOINTED BY THE PRESIDENT.

BEFORE THE INTERSTATE COMMERCE COMMISSION.

COMPLAINT.

_____ _____
v.
_____ _____

The complaint of the above-named complainant–, respectfully shows:

I. That [*complainant or complainants should here state nature and place of business, also whether a corporation, firm, or partnership, and if a firm or partnership, the individual names of the partners composing the same.*]

II. That defendant, Walker D. Hines, Director General of Railroads, as Agent, is an officer of the United States designated by the President pursuant to the provisions of section 206 of the transportation act, 1920; that the railroads and systems of transportation over whose lines or routes the rates [*fares, charges, classifications, regulations, or practices*] complained of herein applied, and which during federal control were operated by the Director General of Railroads, are as follows: [*Here specify the carriers whose railroads or systems of transportation were under federal control and over which the rates, fares, charges, classifications, regulations, or practices applied, and against which such complaint would have been brought if such railroad or system had not been under federal control at the time the matter complained of took place.*]

III. That [*state in this and subsequent paragraphs to be numbered IV, V, etc., the matter or matters intended to be complained of, naming every rate, fare, charge, classification, regulation, or practice the lawfulness of which is challenged, and also, if practicable, each point of origin and point of destination between which the rates, etc., complained of were applied. Where it is impracticable to designate each point, defined territorial or rate groups and typical points should be designated. Whenever practicable tariff references should be given.* See rule III.

Where unjust discrimination or undue prejudice is charged, the facts constituting the basis of the charge should be clearly stated; that is, if the unlawful discrimination was under section 2, the person or persons claimed to have been injured should be named, and the kind of service and kind of traffic, together with the claimed similarity of circumstances and conditions of transportation, should be set forth. See rule III(1). *If the unlawful discrimination was under section 3, the particular person, company, firm, corporation, locality, or traffic claimed to have been accorded undue or unreasonable preference or advantage, or subjected to undue or unreasonable prejudice or disadvantage, should be stated.* See rule III(m).]

X. That by reason of the facts stated in the foregoing paragraphs complainant- has/have been subjected to the payment of rates [*fares or charges*] for transportation which were (1) unjust and unreasonable in violation of section 10 of the federal control act; (2) unjust and unreasonable in violation of section 1 of the interstate commerce act, and/or (3) unjustly discriminatory in violation of section 2, and/or (4) unduly preferential or prejudicial in violation of section 3. [*Use allegation* (1) *and one or more of the others according to the facts intended to be charged.*]

Wherefore complainant- pray- that defendant may be required to answer the charges herein; that after due hearing and investigation an order be made commanding said defendant to pay to complainant- by way of reparation for the unlawful charges hereinbefore alleged the sum of ——— or such other sum as, in view of the evidence to be adduced herein, the Commission shall determine that complainant- is/are entitled to as an award of damages under the provisions of said acts for violations thereof, and that such other and further order or orders be made as the Commission may consider proper in the premises.

Dated at ——— —, 19—.

———— ————,
[*Complainant's signature.*]
———— ————,
[*Office and P. O. address.*]
———— ————,
[*Attorney's signature.*]
———— ————,
[*Office and P. O. address.*]

II

RULES OF PRACTICE FOR THE COURTS OF EQUITY OF THE UNITED STATES.

Rule 1.

DISTRICT COURT ALWAYS OPEN FOR CERTAIN PURPOSES—ORDERS AT CHAMBERS.

The district courts, as courts of equity, shall be deemed always open for the purpose of filing any pleading, of issuing and returning mesne and final process, and of making and directing all interlocutory motions, orders, rules and other proceedings preparatory to the hearing, upon their merits, of all causes pending therein.

Any district judge may, upon reasonable notice to the parties, make, direct, and award, at chambers or in the clerk's office, and in vacation as well as in term, all such process, commissions, orders, rules and other proceedings, whenever the same are not grantable of course, according to the rules and practice of the court.

2.

CLERK'S OFFICE ALWAYS OPEN, EXCEPT, ETC.

The clerk's office shall be open during business hours on all days, except Sundays and legal holidays, and the clerk shall be in attendance for the purpose of receiving and disposing of all motions, rules, orders and other proceedings which are grantable of course.

3.

BOOKS KEPT BY CLERK AND ENTRIES THEREIN.

The clerk shall keep a book known as "Equity Docket," in which he shall enter each suit, with a file number corresponding to the folio in the book. All papers and orders filed with the clerk in the suit, all process issued and returns made thereon, and all appearances shall be noted briefly and chronologically in this book on the folio assigned to the suit and shall be marked with its file number.

The clerk shall also keep a book entitled "Order Book," in which shall be entered at length, in the order of their making, all orders made or passed by him as of course and also all orders made or passed by the judge in chambers.

He shall also keep an "Equity Journal," in which shall be entered all orders, decrees and proceedings of the court in equity causes in term time.

Separate and suitable indices of the Equity Docket, Order Book and Equity Journal shall be kept by the clerk under the direction of the court.

4.

NOTICE OF ORDERS.

Neither the noting of an order in the Equity Docket nor its entry in the Order Book shall of itself be deemed notice to the parties or their solicitors; and when an order is made without prior notice to, and in the absence of, a party, the clerk, unless otherwise directed by the court or judge, shall forthwith send a copy thereof, by mail, to such party or his solicitor and a note of such mailing shall be made in the Equity Docket, which shall be taken as sufficient proof of due notice of the order.

5.

MOTIONS GRANTABLE OF COURSE BY CLERK.

All motions and applications in the clerk's office for the issuing of mesne process or final process to enforce and execute decrees; for taking bills *pro confesso;* and for other proceedings in the clerk's office which do not require any allowance or order of the court or of a judge, shall be deemed motions and applications grantable of course by the clerk; but the same may be suspended, or altered, or rescinded by the judge upon special cause shown.

6.

MOTION DAY.

Each district court shall establish regular times and places, not less than once each month, when motions requiring notice and hearing may be made and disposed of; but the judge may at any time and place, and on such notice, if any, as he may consider reasonable, make and direct all interlocutory orders, rulings and proceedings for the advancement, conduct and hearing of cases. If the public interest permits, the senior circuit judge of the circuit may dispense with the motion day during not to exceed two months in the year in any district.

7.

PROCESS, MESNE AND FINAL.

The process of subpœna shall constitute the proper mesne process in all suits in equity, in the first instance, to require the defendant to appear and answer the bill; and, unless otherwise provided in these rules or spe-

cially ordered by the court, a writ of attachment and, if the defendant cannot be found, a writ of sequestration, or a writ of assistance to enforce a delivery of possession, as the case may require, shall be the proper process to issue for the purpose of compelling obedience to any interlocutory or final order or decree of the court.

8.

ENFORCEMENT OF FINAL DECREES.

Final process to execute any decree may, if the decree be solely for the payment of money, be by a writ of execution, in the form used in the district court in suits at common law in actions of *assumpsit*. If the decree be for the performance of any specific act, as, for example, for the execution of a conveyance of land or the delivering up of deeds or other documents, the decree shall, in all cases, prescribe the time within which the act shall be done, of which the defendant shall be bound, without further service, to take notice; and upon affidavit of the plaintiff, filed in the clerk's office, that the same has not been complied within the prescribed time, the clerk shall issue a writ of attachment against the delinquent party, from which, if attached thereon, he shall not be discharged, unless upon a full compliance with the decree and the payment of all costs, or upon a special order of the court, or a judge thereof, upon motion and affidavit, enlarging the time for the performance thereof. If the delinquent party cannot be found a writ of sequestration shall issue against his estate, upon the return of *non est inventus*, to compel obedience to the decree. If a mandatory order, injunction or decree for the specific performance of any act or contract be not complied with, the court or a judge, besides, or instead of, proceedings against the disobedient party for a contempt or by sequestration, may by order direct that the act required to be done be done, so far as practicable, by some other person appointed by the court or judge, at the cost of the disobedient party, and the act, when so done, shall have like effect as if done by him.

9.

WRIT OF ASSISTANCE.

When any decree or order is for the delivery of possession, upon proof made by affidavit of a demand and refusal to obey the decree or order, the party prosecuting the same shall be entitled to a writ of assistance from the clerk of the court.

10.

DECREE FOR DEFICIENCY IN FORECLOSURES, ETC.

In suits for the foreclosure of mortgages, or the enforcement of other liens, a decree may be rendered for any balance that may be found due to the plaintiff over and above the proceeds of the sale or sales, and execution

may issue for the collection of the same, as is provided in rule 8 when the decree is solely for the payment of money.

11.

PROCESS IN BEHALF OF AND AGAINST PERSONS NOT PARTIES.

Every person, not being a party in any cause, who has obtained an order, or in whose favor an order shall have been made, may enforce obedience to such order by the same process as if he were a party; and every person, not being a party, against whom obedience to any order of the court may be enforced, shall be liable to the same process for enforcing obedience to such orders as if he were a party.

12.

ISSUE OF SUBPŒNA—TIME FOR ANSWER.

Whenever a bill is filed, and not before, the clerk shall issue the process of subpœna thereon, as of course, upon the application of the plaintiff, which shall contain the names of the parties and be returnable into the clerk's office twenty days from the issuing thereof. At the bottom of the subpœna shall be placed a memorandum, that the defendant is required to file his answer or other defense in the clerk's office on or before the twentieth day after service, excluding the day thereof; otherwise the bill may be taken *pro confesso*. Where there are more than one defendant, a writ of subpœna may, at the election of the plaintiff, be sued out separately for each defendant, or a joint subpœna against all the defendants.

13.

MANNER OF SERVING SUBPŒNA.

The services of all subpœnas shall be by delivering a copy thereof to the defendant personally, or by leaving a copy thereof at the dwelling-house or usual place of abode of each defendant, with some adult person who is a member of or resident in the family.

14.

ALIAS SUBPŒNA.

Whenever any subpœna shall be returned not executed as to any defendant, the plaintiff shall be entitled to other subpœnas against such defendant, until due service is made.

15.

PROCESS, BY WHOM SERVED.

The service of all process, mesne and final, shall be by the marshal of the district, or his deputy, or by some other person specially appointed by

the court or judge for that purpose, and not otherwise. In the latter case, the person serving the process shall make affidavit thereof.

16.

DEFENDANT TO ANSWER—DEFAULT—DECREE PRO CONFESSO.

It shall be the duty of the defendant, unless the time shall be enlarged, for cause shown, by a judge of the court, to file his answer or other defense to the bill in the clerk's office within the time named in the subpœna as required by rule 12. In default thereof the plaintiff may, at his election, take an order as of course that the bill be taken *pro confesso;* and thereupon the cause shall be proceeded in *ex parte.*

17.

DECREE PRO CONFESSO TO BE FOLLOWED BY FINAL DECREE—SETTING ASIDE DEFAULT.

When the bill is taken *pro confesso* the court may proceed to a final decree at any time after the expiration of thirty days after the entry of the order *pro confesso,* and such decree shall be deemed absolute, unless the court shall, at the same term, set aside the same, or enlarge the time for filing the answer, upon cause shown upon motion and affidavit. No such motion shall be granted, unless upon the payment of the costs of the plaintiff up to that time, or such part thereof as the court shall deem reasonable, and unless the defendant shall undertake to file his answer within such time as the court shall direct, and submit to such other terms as the court shall direct, for the purpose of speeding the cause.

18.

PLEADINGS—TECHNICAL FORMS ABROGATED.

Unless otherwise prescribed by statute or these rules the technical forms of pleadings in equity are abolished.

19.

AMENDMENTS GENERALLY.

The court may at any time, in furtherance of justice, upon such terms as may be just, permit any process, proceeding, pleading or record to be amended, or material supplemental matter to be set forth in an amended or supplemental pleading. The court, at every stage of the proceeding, must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties.

20.

FURTHER AND PARTICULAR STATEMENT IN PLEADING MAY BE REQUIRED.

A further and better statement of the nature of the claim or defense, or further and better particulars of any matter stated in any pleading, may in any case be ordered, upon such terms, as to costs and otherwise, as may be just.

21.

SCANDAL AND IMPERTINENCE.

The right to except to bills, answers, and other proceedings for scandal or impertinence shall not obtain, but the court may, upon motion or its own initiative, order any redundant, impertinent or scandalous matter stricken out, upon such terms as the court shall think fit.

22.

ACTION AT LAW ERRONEOUSLY BEGUN AS SUIT IN EQUITY—TRANSFER.

If at any time it appear that a suit commenced in equity should have been brought as an action on the law side of the court, it shall be forthwith transferred to the law side and be there proceeded with, with only such alteration in the pleadings as shall be essential.

23.

MATTERS ORDINARLY DETERMINABLE AT LAW, WHEN ARISING IN SUIT IN EQUITY TO BE DISPOSED OF THEREIN.

If in a suit in equity a matter ordinarily determinable at law arises, such matter shall be determined in that suit according to the principles applicable, without sending the case or question to the law side of the court.

24.

SIGNATURE OF COUNSEL.

Every bill or other pleading shall be signed individually by one or more solicitors of record, and such signatures shall be considered as a certificate by each solicitor that he has read the pleading so signed by him; that upon the instructions laid before him regarding the case there is good ground for the same; that no scandalous matter is inserted in the pleading; and that it is not interposed for delay.

25.

BILL OF COMPLAINT—CONTENTS.

Hereafter it shall be sufficient that a bill in equity shall contain, in addition to the usual caption:

First, the full name, when known, of each plaintiff and defendant, and the citizenship and residence of each party. If any party be under any disability that fact shall be stated.

Second, a short and plain statement of the grounds upon which the court's jurisdiction depends.

Third, a short and simple statement of the ultimate facts upon which the plaintiff asks relief, omitting any mere statement of evidence.

Fourth, if there are persons other than those named as defendants who appear to be proper parties, the bill should state why they are not made parties—as that they are not within the jurisdiction of the court, or cannot be made parties without ousting the jurisdiction.

Fifth, a statement of and prayer for any special relief pending the suit or on final hearing, which may be stated and sought in alternative forms. If special relief pending the suit be desired the bill should be verified by the oath of the plaintiff, or someone having knowledge of the facts upon which such relief is asked.

26.

JOINDER OF CAUSES OF ACTION.

The plaintiff may join in one bill as many causes of action, cognizable in equity, as he may have against the defendant. But when there are more than one plaintiff, the causes of action joined must be joint, and if there be more than one defendant the liability must be one asserted against all of the material defendants, or sufficient grounds must appear for uniting the causes of action in order to promote the convenient administration of justice. If it appear that any such causes of action cannot be conveniently disposed of together, the court may order separate trials.

27.

STOCKHOLDER'S BILL.

Every bill brought by one or more stockholders in a corporation against the corporation and other parties, founded on rights which may properly be asserted by the corporation, must be verified by oath, and must contain an allegation that the plaintiff was a shareholder at the time of the transaction of which he complains, or that his share had devolved on him since by operation of law, and that the suit is not a collusive one to confer on a court of the United States jurisdiction of a case of which it would not

otherwise have cognizance. It must also set forth with particularity the efforts of the plaintiff to secure such action as he desires on the part of the managing directors or trustees, and, if necessary, of the shareholders, and the causes of his failure to obtain such action, or the reasons for not making such effort.

28.

AMENDMENT OF BILL AS OF COURSE.

The plaintiff may, as of course, amend his bill before the defendant has responded thereto, but if such amendment be filed after any copy has issued from the clerk's office, the plaintiff at his own cost shall furnish to the solicitor of record of each opposing party a copy of the bill as amended, unless otherwise ordered by the court or judge.

After pleading filed by any defendant, plaintiff may amend only by consent of the defendant or leave of the court or judge.

29.

DEFENSES—HOW PRESENTED.

Demurrers and pleas are abolished. Every defense in point of law arising upon the face of the bill, whether for misjoinder, nonjoinder, or insufficiency of fact to constitute a valid cause of action in equity, which might heretofore have been made by demurrer or plea, shall be made by motion to dismiss or in the answer; and every such point of law going to the whole or a material part of the cause or causes of action stated in the bill may be called up and disposed of before final hearing at the discretion of the court. Every defense heretofore presentable by plea in bar or abatement shall be made in the answer and may be separately heard and disposed of before the trial of the principal case in the discretion of the court. If the defendant move to dismiss the bill or any part thereof, the motion may be set down for hearing by either party upon five days' notice, and, if it be denied, answer shall be filed within five days thereafter or a decree *pro confesso* entered.

30.

ANSWER—CONTENTS—COUNTER-CLAIM.

The defendant in his answer shall in short and simple terms set out his defense to each claim asserted by the bill, omitting any mere statement of evidence and avoiding any general denial of the averments of the bill, but specifically admitting or denying or explaining the facts upon which the plaintiff relies, unless the defendant is without knowledge, in which case he shall so state, such statement operating as a denial. Averments

other than of value or amount of damage, if not denied, shall be deemed confessed, except as against an infant, lunatic or other person *non compos* and not under guardianship, but the answer may be amended, by leave of the court or judge, upon reasonable notice, so as to put any averment in issue, when justice requires it. The answer may state as many defenses, in the alternative, regardless of consistency, as the defendant deems essential to his defense.

The answer must state in short and simple form any counter-claim arising out of the transaction which is the subject matter of the suit, and may, without cross-bill, set out any set-off or counter-claim against the plaintiff which might be the subject of an independent suit in equity against him, and such set-off or counter-claim, so set up, shall have the same effect as a cross-suit, so as to enable the court to pronounce a final judgment in the same suit both on the original and crossclaims.

31.

REPLY—WHEN REQUIRED—WHEN CAUSE AT ISSUE.

Unless the answer assert a set-off or counter-claim, no reply shall be required without special order of the court or judge, but the cause shall be deemed at issue upon the filing of the answer, and any new or affirmative matter therein shall be deemed to be denied by the plaintiff. If the answer include a set-off or counter-claim, the party against whom it is asserted shall reply within ten days after the filing of the answer, unless a longer time be allowed by the court or judge. If the counter-claim is one which affects the rights of other defendants they or their solicitors shall be served with a copy of the same within ten days from the filing thereof, and ten days shall be accorded to such defendants for filing a reply. In default of a reply, a decree *pro confesso* on the counter-claim may be entered as in default of an answer to the bill.

32.

ANSWER TO AMENDED BILL.

In every case where an amendment to the bill shall be made after answer filed, the defendant shall put in a new or supplemental answer within ten days after that on which the amendment or amended bill is filed, unless the time is enlarged or it is otherwise ordered by a judge of the court; and upon his default, the like proceedings may be had as upon an omission to put in an answer.

33.

TESTING SUFFICIENCY OF DEFENSE.

Exceptions for insufficiency of an answer are abolished. But if an answer set up an affirmative defense, set-off or counter-claim, the plaintiff may,

upon five days' notice, or such further time as the court may allow, test the sufficiency of the same by motion to strike out. If found insufficient but amenable the court may allow an amendment upon terms, or strike out the matter.

34.

SUPPLEMENTAL PLEADING.

Upon application of either party the court or judge, may, upon reasonable notice and such terms as are just, permit him to file and serve a supplemental pleading, alleging material facts occurring after his former pleading, or of which he was ignorant when it was made, including the judgment or decree of a competent court rendered after the commencement of the suit determining the matters in controversy or a part thereof.

35.

BILLS OF REVIVOR AND SUPPLEMENTAL BILLS—FORM.

It shall not be necessary in any bill of revivor or supplemental bill to set forth any of the statements in the original suit, unless the special circumstances of the case may require it.

36.

OFFICERS BEFORE WHOM PLEADINGS VERIFIED.

Every pleading which is required to be sworn to by statute, or these rules, may be verified before any justice or judge of any court of the United States, or of any State or Territory, or of the District of Columbia, or any clerk of any court of the United States, or of any Territory, or of the District of Columbia, or any notary public.

37.

PARTIES GENERALLY—INTERVENTION.

Every action shall be prosecuted in the name of the real party in interest, but an executor, administrator, guardian, trustee of an express trust, a party with whom or in whose name a contract has been made for the benefit of another, or a party expressly authorized by statute, may sue in his own name without joining with him the party for whose benefit the action is brought. All persons having an interest in the subject of the action and in obtaining the relief demanded may join as plaintiffs, and any person may be made a defendant who has or claims an interest adverse to the plaintiff. Any person may at any time be made a party if his pres-

ence is necessary or proper to a complete determination of the cause. Persons having a united interest must be joined on the same side as plaintiffs or defendants, but when any one refuses to join, he may for such reason be made a defendant.

Anyone claiming an interest in the litigation may at any time be permitted to assert his right by intervention, but the intervention shall be in subordination to, and in recognition of, the propriety of the main proceeding.

38.

REPRESENTATIVES OF CLASS.

When the question is one of common or general interest to many persons constituting a class so numerous as to make it impracticable to bring them all before the court, one or more may sue or defend for the whole.

39.

ABSENCE OF PERSONS WHO WOULD BE PROPER PARTIES.

In all cases where it shall appear to the court that persons, who might otherwise be deemed proper parties to the suit, cannot be made parties by reason of their being out of the jurisdiction of the court, or incapable otherwise of being made parties, or because their joinder would oust the jurisdiction of the court as to the parties before the court, the court may, in its discretion, proceed in the cause without making such persons parties; and in such cases the decree shall be without prejudice to the rights of the absent parties.

40.

NOMINAL PARTIES.

Where no account, payment, conveyance, or other direct relief is sought against a party to a suit, not being an infant, the party, upon service of the subpœna upon him, need not appear and answer the bill, unless the plaintiff specially requires him to do so by the prayer; but he may appear and answer at his option; and if he does not appear and answer he shall be bound by all the proceedings in the cause. If the plaintiff shall require him to appear and answer he shall be entitled to the costs of all the proceedings against him, unless the court shall otherwise direct.

41.

SUIT TO EXECUTE TRUSTS OF WILL—HEIR AS PARTY.

In suits to execute the trusts of a will, it shall not be necessary to make the heir at law a party; but the plaintiff shall be at liberty to make

the heir at law a party where he desires to have the will established against him.

42.

JOINT AND SEVERAL DEMANDS.

In all cases in which the plaintiff has a joint and several demand against several persons, either as principals or sureties, it shall not be necessary to bring before the court as parties to a suit concerning such demand all the persons liable thereto; but the plaintiff may proceed against one or more of the persons severally liable.

43.

DEFECT OF PARTIES—RESISTING OBJECTION.

Where the defendant shall by his answer suggest that the bill of complaint is defective for want of parties, the plaintiff may, within fourteen days after answer filed, set down the cause for argument as a motion upon that objection only; and where the plaintiff shall not so set down his cause, but shall proceed therewith to a hearing, notwithstanding an objection for want of parties taken by the answer, he shall not at the hearing of the cause, if the defendant's objection shall then be allowed, be entitled as of course to an order to amend his bill by adding parties; but the court shall be at liberty to dismiss the bill, or to allow an amendment on such terms as justice may require.

44.

DEFECT OF PARTIES—TARDY OBJECTION.

If the defendant shall, at the hearing of a cause, object that a suit is defective for want of parties, not having by motion or answer taken the objection and therein specified by name or description the parties to whom the objection applies, the court shall be at liberty to make a decree saving the rights of the absent parties.

45.

DEATH OF PARTY—REVIVOR.

In the event of the death of either party the court may, in a proper case, upon motion, order the suit to be revived by the substitution of the proper parties. If the successors or representatives of the deceased party fail to make such application within a reasonable time, then any other party may, on motion, apply for such relief, and the court, upon any such motion may make the necessary orders for notice to the parties to be substituted and for the filing of such pleadings or amendments as may be necessary.

46.

TRIAL—TESTIMONY USUALLY TAKEN IN OPEN COURT—RULINGS ON OBJECTIONS TO EVIDENCE.

In all trials in equity the testimony of witnesses shall be taken orally in open court, except as otherwise provided by statute or these rules. The court shall pass upon the admissibility of all evidence offered as in actions at law. When evidence is offered and excluded, and the party against whom the ruling is made excepts thereto at the time, the court shall take and report so much thereof, or make such a statement respecting it, as will clearly show the character of the evidence, the form in which it was offered, the objection made, the ruling, and the exception. If the appellate court shall be of opinion that the evidence should have been admitted, it shall not reverse the decree unless it be clearly of opinion that material prejudice will result from an affirmance, in which event it shall direct such further steps as justice may require.

47.

DEPOSITIONS—TO BE TAKEN IN EXCEPTIONAL INSTANCES.

The court, upon application of either party, when allowed by statute, or for good and exceptional cause for departing from the general rule, to be shown by affidavit, may permit the deposition of named witnesses, to be used before the court or upon a reference to a master, to be taken before an examiner or other named officer, upon the notice and terms specified in the order. All depositions taken under a statute, or under any such order of the court, shall be taken and filed as follows, unless otherwise ordered by the court or judge for good cause shown: Those of the plaintiff within sixty days from the time the cause is at issue; those of the defendant within thirty days from the expiration of the time for the filing of plaintiff's depositions; and rebutting depositions by either party within twenty days after the time for taking original depositions expires.

48.

TESTIMONY OF EXPERT WITNESSES IN PATENT AND TRADE-MARK CASES.

In a case involving the validity or scope of a patent or trade-mark, the district court may, upon petition, order that the testimony in chief of expert witnesses, whose testimony is directed to matters of opinion, be set forth in affidavits and filed as follows: Those of the plaintiff within forty days after the cause is at issue; those of the defendant within twenty days after plaintiff's time has expired; and rebutting affidavits within fifteen days after the expiration of the time for filing original affidavits. Should

the opposite party desire the production of any affiant for cross-examination, the court or judge shall, on motion, direct that said cross-examination and any re-examination take place before the court upon the trial, and unless the affiant is produced and submits to cross-examination in compliance with such direction, his affidavit shall not be used as evidence in the cause.

49.

EVIDENCE TAKEN BEFORE EXAMINERS, ETC.

All evidence offered before an examiner or like officer, together with any objections, shall be saved and returned into the court. Depositions, whether upon oral examination before an examiner or like officer or otherwise, shall be taken upon questions and answers reduced to writing, or in the form of narrative, and the witness shall be subject to cross and re-examination.

50.

STENOGRAPHER—APPOINTMENT—FEES.

When deemed necessary by the court or officer taking testimony, a stenographer may be appointed who shall take down testimony in shorthand and, if required, transcribe the same. His fee shall be fixed by the court and taxed ultimately as costs. The expense of taking a deposition, or the cost of a transcript, shall be advanced by the party calling the witness or ordering a transcript.

51.

EVIDENCE TAKEN BEFORE EXAMINERS, ETC.

Objections to the evidence, before an examiner or like officer, shall be in short form, stating the grounds of objection relied upon, but no transcript filed by such officer shall include argument or debate. The testimony of each witness, after being reduced to writing, shall be read over to or by him, and shall be signed by him in the presence of the officer; provided, that if the witness shall refuse to sign his deposition so taken, the officer shall sign the same, stating upon the record the reasons, if any, assigned by the witness for such refusal. Objection to any question or questions shall be noted by the officer upon the deposition, but he shall not have power to decide on the competency or materiality or relevancy of the questions. The court shall have power, and it shall be its duty, to deal with the costs of incompetent and immaterial or irrelevant depositions, or parts of them, as may be just.

52.

ATTENDANCE OF WITNESSES BEFORE COMMISSIONER, MASTER OR EXAMINER.

Witnesses who live within the district, and whose testimony may be taken out of court by these rules, may be summoned to appear before a commissioner appointed to take testimony, or before a master or examiner appointed in any cause, by subpœna in the usual form, which may be issued by the clerk in blank and filled up by the party praying the same, or by the commissioner, master, or examiner, requiring the attendance of the witnesses at the time and place specified, who shall be allowed for attendance the same compensation as for attendance in court; and if any witness shall refuse to appear or give evidence it shall be deemed a contempt of the court, which being certified to the clerk's office by the commissioner, master, or examiner, an attachment may issue thereupon by order of the court or of any judge thereof, in the same manner as if the contempt were for not attending, or for refusing to give testimony in, the court.

In case of refusal of witnesses to attend or be sworn or to answer any question put by the commissioner, master or examiner or by counsel or solicitor, the same practice shall be adopted as is now practiced with respect to witnesses to be produced on examination before an examiner of said court on written interrogatories.

53.

NOTICE OF TAKING TESTIMONY BEFORE EXAMINER, ETC.

Notice shall be given by the respective counsel or parties to the opposite counsel or parties of the time and place of examination before an examiner or like officer for such reasonable time as the court or officer may fix by order in each case.

54.

DEPOSITIONS UNDER REV. STAT. §§ 863, 865, 866, 867— CROSS-EXAMINATION.

After a cause is at issue, depositions may be taken as provided by sections 863, 865, 866 and 867, Revised Statutes. But if in any case no notice has been given the opposite party of the time and place of taking the deposition, he shall, upon application and notice, be entitled to have the witness examined orally before the court, or to a cross-examination before an examiner or like officer, or a new deposition taken with notice, as the court or judge under all the circumstances shall order.

55.

DEPOSITION DEEMED PUBLISHED WHEN FILED.

Upon the filing of any deposition or affidavit taken under these rules or any statute, it shall be deemed published, unless otherwise ordered by the court.

56.

ON EXPIRATION OF TIME FOR DEPOSITIONS, CASE GOES ON TRIAL CALENDAR.

After the time has elapsed for taking and filing depositions under these rules, the case shall be placed on the trial calendar. Thereafter no further testimony by deposition shall be taken except for some strong reason shown by affidavit. In every such application the reason why the testimony of the witness cannot be had orally on the trial, and why his deposition has not been before taken, shall be set forth, together with the testimony which it is expected the witness will give.

57.

CONTINUANCES.

After a cause shall be placed on the trial calendar it may be passed over to another day of the same term, by consent of counsel or order of the court, but shall not be continued beyond the term save in exceptional cases by order of the court upon good cause shown by affidavit and upon such terms as the court shall in its discretion impose. Continuances beyond the term by consent of the parties shall be allowed on condition only that a stipulation be signed by counsel for all the parties and that all costs incurred theretofore be paid. Thereupon an order shall be entered dropping the case from the trial calendar, subject to reinstatement within one year upon application to the court by either party, in which event it shall be heard at the earliest convenient day. If not so reinstated within the year, the suit shall be dismissed without prejudice to a new one.

58.

DISCOVERY — INTERROGATORIES — INSPECTION AND PRODUCTION OF DOCUMENTS—ADMISSION OF EXECUTION OR GENUINENESS.

The plaintiff at any time after filing the bill and not later than twenty-one days after the joinder of issue, and the defendant at any time after filing his answer and not later than twenty-one days after the joinder of issue, and either party at any time thereafter by leave of the court or

judge, may file interrogatories in writing for the discovery by the opposite party or parties of facts and documents material to the support or defense of the cause, with a note at the foot thereof stating which of the interrogatories each of the parties required to answer. But no party shall file more than one set of interrogatories to the same party without leave of the court or judge.

If any party to the cause is a public or private corporation, any opposite party may apply to the court or judge for an order allowing him to file interrogatories to be answered by any officer of the corporation, and an order may be made accordingly for the examination of such officer as may appear to be proper upon such interrogatories as the court or judge shall think fit.

Copies shall be filed for the use of the interrogated party and shall be sent by the clerk to the respective solicitors of record, or to the last known address of the opposite party if there be no record solicitor.

Interrogatories shall be answered, and the answers filed in the clerk's office, within fifteen days after they have been served, unless the time be enlarged by the court or judge. Each interrogatory shall be answered separately and fully and the answers shall be in writing, under oath, and signed by the party or corporate officer interrogated. Within ten days after the service of interrogatories, objections to them, or any of them, may be presented to the court or judge, with proof of notice of the purpose so to do, and answers shall be deferred until the objections are determined, which shall be at as early a time as is practicable. In so far as the objections are sustained, answers shall not be required.

The court or judge, upon motion and reasonable notice, may make all such orders as may be appropriate to enforce answers to interrogatories or to effect the inspection or production of documents in the possession of either party and containing evidence material to the cause of action or defense of his adversary. Any party failing or refusing to comply with such an order shall be liable to attachment, and shall also be liable, if a plaintiff, to have his bill dismissed, and, if a defendant, to have his answer stricken out and be placed in the same situation as if he had failed to answer.

By a demand served ten days before the trial, either party may call on the other to admit in writing the execution or genuineness of any document, letter or other writing, saving all just exceptions; and if such admission be not made within five days after such service, the costs of proving the document, letter or writing shall be paid by the party refusing or neglecting to make such admission, unless at the trial the court shall find that the refusal or neglect was reasonable.

59.

REFERENCE TO MASTER—EXCEPTIONAL, NOT USUAL.

Save in matters of account, a reference to a master shall be the exception, not the rule, and shall be made only upon a showing that some ex-

ceptional condition requires it. When such a reference is made, the party at whose instance or for whose benefit it is made shall cause the order of reference to be presented to the master for a hearing within twenty days succeeding the time when the reference was made, unless a longer time be specially granted by the court or judge; if he shall omit to do so, the adverse party shall be at liberty forthwith to cause proceedings to be had before the master, at the costs of the party procuring the reference.

60.

PROCEEDINGS BEFORE MASTER.

Upon every such reference, it shall be the duty of the master, as soon as he reasonably can after the same is brought before him, to assign a time and place for proceedings in the same, and to give due notice thereof to each of the parties, or their solicitors; and if either party shall fail to appear at the time and place appointed, the master shall be at liberty to proceed *ex parte*, or, in his discretion, to adjourn the examination and proceedings to a future day, giving notice to the absent party or his solicitor of such adjournment; and it shall be the duty of the master to proceed with all reasonable diligence in every such reference, and with the least practicable delay, and either party shall be at liberty to apply to the court, or a judge thereof, for an order to the master to speed the proceedings and to make his report, and certify to the court or judge the reason for any delay.

61.

MASTER'S REPORT—DOCUMENTS IDENTIFIED BUT NOT SET FORTH.

In the reports made by the master to the court, no part of any state of facts, account, charge, affidavit, deposition, examination, or answer brought in or used before him shall be stated or recited. But such state of facts, account, charge, affidavit, deposition, examination, or answer shall be identified, and referred to, so as to inform the court what state of facts, account, charge, affidavit, deposition, examination, or answer were so brought in or used.

62.

POWERS OF MASTER.

The master shall regulate all the proceedings in every hearing before him, upon every reference; and he shall have full authority to examine the parties in the cause, upon oath, touching all matters contained in the reference; and also to require the production of all books, papers, writings,

vouchers, and other documents applicable thereto; and also to examine on oath, *viva voce,* all witnesses produced by the parties before him, or by deposition, according to the acts of Congress, or otherwise, as here provided; and also to direct the mode in which the matters requiring evidence shall be proved before him; and generally to do all other acts, and direct all other inquiries and proceedings in the matters before him, which he may deem necessary and proper to the justice and merits thereof and the rights of the parties.

63.

FORM OF ACCOUNTS BEFORE MASTER.

All parties accounting before a master shall bring in their respective accounts in the form of debtor and creditor; and any of the other parties who shall not be satisfied with the account so brought in shall be at liberty to examine the accounting party *viva voce,* or upon interrogatories, as the master shall direct.

64.

FORMER DEPOSITIONS, ETC., MAY BE USED BEFORE MASTER.

All affidavits, depositions and documents which have been previously made, read, or used in the court upon any proceeding in any cause or matter may be used before the master.

65.

CLAIMANTS BEFORE MASTER EXAMINABLE BY HIM.

The master shall be at liberty to examine any creditor or other person coming in to claim before him, either upon written interrogatories or *viva voce,* or in both modes, as the nature of the case may appear to him to require. The evidence upon such examinations shall be taken down by the master, or by some other person by his order and in his presence, if either party requires it, in order that the same may be used by the court if necessary.

66.

RETURN OF MASTER'S REPORT—EXCEPTIONS—HEARING.

The master, as soon as his report is ready, shall return the same into the clerk's office and the day of the return shall be entered by the clerk in the Equity Docket. The parties shall have twenty days from the time of the filing of the report to file exceptions thereto, and if no exceptions are within that period filed by either party, the report shall stand confirmed, If exceptions are filed, they shall stand for hearing before the court, if then in session, or, if not, at the next sitting held thereafter, by adjournment or otherwise.

67.

COSTS ON EXCEPTIONS TO MASTER'S REPORT.

In order to prevent exceptions to reports from being filed for frivolous causes, or for mere delay, the party whose exceptions are overruled, shall, for every exception overruled, pay five dollars costs to the other party, and for every exception allowed shall be entitled to the same costs.

68.

APPOINTMENT AND COMPENSATION OF MASTERS.

The district courts may appoint standing masters in chancery in their respective districts (a majority of all the judges thereof concurring in the appointment), and they may also appoint a master *pro hac vice* in any particular case. The compensation to be allowed to every master shall be fixed by the district court, in its discretion, having regard to all the circumstances thereof, and the compensation shall be charged upon and borne by such of the parties in the cause as the court shall direct. The master shall not retain his report as security for his compensation; but when the compensation is allowed by the court, he shall be entitled to an attachment for the amount against the party who is ordered to pay the same, if, upon notice thereof, he does not pay it within the time prescribed by the court.

69.

PETITION FOR REHEARING.

Every petition for a rehearing shall contain the special matter or cause on which such rehearing is applied for, shall be signed by counsel, and the facts therein stated, if not apparent on the record, shall be verified by the oath of the party or by some other person. No rehearing shall be granted after the term at which the final decree of the court shall have been entered and recorded, if an appeal lies to the Circuit Court of Appeals or the Supreme Court. But if no appeal lies, the petition may be admitted at any time before the end of the next term of the court, in the discretion of the court.

70.

SUITS BY OR AGAINST INCOMPETENTS.

Guardians *ad litem* to defend a suit may be appointed by the court, or by any judge thereof, for infants or other persons who are under guardianship, or otherwise incapable of suing for themselves. All infants and other persons so incapable may sue by their guardians, if any, or by their

prochein ami; subject, however, to such orders as the court or judge may direct for the protection of infants and other persons.

71.

FORM OF DECREE.

In drawing up decrees and orders, neither the bill, nor answer, nor other pleadings, nor any part thereof, nor the report of any master, nor any other prior proceeding, shall be recited or stated in the decree or order; but the decree and order shall begin, in substance, as follows: "This cause came on to be heard (or to be further heard, as the case may be) at this term, and was argued by counsel; and thereupon, upon considerations thereof, it was ordered, adjudged and decreed as follows, viz:" (Here insert the decree or order.)

72.

CORRECTION OF CLERICAL MISTAKES IN ORDERS AND DECREES.

Clerical mistakes in decrees or decretal orders, or errors arising from any accidental slip or omission, may, at any time before the close of the term at which final decree is rendered, be corrected by order of the court or a judge thereof, upon petition, without the form or expense of a rehearing.

73.

PRELIMINARY INJUNCTIONS AND TEMPORARY RESTRAINING ORDERS.

No preliminary injunction shall be granted without notice to the opposite party. Nor shall any temporary restraining order be granted without notice to the opposite party, unless it shall clearly appear from specific facts, shown by affidavit or by the verified bill, that immediate and irreparable loss or damage will result to the applicant before the matter can be heard on notice. In case a temporary restraining order shall be granted without notice, in the contingency specified, the matter shall be made returnable at the earliest possible time, and in no event later than ten days from the date of the order, and shall take precedence of all matters, except older matters of the same character. When the matter comes up for hearing the party who obtained the temporary restraining order shall proceed with his application for a preliminary injunction, and if he does not do so the court shall dissolve his temporary restraining order. Upon two days notice to the party obtaining such temporary restraining order, the opposite party may appear and move the dissolution or modification of the order, and in that event the court or judge shall proceed to

hear and determine the motion as expeditiously as the ends of justice may require. Every temporary restraining order shall be forthwith filed in the clerk's office.

74.

INJUNCTION PENDING APPEAL.

When an appeal from a final decree, in an equity suit, granting or dissolving an injunction, is allowed by a justice or a judge who took part in the decision of the cause, he may, in his discretion, at the time of such allowance, make an order suspending, modifying or restoring the injunction during the pendency of the appeal, upon such terms, as to bond or otherwise, as he may consider proper for the security of the rights of the opposite party.

75.

RECORD ON APPEAL—REDUCTION AND PREPARATION.

In case of appeal:

(*a*) It shall be the duty of the appellant or his solicitor to file with the clerk of the court from which the appeal is prosecuted, together with proof of acknowledgment of service of a copy on the appellee or his solicitor, a *præcipe* which shall indicate the portions of the record to be incorporated into the transcript on such appeal. Should the appellee or his solicitor desire additional portions of the record incorporated into the transcript, he shall file with the clerk of the court his *præcipe* also within ten days thereafter, unless the time shall be enlarged by the court or a judge thereof, indicating such additional portions of the record desired by him.

(*b*) The evidence to be included in the record shall not be set forth in full, but shall be stated in simple and condensed form, all parts not essential to the decision of the questions presented by the appeal being omitted and the testimony of witnesses being stated only in narrative form, save that if either party desires it, and the court or judge so directs, any part of the testimony shall be reproduced in the exact words of the witness. The duty of so condensing and stating the evidence shall rest primarily on the appellant, who shall prepare his statement thereof and lodge the same in the clerk's office for the examination of the other parties at or before the time of filing his *præcipe* under paragraph *a* of this rule. He shall also notify the other parties or their solicitors of such lodgment and shall name a time and place when he will ask the court or judge to approve the statement, the time so named to be at least ten days after such notice. At the expiration of the time named or such further time as the court or judge may allow, the statement, together with any objections made or amend-

ments proposed by any party, shall be presented to the court or the judge, and if the statement be true, complete and properly prepared, it shall be approved by the court or judge, and if it be not true, complete or properly prepared, it shall be made so under the direction of the court or judge and shall then be approved. When approved, it shall be filed in the clerk's office and become a part of the record for the purposes of the appeal.

(c) If any difference arise between the parties concerning directions as to the general contents of the record to be prepared on the appeal, such difference shall be submitted to the court or judge in conformity with the provisions of paragraph *b* of this rule and shall be covered by the directions which the court or judge may give on the subject.

76.

RECORD ON APPEAL—REDUCTION AND PREPARATION—COSTS—CORRECTION OF OMISSIONS.

In preparing the transcript on an appeal, especial care shall be taken to avoid the inclusion of more than one copy of the same paper and to exclude the formal and immaterial parts of all exhibits, documents and other papers included therein; and for any infraction of this or any kindred rule the appellate court may withhold or impose costs as the circumstances of the case and the discouragement of like infractions in the future may require. Costs for such an infraction may be imposed upon offending solicitors as well as parties.

If, in the transcript, anything material to either party be omitted by accident or error, the appellate court, on a proper suggestion or its own motion, may direct that the omission be corrected by a supplemental transcript.

77.

RECORD ON APPEAL—AGREED STATEMENT.

When the questions presented by an appeal can be determined by the appellate court without an examination of all the pleadings and evidence, the parties, with the approval of the district court or the judge thereof, may prepare and and sign a statement of the case showing how the questions arose and were decided in the district court and setting forth so much only of the facts alleged and proved, or sought to be proved, as is essential to a decision of such questions by the appellate court. Such statement, when filed in the office of the clerk of the district court, shall be treated as superseding, for the purposes of the appeal, all parts of the record other than the decree from which the appeal is taken, and, together with such decree, shall be copied and certified to the appellate court as the record on appeal.

78.

AFFIRMATION IN LIEU OF OATH.

Whenever under these rules an oath is or may be required to be taken, the party may, if conscientiously scrupulous of taking an oath, in lieu thereof make solemn affirmation to the truth of the facts stated by him.

79.

ADDITIONAL RULES BY DISTRICT COURT.

With the concurrence of a majority of the circuit judges for the circuit, the district courts may make any other and further rules and regulations for the practice, proceedings and process, mesne and final, in their respective districts, not inconsistent with the rules hereby prescribed, and from time to time alter and amend the same.

80.

COMPUTATION OF TIME—SUNDAYS AND HOLIDAYS.

When the time prescribed by these rules for doing any act expires on a Sunday or legal holiday, such time shall extend to and include the next succeeding day that is not a Sunday or legal holiday.

81.

THESE RULES EFFECTIVE FEBRUARY 1, 1913—OLD RULES ABROGATED.

These rules shall be in force on and after February 1, 1913, and shall govern all proceedings in cases then pending or thereafter brought, save that where in any then pending cause an order has been made or act done which cannot be changed without doing substantial injustice, the court may give effect to such order or act to the extent necessary to avoid any such injustice.

All rules theretofore prescribed by the Supreme Court, regulating the practice in suits in equity, shall be abrogated when these rules take effect.

III

RULES OF PRACTICE FOR THE COURTS OF THE UNITED STATES IN ADMIRALTY AND MARITIME JURISDICTION.

PROMULGATED BY THE SUPREME COURT OF THE UNITED STATES, DECEMBER 6, 1920. TO TAKE EFFECT MARCH 7, 1921, 254 U. S. 671.

1. No *mesne* process shall issue from the district court in any civil cause of admiralty and maritime jurisdiction until the libel, or libel of information, shall have been filed in the clerk's office from which such process is to issue. All process shall be served by the marshal or by his deputy, or, where he or they are interested, by some discreet and disinterested person appointed by the court.

2. In suits *in personam* the *mesne* process shall be by a simple monition in the nature of a summons to appear and answer to the suit, or by a simple warrant of arrest of the person of the respondent in the nature of a capias, as the libellant may, in his libel or information pray for or elect; in either case with a clause therein to attach his goods and chattels, or credits and effects in the hands of the garnishees named in the libel to the amount sued for, if said respondent shall not be found within the District. But no warrant of arrest of the person of the respondent shall issue unless by special order of the court, on proof of the propriety thereof by affidavit or otherwise.

3. In all suits *in personam*, where a simple warrant of arrest issues and is executed, bail shall be taken by the marshal and the court in those cases only in which it is required by the laws of the State where an arrest is made on similar or analogous process issuing from the State court. And imprisonment for debt, on process issuing out of the admiralty court, is abolished, in all cases where, by the laws of the State in which the court is held, imprisonment for debt has been, or shall be hereafter, abolished, on similar or analogous process issuing from a State court.

4. The marshal shall take from the party arrested, as bail, either sufficient cash or a bond or stipulation in a sufficient sum, with sufficient sureties or an approved corporate surety, to be held by him to secure the appearance of the party so arrested in the suit. And upon such bond or stipulation summary process of execution shall be issued against the principal and sureties or corporate surety by the court to which the process is returnable.

5. In all suits *in personam*, where goods and chattels, or credits and effects, are attached under a process authorizing the same, the attach-

ment shall be dissolved by order of the court to which the process is returnable, on the giving of a bond or stipulation, with sufficient sureties, or an approved corporate surety, by the respondent whose property is so attached, or by someone on his behalf, conditioned to abide by all orders, interlocutory or final, of the court, and to pay the amount awarded by the final decree of the court to which the process is returnable, or in any appellate court, not exceeding, however, the value of the goods so attached with interest at six per centum per annum and costs; and upon such bond or stipulation, summary process of execution shall be issued against the principal and sureties or surety by the court to which the process is returnable, to enforce the final decree so rendered or on appeal by any appellate court.

6. All bonds or stipulations in admiralty suits may be given and taken in open court, or at chambers, or before the clerk or a deputy clerk or before any commissioner of the court who is authorized by the court to take affidavits of bail and depositions in cases pending before the court, or before any commissioner of the United States authorized by law to take bail and affidavits in civil cases, or otherwise by written agreement of the parties or their proctors of record.

7. If costs shall be awarded by the Court to either or any party then the reasonable premiums or expense paid on all bonds or stipulations or other security given by that party in that suit shall be taxed as part of the costs of that party.

8. In all suits either *in rem* or *in personam*, where bail is given or a bond or stipulation is taken, the court may, on motion, for due cause shown, reduce the amount of such bail or may reduce the amount of security given by either bond or stipulation; and in all cases, either *in rem* or *in personam*, where a bond or stipulation is given, if either of the sureties or the corporate surety shall be or become insufficient or the security for costs shall for any reason be insufficient pending the suit, new or additional security may be required by order of the court on motion.

9. In all suits *in rem* against a ship, and/or her appurtenances if her appurtenances or any of them are in the possession or custody of any third person, the court shall, on due notice to such third person and after hearing, decree that the same be delivered into the custody of the marshal or other proper officer, if on hearing it appears that the same is required by law and justice.

10. In all cases of seizure, and in other suits and proceedings *in rem*, the process, if issued and unless otherwise provided for by statute, shall be by a warrant of arrest of the ship, goods, or other thing to be arrested; and the marshal shall thereupon arrest and take the ship, goods, or other thing into his possession for safe custody, and shall cause public notice thereof and of the time assigned for the return of such process and the hearing of the cause, to be given in such newspaper within the district as the district court shall order; and if there is no newspaper

published therein, then in such other public places in the district as the court shall direct.

11. In all cases where any goods or other things are arrested, if the expense of keeping the same is excessive or disproportionate, or if the same are perishable, or are liable to deterioration, decay, or injury, by being detained in custody pending the suit, the court may, on the application of either party, order the same or any portion thereof to be sold; and the proceeds, or so much thereof as shall be full security to satisfy any decree, to be brought into court to abide the event of the suit; or the court may, on the application of the claimant, order a delivery thereof to him, either on the filing of a written agreement of the parties or their proctors of record to that effect, or on a due appraisement, to be had under its direction, unless the value has been agreed to in writing by the parties or their proctors of record, on the claimant's depositing in court so much money as the court shall order, or on his giving a stipulation, with sufficient sureties or an approved corporate surety, in such sum as the court shall direct or as shall be agreed upon in writing by the parties or their proctors of record, conditioned to abide by and pay the money awarded by the final decree rendered by the court, or any appellate court, if any appeal intervenes, not to exceed however in any event such agreed or appraised value with interest at six per cent. per annum and costs, as the one or the other course shall be ordered by the court.

12. Where any ship shall be arrested, the same shall, on the application of the claimant, be delivered to him either on a due appraisement, to be had under the direction of the court, or on his filing an agreement in writing to that effect signed by the parties or their proctors of record, and on the claimant's depositing in court so much money as the court shall order, or on his giving a stipulation for like amount, with sufficient sureties, or an approved corporate surety, conditioned as provided in the foregoing rule; and if the claimant shall unreasonably neglect to make any such application, then the court may, on the application of either party, on due cause shown, order a sale of such ship, and require the proceeds thereof to be brought into court or otherwise disposed of.

13. In all suits for mariners' wages or by material-men for supplies or repairs or other necessaries, the libellant may proceed *in rem* against the ship and freight and/or *in personam* against any party liable.

14. In all suits for pilotage or damage by collision, the libellant may proceed *in rem* against the ship and/or *in personam* against the master and/or the owner.

15. In all suits for an assault or beating on the high seas, or else where within the admiralty and maritime jurisdiction, the suit shall be *in personam* only.

16. In all suits founded upon a mere maritime hypothecation of ship or freight, either express or implied, by the master for moneys taken up in a foreign port for supplies or repairs or other necessaries for

the voyage, without any claim of maritime interest, the libellant may proceed *in rem* and/or *in personam* against the master and/or the owners.

17. In all suits on bottomry bonds, properly so called, the suit shall be *in rem* only against the property hypothecated, or the proceeds of the property, in whosesoever hands the same may be found, unless the master has, without authority, given the bottomry bond, or by his fraud or misconduct has avoided the same, or has subtracted the property, or unless the owner has, by its own misconduct or wrong, lost or subtracted the property, in which latter cases the suit may be *in personam* against the wrong-doer.

18. In all suits for salvage, the suit may be *in rem* against the property saved, or the proceeds thereof, and/or *in personam* against any party liable for the salvage service.

19. In all petitory and possessory suits between part owners or adverse proprietors, or by the owners of a ship or the majority thereof, against the master of a ship, for the ascertainment of the title and delivery of the possession, or for the possession only, or by one or more part owners against the others to obtain security for the return of the ship from any voyage undertaken without their consent, or by one or more part owners against the others to obtain possession of the ship for any voyage, on giving security for the safe return thereof, the process shall be by an arrest of the ship, and by a monition to the adverse party or parties to appear and make answer to the suit.

20. In all cases of a final decree for the payment of money, the libellant shall have a writ of execution, in the nature of a *fieri facias*, commanding the marshal or his deputy to levy and collect the amount thereof out of the goods and chattels, lands and tenements, or other real estate of the respondent, claimant, or stipulators. And any other remedies shall be available that may exist under the State or Federal law for the enforcement of judgments or decrees.

21. All informations and libels of information upon seizures for any breach of the revenue, or navigation or other laws of the United States, shall state the place of seizure, whether it be on land or on the high seas, or on navigable waters within the admiralty and maritime jurisdiction of the United States, and the district within which the property is brought and where it then is. The information or libel of information shall also propound in distinct articles the matters relied on as grounds or causes of forfeiture, and aver the same to be contrary to the form of the statute or statutes of the United States in such case provided, as the case may require, and shall conclude with a prayer of due process to enforce the forfeiture, and to give notice to all persons concerned in interest to appear and show cause at the return-day of the process why the forfeiture should not be decreed.

22. All libels in instance causes, civil or maritime, shall be on oath or solemn affirmation and shall state the nature of the cause, as, for example, that it is a cause, civil and maritime, of contract, or a tort or damage, or of salvage, or of possession, or otherwise, as the same may be; and, if the

libel be *in rem*, that the property is within the district; and, if *in personam*, the names and places of residence of the parties so far as known. The libel shall also propound and allege in distinct articles the various allegations of act upon which the libellant relies in support of his suit, so that the respondent or claimant may be enabled to answer distinctly and separately the several matters contained in each article; and it shall conclude with a prayer for due process to enforce his rights *in rem*, or *in personam*, as the case may be, and for such relief and redress as the court is competent to give in the premises.

23. In all informations and libels in causes of admiralty and maritime jurisdiction, amendments in matters of form may be made at any time, on motion to the court, as of course. And new counts may be filed, and amendments in matters of substance may be made, on motion, at any time before the final decree, on such terms as the court shall impose. And where any defect of form is set down by the respondent or claimant upon special exceptions, and is allowed, the court may, in granting leave to amend, impose terms on the libellant.

24. In all cases the court may, on the filing of a libel or on the appearance of any respondent, or claimant, or at any other time, require the libellant, respondent or claimant, or either of them to give a stipulation or an additional stipulation with sufficient sureties, or an approved corporate surety, in such sum as the court shall direct, to pay all costs and expenses which shall be awarded against him, it, or them, by the final decree of the court, or by any interlocutory order in the progress of the suit, or an appeal by any appellate court.

25. In suits *in rem* the party claiming the property shall verify his claim on oath or solemn affirmation, stating that the claimant by whom or on whose behalf the claim is made is the true and bona fide owner. And where the claim is put in by an agent or consignee, he shall also make oath that he is duly authorized thereto by the owner; or, if the property be, at the time of the arrest, in the possession of the master of a ship, that he is the lawful bailee thereof for the owner. And, on putting in such claim, the claimant shall file a bond or stipulation for costs as above provided.

26. In all libels in causes of civil and maritime jurisdiction, whether *in rem* or *in personam*, the answers of or on behalf of the respondent or claimant to the libels and interrogatories shall be on oath or solemn affirmation; and all answers shall be full and explicit and distinct to each separate article and separate allegation in the libel, in the same order as numbered in the libel, and shall also answer in like manner or except to each interrogatory propounded by the libellant. But this rule shall not apply to cases where the sum or value in dispute does not exceed fifty dollars, exclusive of costs, unless the District Court shall be of opinion that the proceedings prescribed herein are necessary for the purposes of justice in the case before the court.

27. Either party may except to the sufficiency, fullness, distinctness, relevancy or competency of any of the pleadings or interrogatories filed

by the other party; and if the court shall so adjudge on a hearing on the exceptions, and shall order further pleadings or answers to be filed by either party, such pleadings or answers shall be filed within such time and on such terms as the court may direct.

28. If the respondent or claimant shall omit or refuse to make due answer to the libel upon the return-day of the process, or other day assigned by the court, the court may pronounce him to be in contumacy and default and thereupon shall proceed to hear the cause *ex parte*, and adjudge therein as to law and justice shall appertain. But the court may set aside the default, and upon the application of the respondent or claimant admit him to make answer to the libel on such terms as the court may direct.

29. In all cases where the respondent or claimant answers, but does not answer fully and explicitly and distinctly to all the matters in any article of the libel, and exception is taken thereto by the libellant, and the exception is allowed, the court may, by attachment or otherwise, compel the respondent or claimant to make further answer thereto; or may make such other order in the cause as it shall deem most fit to promote justice.

30. Either party may object by proper pleadings to answering any allegation contained in any pleading or interrogatory filed by the other party, which will tend to expose him, it, or them, to any prosecution or punishment for crime, or for any penalty or any forfeiture of his, its or their property for any penal offense.

31. Either party shall have the right to require the personal answer of the other party or of its proper officer on oath or solemn affirmation to all interrogatories propounded by him, it, or them, in the libel, answer or otherwise as may be ordered by the court on cause shown and required to be answered. In default of due answer by either party to such interrogatories, the court may adjudge such party to be in default and enter such order in the cause as it shall deem most fit to promote justice.

32. After joinder of issue, and before trial, any party may apply to the court for an order directing any other party, his agent or representative, to make discovery, on oath, of any documents which are, or have been, in his possession or power, relating to any matter or question in issue. And the court may order the production, by any party, his agent or representative, on oath, of such of the documents in his possession or power relating to any matter in question in the cause as the court shall think right, and the court may deal with such documents, when produced, in such manner as shall appear just.

33. Where either the libellant or the respondent or claimant is out of the country, or unable, from sickness or other casualty, to make an answer to any interrogatory on oath or solemn affirmation at the proper time, the court may, in its discretion in furtherance of the due administration of justice, dispense therewith, or may award a commission to take the answer of the respondent or claimant when and as soon as it may be practicable or may receive a verification by agent or attorney with like force and effect as if made by the party.

34. If any third person shall intervene in any cause of admiralty and

maritime jurisdiction *in rem* for his own interest, and he is entitled, according to the course of admiralty proceedings, to be heard therein, he shall propound the matter in suitable allegations, to which, if admitted by the court, the other party or parties in the suit may be required, by order of the court, to make due answer; and such further proceedings shall be had and decree rendered by the court therein as to law and justice shall appertain. But every such intervenor shall be required, on filing his allegations, to give a stipulation with sufficient sureties or an approved corporate surety to abide by the final decree rendered in the cause, and to pay all such costs and expenses and damages as shall be awarded against him by the court on the final decree, whether it is rendered in the original or appellate court, not to exceed however in any event the agreed or appraised value of the property so claimed by him, it, or them, with interest at six per cent. per annum and costs.

35. Exceptions may be taken to any libel, allegation, answer or other pleading for surplusage, impertinence or scandal; and if on hearing the matter excepted to shall be held to be so objectionable it shall be expunged on such terms as the court may direct.

36. In cases of foreign attachment, the garnishee shall be required to answer on oath or solemn affirmation as to the debts, credits, or effects of the respondent or claimant in his hands, and to such interrogatories touching the same as may be propounded by the libellant; and if he shall refuse or neglect so to do, the court may award compulsory process *in personam* against him. If he admits any debts, credits or effects, the same shall be held in his hands, or paid into the registry of the court and shall be held in either case subject to the further order of the court.

37. In cases of mariners' wages, or bottomry, or salvage, or other proceeding *in rem*, where freight or other proceeds of property are attached to or are bound by the suit, which are in the hands or possession of any person, the court may, on due application, by petition of the party interested, require the party charged with the possession thereof to appear and show cause why the same should not be brought into court to answer the exigency of the suit, and if no cause be shown, the court may order the same to be brought into court to answer the exigency of the suit, and on failure of the party to comply with the order, may award an attachment, or other compulsory process to compel obedience thereto.

38. If, in any admiralty suit, the libellant shall not appear and prosecute his suit, and comply with the orders of the court, he shall be deemed in default and contumacy; and the court may, on the application of the respondent or claimant, pronounce the suit to be deserted, and the same may be dismissed with costs.

39. The court may, in its discretion, on motion of the respondent or claimant and the payment of costs, rescind the decree in any suit in which, on account of his contumacy and default, the matter of the libel shall have been decreed against him, and grant a rehearing thereof at any time within sixty days after the decree has been entered, the respondent or claimant submitting to such further orders and terms in the premises as

the court may direct; and the term of the court shall be deemed extended for this purpose until the expiration of such period of sixty days.

40. All sales of property under any decree of admiralty shall be made by the marshal or his deputy, or other proper officer assigned by the court, where the marshal is a party in interest, in pursuance of the orders of the court; and the proceeds thereof, when sold, shall be forthwith paid into the registry of the court by the officer making the sale, to be disposed of by the court according to law.

41. All moneys paid into the registry of the court shall be deposited in some bank designated by the court, and shall be so deposited in the name of the court, and shall not be drawn out, except by a check or checks signed by a judge of the court and countersigned by the clerk, stating on whose account and for whose use it is drawn, and in what suit and out of what fund in particular it is paid. The clerk shall keep a regular book, containing a memorandum and copy of all of the checks so drawn and the date thereof.

42. Any person having an interest in any proceeds in the registry of the court shall have a right, by petition and summary proceedings, to intervene *pro interesse suo* for delivery thereof to him, and on due notice to the adverse parties, if any, the court shall and may proceed summarily to hear and decide thereon, and to decree therein according to law and justice. And if such petition or claim shall be deserted, or on a hearing, be dismissed, the court may, in its discretion, award costs against the petitioner in favor of the adverse party.

43. In cases where the court shall deem it expedient or necessary for the purposes of justice, it may refer any matters arising in the progress of the suit to one or two commissioners or assessors, to be appointed by the court, to hear the parties and make a report therein. And such commissioners or assessors shall have and possess all the powers in the premises which are usually given to or exercised by masters in chancery in references to them, including the power to administer oaths to and examine the parties and witnesses touching the premises.

44. In suits in admiralty in all cases not provided for by these rules or by statute, the district courts are to regulate their practice in such a manner as they deem most expedient for the due administration of justice, provided the same are not inconsistent with these rules.

45. Further proof taken by leave of a circuit court of appeals or the Supreme Court on an appeal in admiralty shall be taken in such manner as may be prescribed by statute or by said court.

46. In all trials in admiralty the testimony of witnesses shall be taken orally in open court, except as otherwise provided by statute, or agreement of parties. When deemed necessary by the court or the officer taking the testimony or by the parties, a stenographer may be employed who shall take down the testimony in shorthand or otherwise and, if requested by the court or either party, transcribe the same. The fees may be fixed by the court and taxed as costs.

47. Traveling expenses of any witness for more than one hundred miles

to and from the Court or place of taking the testimony shall not be taxed as costs.

48. When the respondent or claimant in his answer, alleges new facts, these shall be considered as denied by the libellant, and no replication or reply, general or special, shall be filed, unless ordered by the court on proper cause shown. But within such time after the answer is filed as shall be fixed by the district court, either by general rule or by special order, the libellant may amend his libel so as to confess and avoid, or explain or add to, the new matters set forth in the answer; and within such time as may be fixed, in like manner, the respondent or claimant shall answer such amendments.

49. The Clerks of the District Courts shall make up the records to be transmitted to the Circuit Court of Appeals.

I. They shall contain the following:

A. The style of the court.

B. The names of the parties, setting forth the original parties, and those who have become parties before the appeal, if any change has taken place.

C. If bail was taken, or property was attached or arrested, the process of the arrest or attachment and the service thereof, all bail and stipulations, and, if any sale has been made, the orders, warrants, and reports relating thereto.

D. The libel, with exhibits annexed thereto.

E. The pleadings of the respondent or claimant with the exhibits annexed thereto.

F. The testimony as taken on the part of the libellant, and any exhibits not annexed to the libel.

G. The testimony as taken on the part of the respondent or claimant and any exhibits not annexed to his pleadings.

H. Any orders and opinions of the court.

I. Any report of a commissioner or assessor, if excepted to, with the orders of the court respecting the same, and the exceptions to the report. If the report was not excepted to, only the fact that a reference was made, and so much of the report as shows what results were arrived at by the commissioner or assessor are to be stated.

J. The final decree.

K. The notice of or prayer for an appeal, and the assignment of errors.

II. The following shall be omitted:

A. The continuances.

B. All motions, rules, and orders which are merely preparatory for trial and to which no exception was taken or error assigned.

C. The commissions to take depositions, notices therefor, their captions, and certificates of their being sworn to, unless some exception to a deposition in the District Court was founded on some one or more of these; in which case so much of either of them as may be involved in the exception shall be set out. In all other cases it shall be suffi-

cient to give the name of the witness, and to copy the interrogatories and answers, and to state the name of the commissioner, and the place where and the date when the deposition was sworn to; and in copying all depositions taken on interrogatories, the answer shall be inserted immediately following the question.

III. The Clerk of the District Court shall page the copy of the record thus made up, and shall make an index thereto, and he shall certify the entire document at the end thereof under the seal of the court, to be a transcript of the record of the District Court in the cause named at the beginning of the copy made up pursuant to this rule.

IV. In making up the record to be transmitted to the Circuit Court of Appeals, the Clerk of the District Court shall omit therefrom any of the pleadings, testimony or exhibits which the parties, by their proctors, shall, by written stipulation, agree may be omitted; and shall receive and include in the record any statement of the case which may be signed by the proctors showing how the questions arose and were decided in the District Court and setting forth so much only of the facts alleged and proved, or sought to be proved, or of the evidence thereof, as is essential to a decision of such question by the Appellate Court, and such stipulation and statement shall be filed and certified up with the record.

50. Whenever a cross-libel is filed upon any counterclaim arising out of the same contract or cause of action for which the original libel was filed, and the respondent or claimant in the original suit shall have given security to respond in damages, the respondent in the cross-libel shall give security in the usual amount and form to respond in damages to the claims set forth in said cross-libel, unless the court, for cause shown, shall otherwise direct; and all proceedings on the original libel shall be stayed until such security be given unless the court otherwise directs.

51. When any ship or vessel shall be libeled, or the owner or owners thereof shall be sued, for any embezzlement, loss, or destruction by the master, officers, mariners, passengers, or any other person or persons, of any property, goods, or merchandise, shipped or put on board of such ship or vessel, or for any loss, damage or injury by collision, or for any act, matter or thing, loss, damage or forfeiture, done, occasioned or incurred, without the privity or knowledge of such owner or owners, and he or they shall desire to claim the benefit of limitation of liability provided for in the third and fourth sections of the act of March 3, 1851, entitled "An Act to limit the liability of shipowners and for other purposes" now embodied in sections 4283 to 4285 of the Revised Statutes, as now or hereafter amended or supplemented, the said owner or owners shall and may file a libel or petition in the proper district court of the United States, as hereinafter specified, setting forth the facts and circumstances on which said limitation of liability is claimed, and praying proper relief in that behalf; and thereupon said court, having caused due appraisement to be had of the amount or value of the interest of said owner or owners, respectively, in such ship or vessel, and her freight, for the voyage, shall make an order for the payment of the same into court, or for the giving

of a stipulation with sufficient sureties or an approved corporate surety for the payment thereof into court with interest at the rate of six per cent. per annum from the date of said stipulation and costs, whenever the same shall be ordered; or, if the said owner or owners shall so elect, the said court shall, without such appraisement make an order for the transfer by him or them of his or their interest in such vessel and freight to a trustee to be appointed by the court under the fourth section of said act; and, upon compliance with such order, the said court shall issue a monition against all persons claiming damages for any such embezzlement, loss, destruction, damage or injury, citing them to appear before the said court and file their respective claims at or before a certain time to be named in said writ, not less than thirty days from the issuing of the same; and public notice of such monition shall be given as in other cases, and such further notice served through the post office, or otherwise, as the court, in its discretion, may direct; and the said court shall also, on the application of the said owner or owners, make an order to restrain the further prosecution of all and any suit or suits against said owner or owners in respect to any such claim or claims.

52. Proof of all claims which shall be filed in pursuance of said monition shall thereafter be made before a commissioner to be designated by the court, or before the court as the court may determine, subject to the right of any person interested to question or controvert the same; and on the completion of said proofs, the commissioner shall make report, or the court its finding on the claims so proven, and on confirmation of said commissioner's report, after hearing any exceptions thereto, or on such finding by the court, the moneys paid or secured to be paid into court as aforesaid, or the proceeds of said ship or vessel and freight (after payment of costs and expense) shall be divided pro rata amongst the several claimants in proportion to the amount of their respective claims, duly proved and confirmed as aforesaid, saving, however, to all parties any priority to which they may be legally entitled.

53. In the proceedings aforesaid, the said owner or owners shall be at liberty to contest his or their liability, or the liability of said ship or vessel for said embezzlement, loss, destruction, damage or injury (independently of the limitation of liability claimed under said act), provided he, it or they shall have complied with the requirements of Rule fifty-one and shall also have given a bond for costs and provided that, in his or their libel or petition, he or they shall state the facts and circumstances by reason of which exemption from liability is claimed; and any person or persons claiming damages as aforesaid, and who shall have filed his or their claim under oath, shall and may answer such libel or petition, and contest the right of the owner or owners of said ship or vessel, either to an exemption from liability, or to a limitation of liability under the said act of Congress, or both, provided such answer shall in suitable allegations state the facts and circumstances by reason of which liability is claimed or right to limitation of liability should be denied.

54. The said libel or petition shall be filed and the said proceedings

had in any district court of the United States in which said ship or vessel may be libeled to answer for any such embezzlement, loss, destruction, damage or injury; or, if the said ship or vessel be not libeled, then in the district court for any district in which the said owner or owners may be sued in that behalf; when the said ship or vessel has not been libeled to answer the matters aforesaid, and suit has not been commenced against the said owner or owners, or has been commenced in a district other than that in which the said ship or vessel may be, the said proceedings may be had in the district court of the district in which the said ship or vessel may be, and where it may be subject to the control of such court for the purposes of the case as hereinbefore provided. If the ship shall have already been libeled or sold, the proceeds shall represent the same for the purposes of these rules.

55. All the preceding rules and regulations for proceeding in causes where the owner or owners of a ship or vessel shall desire to claim the benefit of limitation of liability provided for in the act of Congress in that behalf, shall apply to the Circuit Courts of Appeals of the United States where such cases are or shall be pending in said courts on appeal from the District Courts.

56. In any suit, whether *in rem* or *in personam*, the claimant or respondent (as the case may be) shall be entitled to bring in any other vessel or person (individual or corporation) who may be partly or wholly liable either to the libellant or to such claimant or respondent by way of remedy over, contribution or otherwise, growing out of the same matter. This shall be done by petition, on oath, presented before or at the time of answering the libel, or at any later time during the progress of the cause that the court may allow. Such petition shall contain suitable allegations showing such liability, and the particulars thereof, and that such other vessel or person ought to be proceeded against in the same suit for such damage, and shall pray that process be issued against such vessel or person to that end. Thereupon such process shall issue, and if duly served, such suit shall proceed as if such vessel or person had been originally proceeded against; the other parties in the suit shall answer the petition; the claimant of such vessel or such new party shall answer the libel; and such further proceedings shall be had and decree rendered by the court in the suit as to law and justice shall appertain. But every such petitioner shall, upon filing his petition, give a stipulation, with sufficient sureties, or an approved corporate surety, to pay the libellant and to any claimant or any new party brought in by virtue of such process, all such costs, damages, and expenses as shall be awarded against the petitioner by the court on the final decree, whether rendered in the original or appellate court; and any such claimant or new party shall give the same bonds or stipulations which are required in the like cases from parties brought in under process issued on the prayer of a libellant.

57. No property in the custody of the marshal or other officer of the court shall be delivered up without an order of the court but, except in possessory actions, such order may be entered, as of course, by the clerk,

on the filing of either a written consent thereto by the proctor on whose behalf it is detained, or an approved stipulation or bond given as provided by law and these rules; or upon the dismissal or discontinuance of the libel; except that in proceedings under Section 941 of the Revised Statutes the marshal shall not deliver any property so released until the costs and charges of the officers of the court shall first have been paid into the court by the party receiving such property subject to the decision of the court with respect to the amount of costs due such officers.

IV

RULES OF THE SUPREME COURT OF THE UNITED STATES.

[210 U. S. 471; 222 U. S. Appendix.]

1.

CLERK.

1. The clerk of this court shall reside and keep the office at the seat of the National Government, and he shall not practice, either as attorney or counsellor, in this court, or in any other court, while he shall continue to be clerk of this court.

2. The clerk shall not permit any original record or paper to be taken from the court room, or from the office, without an order from the court except as provided by Rule 10.

2.

ATTORNEYS AND COUNSELLORS.

1. It shall be requisite to the admission of attorneys or counsellors to practice in this court, that they shall have been such for three years past in the highest courts of the States to which they respectively belong, and that their private and professional characters shall appear to be fair.

2. They shall respectively take and subscribe the following oath or affirmation, viz.:

I, ——— ———, do solemnly swear (or affirm) that I will demean myself, as an attorney and counsellor of this court, uprightly, and according to law; and that I will support the Constitution of the United States.

3.

PRACTICE.

This court considers the former practice of the courts of king's bench and of chancery, in England, as affording outlines for the practice of this court; and will, from time to time, make such alterations therein as circumstances may render necessary.

4.

BILL OF EXCEPTIONS.

The judges of the district courts in allowing bills of exception shall give effect to the following rules:

1. No bill of exceptions shall be allowed which shall contain the charge of the court at large to the jury in trials at common law, upon any general exception to the whole of such charge. But the party excepting shall be required to state distinctly the several matters of law in such charge to which he excepts; and those matters of law, and those only, shall be inserted in the bill of exceptions and allowed by the court.

2. Only so much of the evidence shall be embraced in a bill of exceptions as may be necessary to present clearly the questions of law involved in the rulings to which exceptions are reserved, and such evidence as is embraced therein shall be set forth in condensed and narrative form, save as a proper understanding of the questions presented may require that parts of it be set forth otherwise.

5.

PROCESS.

1. All process of this court be in the name of the President of the United States, and shall contain the Christian names, as well as the surnames, of the parties.

2. When process at common law or in equity shall issue against a State, the same shall be served on the governor, or chief executive magistrate, and attorney-general of such State.

3. Process of subpœna, issuing out this court, in any suit in equity, shall be served on the defendant sixty days before the return day of the said process; and if the defendant, on such service of the subpœna, shall not appear at the return day, the complainant shall be at liberty to proceed *ex parte*.

6.

MOTIONS.

1. All motions to the court shall be reduced to writing, and shall contain a brief statement of the facts and objects of the motion.

2. Forty-five minutes on each side shall be allowed to the argument of a motion, and no more, without special leave of the court, granted before the argument begins.

3. No motion to dismiss, except on special assignment by the court, shall be heard, unless previous notice has been given to the adverse party, or the counsel or attorney of such party.

4. All motions to dismiss writs of error and appeals, except motions to docket and dismiss under Rule 9, must be submitted in the first instance on printed briefs or arguments. If the court desires further argument on that subject, it will be ordered in connection with the hearing on the merits. The party moving to dismiss shall serve notice of the motion, with a copy of his brief of argument, on the counsel for plaintiff in error or appellant of record in this court, at least three weeks before the time fixed for submitting the motion, in all cases except where the counsel to be notified resides west of the Rocky Mountains, in which case the notice shall be at least thirty days. Affidavits of the deposit in the mail of the notice and brief to the proper address of the counsel to be served, duly post-paid at such time as to reach him by due course of mail, the three weeks or thirty days before the time fixed by the notice, will be regarded as *prima facie* evidence of service on counsel who reside without the District of Columbia. On proof of such service, the motion will be considered, unless, for satisfactory reasons, further time be given by the court to either party.

5. The court in any pending cause will receive a motion to affirm on the ground that it is manifest that the writ or appeal was taken for delay only, or that the questions on which the decision of the cause depend are so frivolous as not to need further argument. The same procedure shall apply to and control such motions as is provided for in cases of motions to dismiss under paragraph 4 of this rule.

6. Although the court upon consideration of a motion to dismiss or a motion to affirm may refuse to grant the motion, it may nevertheless, if the conclusion is arrived at that the case is of such a character as not to justify extended argument, order the cause transferred for hearing to a summary docket. The hearing of the causes on such docket will be expedited, the court providing from time to time for such speedy disposition of the docket as the regular order of business may permit, and on the hearing of such causes one-half hour will be allowed each side for oral argument.

7. The court will not hear arguments on Saturday (unless for special cause it shall order to the contrary), but will devote that day to the other business of the court. The motion day shall be Monday of each week; and motions not required by the rules of the court to be put on the docket shall be entitled to preference immediately after the reading of opinions, if such motions shall be made before the court shall have entered upon the hearing of a case upon the docket.

7.

LAW LIBRARY.

1. During the session of the court, any gentleman of the bar having a case on the docket, and wishing to use any book or books in the law library, shall be at liberty, upon application to the clerk of the court, to receive an order to take the same (not exceeding at any one time three) from the

library, he being thereby responsible for the due return of the same within a reasonable time, or when required by the clerk. And in case the same shall not be so returned, the party receiving the same shall be responsible for and forfeit and pay twice the value thereof, and also one dollar per day for each's day's detention beyond the limited time.

2. The clerk shall deposit in the law library, to be there carefully preserved, one copy of the printed record in every case submitted to the court for its consideration, and of all printed motions, briefs, or arguments filed therein.

3. The marshal shall take charge of the books of the court, together with such of the duplicate law books as Congress may direct to be transferred to the court, and arrange them in the conference room, which he shall have fitted up in a proper manner; and he shall not permit such books to be taken therefrom by any one except the justices of the court.

8.

WRIT OF ERROR AND APPEAL, RETURN AND RECORD.

1. The clerk of the court to which any writ of error may be directed shall make return of the same, by transmitting a true copy of the record, and of the assignment of errors, and of all proceedings in the case, under his hand and the seal of the court.

In order to enable the Clerk to perform such duty and for the purpose of reducing the size of transcripts of record in cases brought to this Court by appeal or writ of error, by eliminating all papers not necessary to the consideration of the questions to be reviewed, it shall be the duty of the appellant or plaintiff in error or his attorney to file with the clerk of the lower court, together with proof or acknowledgment of service of a copy on the appellee or defendant in error, or his counsel, a *praecipe* which shall indicate the portions of the record to be incorporated into the transcript of the record on such appeal or writ of error. Should the appellee or defendant in error, or his counsel, desire additional portions of the record incorporated into the transcript of the record to be filed in this Court, he shall file with the clerk of the lower court his *praecipe* also, within ten days thereafter, (unless the time shall be enlarged by a judge of the lower court or by a Justice of this Court), indicating such additional portions of the record desired by him.

The clerk of the lower court shall transmit to this Court as the transcript of the record in the case only the portions of the record below designated by both parties as above provided.

The parties or their counsel, however, may agree by written stipulation to be filed with the clerk of the lower court the portions of the record which shall constitute the transcript of record on appeal or writ of error, and the clerk in such case shall transmit only the papers designated in such stipulation.

If this Court shall find that portions of the record unnecessary to a

proper presentation of the case have been incorporated into the transcript by either party, the Court may order that the whole or any part of the Clerk's fee for supervising the printing and of the cost of printing the record be paid by the offending party.

2. In all cases brought to this court, by writ of error or appeal, to review any judgment or decree, the clerk of the court by which such judgment or decree was rendered shall annex to and transmit with the record a copy of the opinion or opinions filed in the case.

3. No case will be heard until a complete record, containing in itself, and not by reference, all the papers, exhibits, depositions, and other proceedings which are necessary to the hearing in this court, shall be filed.

4. Whenever it shall be necessary or proper, in the opinion of the presiding judge in any district court, that original papers of any kind should be inspected in this court upon writ of error or appeal, such presiding judge may make such rule or order for the safe-keeping, transporting, and return of such original papers as to him may seem proper, and this court will receive and consider such original papers in connection with the transcript of the proceedings.

5. All appeals, writs of error, and citations must be made returnable not exceeding thirty days from the day of signing the citation, whether the return day fall in vacation or in term time, and be served before the return day, except in writs of error and appeals from California, Oregon, Nevada, Washington, New Mexico, Utah, Arizona, Montana, Wyoming, North Dakota, South Dakota, Alaska, Idaho, Hawaii and Porto Rico, when the time shall be extended to sixty days and from the Philippine Islands to one hundred and twenty days.

6. The record in cases of admiralty and maritime jurisdiction, when under the requirements of law the facts have been found in the court below, and the power of review is limited to the determination of questions of law arising on the record, shall be confined to the pleadings, the findings of fact, and conclusions of law thereon, the bills of exceptions, the final judgment or decree, and such interlocutory orders and decrees as may be necessary to a proper review of the case.

9.

DOCKETING CASES.

1. It shall be the duty of the plaintiff in error or appellant to docket the case and file the record thereof with the clerk of this court by or before the return day, whether in vacation or in term time. But, for good cause shown, the justice or judge who signed the citation, or any justice of this court, may enlarge the time, by or before its expiration, the order of enlargement to be filed with the clerk of this court. If the plaintiff in error or appellant shall fail to comply with this rule, the defendant in error or appellee may have the cause docketed and dismissed upon producing a certificate, whether in term time or vacation, from the clerk of the court

wherein the judgment or decree was rendered, stating the case and certifying that such writ or error or appeal has been duly sued out or allowed. And in no case shall the plaintiff in error or appellant be entitled to docket the case and file the record after the same shall have been docketed and dismissed under this rule, unless by order of the court.

2. But the defendant in error or appellee may, at his option, docket the case and file a copy of the record with the clerk of this court; and if the case is docketed and a copy of the record filed with the clerk of this court by the plaintiff in error or appellant within the period of time above limited and prescribed by this rule, or by the defendant in error or appellee at any time thereafter, the case shall stand for argument.

3. Upon the filing of the transcript of a record brought up by writ of error or appeal, the appearance of the counsel for the party docketing the case shall be entered.

10.

As amended May 1, 1916, 241 U. S. 633.

PRINTING RECORDS.

1. In all cases the plaintiff in error or appellant, on docketing a case and filing the record, shall make such cash deposit with the clerk for the payment of his fees as he may require or otherwise satisfy him in that behalf.

2. Immediately after the designation of the parts of the record to be printed or the expiration of the time allotted therefor, the Clerk shall make an estimate of the cost of printing the record, his fee for preparing it for the printer and supervising fee, and other probable fees, and upon application therefor shall furnish the same to the party docketing the case. If such estimated sum be not paid within ninety days after the cause is docketed, it shall be the duty of the Clerk to report that fact to the Court, and thereupon the cause will be dismissed, unless good cause to the contrary is shown.

3. Upon payment of the amount estimated by the clerk, thirty copies of the record shall be printed, under his supervision, for the use of the court and of counsel.

4. In cases of appellate jurisdiction the original transcript on file shall be taken by the clerk to the printer. But the clerk shall cause copies to be made for the printer of such original papers, sent up under Rule 8, section 4, as are necessary to be printed; and of the whole record in cases of original jurisdiction.

5. The clerk shall supervise the printing, and see that the printed copy is properly indexed. He shall distribute the printed copies to the justices and the reporter, from time to time, as required, and a copy to the counsel for the respective parties.

6. If the actual cost of printing the record, together with the fee of the clerk, shall be less than the amount estimated and paid, the amount of the

difference shall be refunded by the clerk to the party paying it. If the actual cost and clerk's fee shall exceed the estimate, the amount of the excess shall be paid to the clerk before the delivery of a printed copy to either party or his counsel.

7. In case of reversal, affirmance, or dismissal, with costs, the amount of the cost of printing the record and of the clerk's fee shall be taxed against the party against whom costs are given, and shall be inserted in the body of the mandate or other proper process.

8. Upon the clerk's producing satisfactory evidence, by affidavit or the acknowledgment of the parties or their sureties, of having served a copy of the bill of fees due by them, respectively, in this court, on such parties or their sureties, an attachment shall issue against such parties or sureties, respectively, to compel payment of said fees.

9. When the record is filed, or within twenty days thereafter, the plaintiff in error or appellant may file with the clerk a statement of the points on which he intends to rely and of the parts of the record which he thinks necessary for the consideration thereof, with proof of service of the same on the adverse party. The adverse party, within thirty days thereafter, may designate in writing, filed with the clerk, additional parts of the record which he thinks material; and, if he shall not do so, he shall be held to have consented to a hearing on the parts designated by the plaintiff in error or appellant. If parts of the record shall be so designated by one or both of the parties, the clerk shall print those parts only; and the court will consider nothing but those parts of the record, and the errors so stated. If at the hearing it shall appear that any material part of the record has not been printed, the writ of error or appeal may be dismissed, or such other order made as the circumstances may appear to the court to require. If the defendant in error or appellee shall have caused unnecessary parts of the record to be printed, such order as to costs may be made as the court shall think proper.

The fees of the clerk under Rule 24, section 7, shall be computed, as at present, on the folios in the record as filed, and shall be in full for the performance of his duties in the execution hereof.

11.

TRANSLATIONS.

Whenever any record transmitted to this court upon a writ of error or appeal shall contain any document, paper, testimony, or other proceedings in a foreign language, and the record does not also contain a translation of such document, paper, testimony, or other proceedings, made under the authority of the inferior court, or admitted to be correct, the record shall not be printed; but the case shall be reported to this court by the clerk, and the court will order that a translation be supplied and inserted in the record.

12.

FURTHER PROOF.

1. In all cases where further proof is ordered by the court, the depositions which may be taken shall be by a commission, to be issued from this court, or from any district court of the United States.

2. In all cases of admiralty and maritime jurisdiction, where new evidence shall be admissible in this court, the evidence by testimony of witnesses shall be taken under a commission to be issued from this court, or from any district court of the United States, under the direction of any judge thereof; and no such commission shall issue but upon interrogatories, to be filed by the party applying for the commission, and notice to the opposite party or his agent or attorney, accompanied with a copy of the interrogatories so filed, to file cross-interrogatories within twenty days from the service of such notice: Provided, however, That nothing in this rule shall prevent any party from giving oral testimony in open court in cases where by law it is admissible.

13.

OBJECTIONS TO EVIDENCE IN THE RECORD.

In all cases of equity or admiralty jurisdiction, heard in this court, no objection shall hereafter be allowed to be taken to the admissibility of any deposition, deed, grant, or other exhibit found in the record as evidence, unless objection was taken thereto in the court below and entered of record; but the same shall otherwise be deemed to have been admitted by consent.

14.

CERTIORARI.

No *certiorari* for diminution of the record will be hereafter awarded in any case, unless a motion therefor shall be made in writing, and the facts on which the same is founded shall, if not admitted by the other party, be verified by affidavit. And all motions for *certiorari* must be made at the first term of the entry of the case; otherwise, the same will not be granted, unless upon special cause shown to the court, accounting satisfactorily for the delay.

15.

DEATH OF A PARTY.

1. Whenever, pending a writ of error or appeal in this court, either party shall die, the proper representatives in the personalty or realty of the de-

ceased party, according to the nature of the case, may voluntarily come in and be admitted parties to the suit, and thereupon the case shall be heard and determined as in other cases; and if such representatives shall not voluntarily become parties, then the other party may suggest the death on the record, and thereupon, on motion, obtain an order that unless such representatives shall become parties within the first ten days of the ensuing term, the party moving for such order, if defendant in error or appellee, shall be entitled to have the writ of error or appeal dismissed; and if the party so moving shall be plaintiff in error or appellant he shall be entitled to open the record, and on hearing have the judgment or decree reversed, if it be erroneous: Provided, however, That a copy of every such order shall be printed in some newspaper of general circulation within the State, Territory, or District from which the case is brought, for three successive weeks, at least sixty days before the beginning of the term of the Supreme Court then next ensuing.

2. When the death of a party is suggested, and the representatives of the deceased do not appear by the tenth day of the second term next succeeding the suggestion, and no measures are taken by the opposite party within that time to compel their appearance, the case shall abate.

3. When either party to a suit in a court of the United States shall desire to prosecute a writ of error or appeal to the Supreme Court of the United States, from any final judgment or decree, rendered in such court, and at the time of suing out such writ of error or appeal the other party to the suit shall be dead and have no proper representative within the jurisdiction of the court which rendered such final judgment or decree, so that the suit cannot be revived in that court, but shall have a proper representative in some State or Territory of the United States, the party desiring such writ of error or appeal may procure the same, and may have proceedings on such judgment or decree superseded or stayed in the same manner as is now allowed by law in other cases, and shall thereupon proceed with such writ of error or appeal as in other cases. And within thirty days after the commencement of the term to which such writ of error or appeal is returnable, the plaintiff in error or appellant shall make a suggestion to the court, supported by affidavit, that the said party was dead when the writ of error or appeal was taken or sued out, and had no proper representative within the jurisdiction of the court which rendered said judgment or decree, so that the suit could not be revived in that court, and that said party had a proper representative in some State or Territory of the United States, and stating therein the name and character of such representative, and the State or Territory in which such representative resides; and, upon such suggestion, he may, on motion, obtain an order that, unless such representative shall make himself a party within the first ten days of the ensuing term of the court, the plaintiff in error or appellant shall be entitled to open the record, and, on hearing, have the judgment or decree reversed, if the same be erroneous: Provided, however, That a proper citation reciting the substance of such order shall be served upon such representative, either personally or by being left at his residence, at

least sixty days before the beginning of the term of the Supreme Court then next ensuing: And provided, also, That in every such case if the representative of the deceased party does not appear by the tenth day of the term next succeeding said suggestion, and the measures above provided to compel the appearance of such representative have not been taken within time as above required, by the opposite party, the case shall abate: And provided, also, That the said representative may at any time before or after said suggestion come in and be made a party to the suit, and thereupon the case shall proceed, and be heard and determined as in other cases.

16.

NO APPEARANCE OF PLAINTIFF IN ERROR OR APPELLANT.

Where no counsel appears and no brief has been filed for the plaintiff in error or appellant, when the case is called for trial, the defendant in error or appellee may have the plaintiff in error or appellant called and the writ of error or appeal dismissed, or may open the record and pray for an affirmance.

17.

NO APPEARANCE OF DEFENDANT IN ERROR OR APPELLEE.

Where the defendant in error or appellee fails to appear when the case is called for trial, the court may proceed to hear an argument on the part of the plaintiff in error or appellant and to give judgment according to the right of the case.

18.

NO APPEARANCE OF EITHER PARTY.

When a case is reached in the regular call of the docket, and there is no appearance for either party, the case shall be dismissed at the cost of the plaintiff in error or appellant.

19.

NEITHER PARTY READY AT SECOND TERM.

When a case is called for argument at two successive terms, and upon the call at the second term neither party is prepared to argue it, it shall be dismissed at the cost of the plaintiff in error or appellant, unless sufficient cause is shown for further postponement.

20.

PRINTED ARGUMENTS.

1. In all cases brought here on writ of error, appeal, or otherwise, the court will receive printed arguments without regard to the number of the cases on the docket, if the counsel on both sides shall choose to submit the same within the first ninety days of the term; and, in addition, appeals from the Court of Claims may be submitted by both parties within thirty days after they are docketed, but not after the first day of April; but thirty copies of the arguments, signed by attorneys or counsellors of this court, must be first filed.

2. When a case is reached in the regular call of the docket, and a printed argument shall be filed for one or both parties, the case shall stand on the same footing as if there were an appearance by counsel.

3. When a case is taken up for trial upon the regular call of the docket, and argued orally in behalf of only one of the parties, no printed argument for the opposite party will be received, unless it is filed before the oral argument begins, and the court will proceed to consider and decide the case upon the *ex parte* argument.

4. No brief or argument will be received, either through the clerk or otherwise, after a case has been argued or submitted, except upon leave granted in open court after notice to opposing counsel.

21.

BRIEFS.

1. The counsel for plaintiff in error or appellant shall file with the clerk of the court, at least three weeks before the case is called for argument, thirty copies of a printed brief, one of which shall, on application, be furnished to each of the counsel engaged upon the opposite side.

2. This brief shall contain, in the order here stated—

(1) A concise abstract, or statement of the case, presenting succinctly the questions involved and the manner in which they are raised.

(2) A specification of the errors relied upon, which, in cases brought up by writ of error, shall set out separately and particularly each error asserted and intended to be urged; and in cases brought up by appeal the specification shall state, as particularly as may be, in what the decree is alleged to be erroneous. When the error alleged is to the admission or to the rejection of evidence, the specification shall quote the full substance of the evidence admitted or rejected. When the error alleged is to the charge of the court, the specification shall set out the part referred to *totidem verbis*, whether it be instructions given or instructions refused. When the error alleged is to a ruling upon the report of a master, the specification shall state the exception to the report and the action of the court upon it.

(3) A brief of the argument, exhibiting a clear statement of the points of law or fact to be discussed, with a reference to the pages of the record and the authorities relied upon in support of each point. When a statute of a State is cited, so much thereof as may be deemed necessary to the decision of the case shall be printed at length.

3. The counsel for a defendant in error or an appellee shall file with the clerk thirty printed copies of his argument, at least one week before the case is called for hearing. His brief shall be of like character with that required of the plaintiff in error or appellant, except that no specification of errors shall be required, and no statement of the case, unless that presented by the plaintiff in error or appellant is controverted.

4. When there is no assignment of errors, as required by section 997 of the Revised Statutes, counsel will not be heard, except at the request of the court; and errors not specified according to this rule will be disregarded; but the court, at its option, may notice a plain error not assigned or specified.

5. When, according to this rule, a plaintiff in error or an appellant is in default, the case may be dismissed on motion; and when a defendant in error, or an appellee is in default, he will not be heard, except on consent of his adversary, and by request of the court.

6. When no oral argument is made for one of the parties, only one counsel will be heard for the adverse party.

7. No brief or printed argument, required by the foregoing sections, shall be filed by the clerk unless the same shall be accompanied by satisfactory proof of service upon counsel for the adverse party.

8. Every brief of more than twenty pages shall contain on its front fly leaves a subject index with page references, the subject index to be supplemented by a list of all cases referred to, alphabetically arranged, together with references to pages where the cases are cited.

22.

As amended October 21, 1918, 248 U. S. 528.

ORAL ARGUMENTS.

1. The plaintiff in error or appellant in this court shall be entitled to open and conclude the argument of the case. But when there are cross-appeals they shall be argued together as one case, and the plaintiff in the court below shall be entitled to open and conclude the argument.

2. Only two counsel will be heard for each party on the argument of a case.

3. One hour on each side will be allowed for the argument, and no more, without special leave of the court, granted before the argument begins. But in cases certified from the Circuit Court of Appeals, cases involving solely the jurisdiction of the court below, and cases under the Act of March 2, 1907, 34 Stat. 1246, forty-five minutes only on each side

will be allowed for the argument unless the time be extended. The time thus allowed may be apportioned between the counsel on the same side, at their discretion; provided, always, that a fair opening of the case shall be made by the party having the opening and closing arguments.

23.

INTEREST.

1. In cases where a writ of error is prosecuted to this court, and the judgment of the inferior court is affirmed, the interest shall be calculated and levied, from the date of the judgment below until the same is paid, at the same rate that similar judgments bear interest in the courts of the state where such judgment is rendered.

2. In all cases where a writ of error shall delay the proceedings on the judgment of the inferior court, and shall appear to have been sued out merely for delay, damages at a rate not exceeding 10 per cent., in addition to interest, shall be awarded upon the amount of the judgment.

3. The same rule shall be applied to decrees for the payment of money in cases in equity; unless otherwise ordered by this court.

4. In cases in admiralty, damages and interest may be allowed if specially directed by the court.

24.

COSTS.

1. In all cases where any suit shall be dismissed in this court, costs shall be allowed to the defendant in error or appellee, unless otherwise agreed by the parties, except where the dismissal shall be for want of jurisdiction, when the costs incident to the motion to dismiss shall be allowed.

2. In all cases of affirmance of any judgment or decree in this court, costs shall be allowed to the defendant in error or appellee, unless otherwise ordered by the court.

3. In cases of reversal of any judgment or decree in this court, costs shall be allowed to the plaintiff in error or appellant, unless otherwise ordered by the court. The cost of the transcript of the record from the court below shall be a part of such costs, and be taxable in that court as costs in the case.

4. Neither of the foregoing sections shall apply to cases where the United States are a party; but in such cases no costs shall be allowed in the court for or against the United States.

5. In all cases of the dismissal of any suit in this court, it shall be the duty of the clerk to issue a mandate, or other proper process, in the nature of a *procedendo*, to the court below, for the purpose of informing such court of the proceedings in this court, so that further proceedings may be had in such court as to law and justice may appertain.

6. When costs are allowed in this court, it shall be the duty of the clerk to insert the amount thereof in the body of the mandate, or other proper process, sent to the court below, and annex to the same the bill of items taxed in detail.

7. In pursuance of the act of March 3, 1883, authorizing and empowering this court to prepare a table of fees to be charged by the clerk of this court, the following table is adopted:

For docketing a case and filing and indorsing the transcript of the record, five dollars.

For entering an appearance, twenty-five cents.

For entering a continuance, twenty-five cents.

For filing a motion, order, or other paper, twenty-five cents.

For entering any rule, or for making or copying any record or other paper, twenty cents per folio of each one hundred words.

For transferring each case to a subsequent docket and indexing the same, one dollar.

For entering a judgment or decree, one dollar.

For every search of the records of the court, one dollar.

For a certificate and seal, two dollars.

For receiving, keeping and paying money in pursuance of any statute or order of court, two per cent. on the amount so received, kept and paid.

For an admission to the bar and certificate under seal, ten dollars.

For preparing the record or a transcript thereof for the printer, indexing the same, supervising the printing, and distributing the printed copies to the justices, the reporter, the law library, and the parties or their counsel, fifteen cents per folio; but when the necessary printed copies of the record, as printed for the use of the lower court, shall be furnished, the fee for supervising shall be five cents per folio.

For making a manuscript copy of the record, when required under Rule 10, twenty cents per folio, but nothing in addition for supervising the printing.

For issuing a writ of error and accompanying papers, five dollars.

For a mandate or other process, five dollars.

For filing briefs, five dollars for each party appearing.

For every printed copy of any opinion of the court or any justice thereof, certified under seal, two dollars.

25.

OPINIONS OF THE COURT.

1. All opinions delivered by the court shall, immediately upon the delivery thereof, be handed to the clerk to be printed. And it shall be the duty of the clerk to cause the same to be forthwith printed, and to deliver a copy to the reporter as soon as the same shall be printed.

2. The original opinions of the court shall be filed with the clerk of this court for preservation.

3. Opinions printed under the supervision of the justices delivering the same need not be copied by the clerk into a book of records; but at the end of each term the clerk shall cause such printed opinions to be bound in a substantial manner into one or more volumes, and when so bound they shall be deemed to have been recorded.

26.

CALL AND ORDER OF THE DOCKET.

1. The court, on the second day in each term, will commence calling the cases for argument in the order in which they stand on the docket, and proceed from day to day during the term in the same order (except as hereinafter provided); and if the parties, or either of them, shall be ready when the case is called, the same will be heard; and if neither party shall be ready to proceed in the argument, the case shall be continued to the next term of the court unless some good and satisfactory reason to the contrary shall be shown to the court.

2. Ten cases only shall be considered as liable to be called on each day during the term. But on the coming in of the court on each day the entire number of such ten cases will be called, with a view to the disposition of such of them as are not to be argued.

3. Criminal cases may be advanced by leave of the court on motion of either party.

4. Cases once adjudicated by this court upon the merits, and again brought up by writ of error or appeal, may be advanced by leave of the court on motion of either party.

5. Revenue and other cases in which the United States are concerned, which also involve or affect some matter of general public interest, or which may be entitled to precedence under the provisions of any act of Congress, may also by leave of the court be advanced on motion of the Attorney-General.

6. All motions to advance cases must be printed, and must contain a brief statement of the matter involved, with the reasons for the application

7. No other case will be taken out of the order on the docket, or be set down for any particular day, except under special and peculiar circumstances to be shown to the court.

8. Two or more cases, involving the same question, may, by the leave of the court, be heard together, but they must be argued as one case.

9. If, after a case has been passed, the parties shall desire to have it heard, they may file with the clerk their joint request to that effect, and the case shall then be by him reinstated for call ten cases after that under argument, or next to be called at the end of the day the request is filed. If the parties will not unite in such a request, either may move to take up the case, and it shall then be assigned to such place upon the docket as the court may direct.

10. No stipulation to pass a case will be recognized as binding upon the

court. A case can only be so passed upon application made and leave granted in open court.

27.

ADJOURNMENT.

The court will, at every term, announce on what day it will adjourn at least ten days before the time which shall be fixed upon, and the court will take up no case for argument, nor receive any case upon printed briefs, within three days next before the day fixed upon for adjournment.

28.

DISMISSING CASES IN VACATION.

Whenever the plaintiff and defendant in a writ of error pending in this court, or the appellant and appellee in an appeal, shall in vacation, by their attorneys of record, sign and file with the clerk an agreement in writing directing the case to be dismissed, and specifying the terms on which it is to be dismissed as to costs, and shall pay to the clerk any fees that may be due to him, it shall be the duty of the clerk to enter the case dismissed, and to give to either party requesting it a copy of the agreement filed; but no mandate or other process shall issue without an order of the court.

29.

SUPERSEDEAS.

Supersedeas bonds in the district courts and Circuit Courts of Appeals must be taken, with good and sufficient security, that the plaintiff in error or appellant shall prosecute his writ or appeal to effect, and answer all damages and costs if he fail to make his plea good. Such indemnity, where the judgment or decree is for the recovery of money not otherwise secured, must be for the whole amount of the judgment or decree, including just damages for delay, and costs and interest on the appeal; but in all suits where the property in controversy necessarily follows the event of the suit, as in real actions replevin and in suits on mortgages, or where the property is in the custody of the marshal under admiralty process, as in case of capture or seizure, or where the proceeds thereof, or a bond for the value thereof is in the custody or control of the court, indemnity in all such cases is only required in an amount sufficient to secure the sum recovered for the use and detention of the property, and the costs of the suit, and just damages for delay, and costs and interest on the appeal.

30.

REHEARING.

A petition for rehearing after judgment can be presented only at the term at which judgment is entered, unless by special leave granted during the term; and must be printed and briefly and distinctly state its grounds, and be supported by certificate of counsel; and will not be granted, or permitted to be argued, unless a justice who concurred in the judgment desires it, and a majority of the court so determines.

31.

FORM OF PRINTED RECORDS AND BRIEFS.

All records, arguments, and briefs, printed for the use of the court, must be in such form and size that they can be conveniently bound together, so as to make an ordinary octavo volume; and, as well as all quotations contained therein, and the covers thereof, must be printed in clear type (never smaller than small pica) and on unglazed paper.

32.

WRITS OF ERROR AND APPEALS IN CASES INVOLVING JURISDICTION OF LOWER COURT.

Cases brought to this court by writ of error or appeal, where the only question in issue is the question of the jurisdiction of the court below, will be advanced on motion, and heard under the rules prescribed by Rule 6, in regard to motions to dismiss writs of error and appeals.

33.

MODELS, DIAGRAMS, AND EXHIBITS OF MATERIAL.

1. Models, diagrams, and exhibits of material forming part of the evidence taken in the court below, in any case pending in this court, on writ of error or appeal, shall be placed in the custody of the marshal of this court at least one month before the case is heard or submitted.

2. All models, diagrams, and exhibits of material, placed in the custody of the marshal for the inspection of the court on the hearing of a case, must be taken away by the parties within one month after the case is decided. When this is not done, it shall be the duty of the marshal to notify the counsel in the case, by mail or otherwise, of the requirements of this rule; and if the articles are not removed within a reasonable time after the notice is given, he shall destroy them, or make such other disposition of them as to him may seem best.

34.

CUSTODY OF PRISONERS ON HABEAS CORPUS.

1. Pending an appeal from the final decision of any court or judge declining to grant the writ of habeas corpus, the custody of the prisoner shall not be disturbed.

2. Pending an appeal from the final decision of any court or judge discharging the writ after it had been issued, the prisoner shall be remanded to the custody from which he was taken by the writ, or shall, for good cause shown, be detained in custody of the court or judge, or be enlarged upon recognizance as hereinafter provided.

3. Pending an appeal from the final decision of any court or judge discharging the prisoner, he shall be enlarged upon recognizance, with surety, for appearance to answer the judgment of the appellate court, except where, for special reasons, sureties ought not to be required.

35.

ASSIGNMENT OF ERRORS.

1. Where an appeal or a writ of error is taken from a district court direct to this court, under section 238 of the act entitled "An act to codify, revise, and amend the laws relating to the judiciary," approved March 3, 1911, chapter 231, the plaintiff in error or appellant shall file with the clerk of the court below, with his petition for the writ or error or appeal, an assignment of errors, which shall set out separately and particularly each error asserted and intended to be urged. No writ of error or appeal shall be allowed until such assignment of error shall have been filed. When the error alleged is to the admission or to the rejection of evidence, the assignment of errors shall quote the full substance of the evidence admitted or rejected. When the error alleged is to the charge of the court, the assignment of errors shall set out the part referred to *totidem verbis*, whether it be in instructions given or in instructions refused. Such assignment of errors shall form part of the transcript of the record, and be printed with it. When this is not done counsel will not be heard, except at the request of the court; and errors not assigned according to this rule will be disregarded, but the court, at its option, may notice a plain error not assigned.

2. The plaintiff in error or appellant shall cause the record to be printed, according to the provisions of sections 2, 3, 4, 5, 6, and 9, of Rule 10.

36.

APPEALS AND WRITS OF ERROR FROM DISTRICT COURTS.

1. An appeal or a writ of error from a district court direct to this court, in the cases provided in §§ 238 and 252 of the act entitled, "An act to

codify, revise, and amend the laws relating to the judiciary,'' approved March 3, 1911, chapter 231, may be allowed, in term time or in vacation by any justice of this court, or by any circuit judge assigned to the district court, or by any district judge within his district, and the proper security be taken and the citation signed by him, and he may also grant a supersedeas and stay of execution or of proceedings, pending such writ of error or appeal.

2. Where such writ of error is allowed in the case of a conviction of an infamous crime, or in any other criminal case in which it will lie under section 238, the district court, or any judge thereof, or any justice of this court, or any circuit judge assigned to the district court, shall have power, after the citation is served, to admit the accused to bail in such amount as may be fixed.

37.

As amended 241 U. S. 635; 248 U. S. 528.

CASES FROM CIRCUIT COURTS OF APPEALS.

1. Where, under section 239 of the act entitled ''An act to codify, revise, and amend the laws relating to the judiciary,'' approved March 3, 1911, chapter 231, a Circuit Court of Appeals shall certify to this court a question or proposition of law, concerning which it desires the instruction of this court for its proper decision, the certificate shall contain a proper statement of the facts on which such question or proposition of law arises.

2. If application is thereupon made to this court that the whole record and cause may be sent up to it for its consideration, the party making such application shall, as a part thereof, furnish this court with a certified copy of the whole of said record.

3. Where an appl'cation is submitted to this court for a writ of certiorari to review a decision of a Circuit Court of Appeals or any other court, it shall be necessary for the petitioner to furnish as an exhibit to the petition a certified copy of the entire transcript of record of the case, including the proceedings in the court to which the writ of certiorari is asked to be directed. The petition shall contain only a summary and short statement of the matter involved and the general reasons relied on for the allowance of the writ. A failure to comply with this provision will be deemed a sufficient reason for denying the petition. Thirty printed copies of such petition and of any brief deemed necessary shall be filed. Notice of the date of submission of the petition, together with a copy of the petition and brief, if any, in support of the same shall be served on the counsel for the respondent at least two weeks before such date in all cases except where the counsel to be notified resides west of the Rocky Mountains, in which cases the time shall be at least three weeks. The brief for the respondent, if any, shall be filed at least three days before the date fixed for the submission of the petition. Oral argument will not be permitted on such petitions, but they may be submitted in open court by counsel or by the clerk on re-

quest of counsel, and no petition will be received within three days next before the day fixed upon for the adjournment of the court for the term.

4. In any case where the time for presenting a petition for certiorari is expressly limited by statute and where the court has adjourned for the term, the petition may be presented during such adjournment and within the period prescribed, by filing it, together with the printed record and briefs, in the office of the clerk, and such filing shall have the same effect as a presentation in open court.

38.

INTEREST, COST, AND FEES.

The provision of Rules 23 and 24 of this court, in regard to interest and costs and fees, shall apply to writs of error and appeals and reviews under the provisions of sections 238, 239, 240, and 241 of the act entitled "An act to codify, revise, and amend the laws relating to the judiciary," approved March 3, 1911, chapter 231.

39.

MANDATES.

Mandates shall issue as of course after the expiration of thirty days from the day of judgment or decree is entered, unless the time is enlarged by order of the court, or of a justice thereof when the court is not in session, but during the term.

40.

PRACTICE IN CASES FROM CIRCUIT COURTS OF APPEALS.

The provision of these rules relating to the practice on direct writs of error to and appeals from the district courts shall also be deemed to relate to and cover the practice on writs of error to and appeals from the Circuit Court of Appeals.

Office of the Clerk,
Supreme Court of the United States,
Washington, D. C.

INSTRUCTIONS AS TO APPLICATIONS FOR WRITS OF CERTIORARI UNDER ACT OF MARCH 3, 1891.

The following are the requirements on applications for writs of certiorari under the act of March 3, 1891:

Petitions are docketed in this Court as ———, Petitioner, *v.* ———, Respondent.

Before the petition will be docketed there must be furnished this office:

(1) An original copy of the transcript with written signature of counsel.

(2) A certified copy of the transcript of the record, including all proceedings in the Circuit Court of Appeals.

(3) An appearance of counsel for petitioner, signed by a member of the bar of this Court.

(4) A deposit of twenty-five dollars ($25) on account of costs.

Before submission of the petition there must be furnished:

(1) Proof of service of date fixed for submission and copies of petition and brief upon counsel for the respondent. Notice of the date of submission of the petition, together with a copy of the petition and brief, if any, in support of the same must be served on counsel for the respondent at least two weeks before such date except where the counsel to be notified resides west of the Rocky Mountains, in which case the time shall be at least three weeks.

(2) Thirty (30) printed copies of the petition and brief in support of petition, if any such brief is to be filed, under one cover.

(3) At least nine (9) uncertified copies of the record, which must contain all of the proceedings in the Circuit Court of Appeals. These copies may be made up by using copies of the record as printed for the Circuit Court of Appeals and adding thereto printed copies of the proceedings in that Court. If a sufficient number of records thus made up cannot be obtained, making it necessary to reprint the record for use on the hearing of the petition, fifty (50) copies must be printed under my supervision in order that, should the petition be granted, there may be a sufficient number for use on the final hearing.

Monday being motion day, some Monday must be fixed upon for the submission of the petition. No oral argument is permitted on such petitions, but they must be called up and submitted in open court by counsel for petitioner, or by some attorney in his behalf.

If a respondent desires to oppose a petition, thirty (30) copies of a brief for such respondent must be filed. These briefs must bear the name of a member of the bar of this Court, who must also enter an appearance for the respondent. It is not necessary, however, for such counsel to be present in court when the petition is submitted.

All papers in the case must be filed not later than the Saturday preceding the Monday fixed for the submission of the petition.

JAMES D. MAHER,
Clerk, Supreme Court of the United States.

For rules adopted by the Supreme Court of the United States for practice and procedure under section 25 of an act to amend and consolidate the acts respecting copyright approved March 4, 1919, Chapter 320, 35 St. at L. 1075; see 241 U. S. 533, quoted *supra* § 150.

V

RULES OF THE UNITED STATES CIRCUIT COURTS OF APPEALS

Edited by Martha Van Praag.

The following are the rules of the United States Circuit Courts of Appeals, adopted in each of the nine Circuits. The rules are substantially identical in all the Circuits, the points of difference being indicated by footnotes.

1. NAME.[1]

The court adopts "United States Circuit Court of Appeals for the ——[1a] Circuit" as the title of the court.[2]

2. SEAL.

The seal shall contain the words "United States" on the upper part of the outer edge; and the words "Circuit Court of Appeals" on the lower part of the outer edge, running from left to right; and the words "—[3] Circuit" in two lines, in the center, with a dash beneath.

3. TERMS.[4]

One term of this court shall be held annually at the city of ——,[5]

[1] In the *Sixth Circuit*, this rule is included in Rule 2 subdivision 1, and Rule 1 in this circuit is as follows: "1. *Definitions.*—In these rules 'counsel' shall include attorneys, solicitors, proctors and advocates; 'appellant' shall include, also, plaintiff in error, petitioner for review or mandamus, and any other party seeking review in this court; 'appellee' shall include, also, defendant in error and any other party respondent in this court." (202 Fed. v.)

[1a] *First, Second, Third, Fourth, Fifth, Sixth, Seventh, Eighth* and *Ninth*, respectively.

[2] In the *Seventh Circuit* this rule reads as follows: "The title of the court shall be 'United States Circuit Court of Appeals for the *Seventh Circuit.*'" See 91 Fed. iii.

[3] *First, Second, Third, Fourth, Fifth, Sixth, Seventh, Eighth* and *Ninth*, respectively.

[4] This rule reads as follows in the *First Circuit:* "One term of this court shall be held annually at the city of Boston at ten o'clock in the forenoon on the first Tuesday of October. Stated sessions thereof shall be there held at the same hour on the first Tuesday of every month, and may be adjourned to

[5] In the *Second Circuit*, "at the city of New York on the first Monday of October." In the *Ninth Circuit*, "at the city of San Francisco on the first Monday of October."

and shall be adjourned to such times and places as the court may from time to time designate.

such times and places as the court may from time to time designate. But, unless otherwise ordered, any adjournment shall be held to have been made to the first day of the next session." In the *Third Circuit:* "The terms of this court shall commence and be held on the first Tuesday in March, and the first Tuesday in October, at the city of Philadelphia." In the *Fourth Circuit:* "1. There shall be held in the city of Richmond, Virginia, three regular terms of this court; one on the first Tuesday of January, one on the first Tuesday of April, and one on the first Tuesday of October, in each year; and there shall be held in the city of Asheville, North Carolina, one regular term of this court on the first Tuesday of July, in each year. 2. Special sessions of this court shall be held at Richmond, Virginia, on the second Tuesday of every month of the year, except in those months in which regular terms of the court are held. During said sessions such orders, judgments or decrees as may be necessary concerning pending cases may be considered and disposed of, opinions in cases theretofore argued may be filed and decrees and judgments relating thereto entered, mandates issued, and any such further action taken as is authorized by the statute in such case made and provided. 3. If at any such special session no judge shall be in attendance, the clerk shall adjourn the court until the next day, or to such time as the senior Circuit Judge shall direct, and then in case no direction be made, to the next session or term of the court." 193 Fed. v. In the *Fifth Circuit:* "A session of this court shall be held annually at the city of Atlanta, Georgia, on the first Monday in October, at the city of Montgomery, Alabama, on the third Monday in October; at the city of Fort Worth, Texas, on the first Monday in November, at the city of New Orleans, Louisiana, on the third Monday in November and shall be adjourned to such other time and place as the court may from time to time order and designate." In the *Sixth Circuit:* "One term of this court shall be held annually on the Tuesday after the first Monday of October, and adjourned sessions on the Tuesday after the first Monday of each month in the year except August and September. At the July session no causes will be heard, except under special order of the court. (1) A printed docket containing all cases docketed and not heard shall be made by the clerk for the October, January and April sessions. (2) All sessions of the court shall be held in Cincinnati unless otherwise specially ordered by the court. (3) The court, on the first day of each session, except the July session, will begin calling the cases for argument in the order in which they stand on the docket, and proceed from day to day during the session in the same way. (4) If the parties, or either of them, shall be ready when the case is called, the same will be heard, provided that the time within which to file briefs has expired. But a case may be continued once by agreement of counsel in open court or by stipulation filed in the clerk's office, to any session during the term. Subsequent continuances must be made by the court on motion for cause shown: and engagements of counsel in other courts will not be considered good cause for continuance. (5) Each day's calendar shall consist of the six cases next in order after the case last submitted on the previous day, but the calendar will not include any case continued or passed by the court on stipulation of counsel before the adjournment of court on the previous day. The calendar for each day shall be exhibited in the clerk's office at the adjournment of court on the previous day. Counsel choosing to rely on the judgment of the clerk as to the probable time of hearing of any case, otherwise than as shown in the day's calendar above provided for, must do so at their own risk. (6) Two or more cases involving the same question may by leave of the court or by its order, be heard together, but they must be argued as one case. (7) For good cause shown, on motion of either party, the court may advance any cause upon the docket to be heard at any session, even though the time permitted under the rules for the filing of briefs may not have expired at the day set

4. QUORUM.

1. If at any term a quorum does not attend on any day appointed for holding it, any judge who does attend may adjourn the court from time

for hearing. Such motion for the advancement of causes will be heard only upon five days' previous notice to opposing counsel." In the *Seventh Circuit:* "A term of this court shall be held annually at the city of Chicago, on the first Tuesday in October, and continue until the first Tuesday in October of the succeeding year. Every term shall be adjourned to such times and places as the court may from time to time designate. Unless otherwise specially ordered the court will hold at Chicago three sessions for the hearing of causes during each term beginning on the first Tuesday in October and January, respectively, and the last Tuesday in April." (253 Fed.) In the *Eighth Circuit:* "1. Three terms of this court will be held annually, one at the city of St. Paul on the first Monday of May, one at the city of Denver on the first Monday of September and one at the city of St. Louis on the first Monday of December. 2. Cases from Minnesota, North Dakota, South Dakota, Nebraska, Iowa, Kansas, Missouri, Arkansas and Oklahoma in which transcripts to be printed under the supervision of the clerk of this court are filed or transcripts printed before the certification by the clerk of the lower court and proof by affidavit or admission that three copies of the printed transcripts have been served on the defendants in error or appellees, or their counsel, are filed on or before the 1st day of April, and cases from Colorado, Utah, Wyoming and New Mexico in which transcripts to be printed under the supervision of the clerk of this court are filed, or transcripts printed before certification by the clerk of the lower court and proof by affidavit or admission that three copies of the printed transcripts have been served on the defendants in error or appellees, or their counsel, and stipulations of the parties for their hearing at the May term in St. Paul are filed on or before the 1st day of April, and those only, will be heard at the succeeding May term of the court in St. Paul. 3. Cases from Colorado, Wyoming, Utah and New Mexico in which transcripts to be printed under the supervision of the clerk of this court are filed, or transcripts printed before certification by the clerk of the lower court and proof by affidavit or admission that three copies of the printed transcripts have been served on the defendants in error or appellees, or their counsel, are filed on or before the 1st day of July and cases from the remainder of the circuit in which transcripts to be printed under the supervision of the clerk of this court are filed, or transcripts printed before certification by the clerk of the lower court and proof by affidavit or admission that three copies of the printed transcripts have been served on the defendants in error or appellees, or their counsel, and stipulations of the parties for their hearing at the September term in Denver are filed on or before the 1st day of July, and those only, will be heard at the succeeding September term in Denver. 4. Cases from Minnesota, North Dakota, South Dakota, Nebraska, Iowa, Kansas, Missouri, Arkansas and Oklahoma in which transcripts to be printed under the supervision of the clerk of this court are filed, or transcripts printed before certification by the clerk of the lower court and proof by affidavit or admission that three copies of the printed transcripts have been served on the defendants in error or appellees, or their counsel, are filed on or before the 1st day of October, and cases from Colorado, Wyoming, Utah and New Mexico in which transcripts to be printed under the supervision of the clerk of this court are filed, or transcripts printed before certification by the clerk of the lower court and proof by affidavit or admission that three copies of the printed transcripts have been served on the defendants in error or appellees, or their counsel, and stipulations of the parties for their hearing at the December term in St. Louis are filed on or before the 1st day of October, and those only, will be heard at the succeeding December term in St. Louis. 5. These terms of the court may be adjourned to such times and places as the court may from time to time designate." (188 Fed.)

to time,[6] or, in the absence of any judge, the clerk may adjourn the court from day to day. If, during a term, after a quorum has assembled, less than that number attend on any day, any judge attending may adjourn the court from day to day until there is a quorum or may adjourn without day.[7]

2. Any judge attending when less than a quorum is present may make all necessary orders touching any suit, proceeding, or process depending in or returned to the court, preparatory to hearing, trial, or decision thereof.

5. CLERK.

1. The clerk's office shall be kept at the place designated in the act creating the court at which a term shall be held annually.[8]

2. The clerk shall not practice, either as attorney or counsellor, in this court or in any other court, while he shall continue to be clerk of this court.[9]

3. He shall, before he enters on the execution of his office, take an oath in the form prescribed by section 794 of the Revised Statutes, and

In the *Ninth Circuit:* "One term of this court shall be held annually at the city of San Francisco on the first Monday of October, and shall be adjourned to such times and places as the court may from time to time designate." (See also Rule 36.)

[6] In the *Third Circuit* the words "or from place to place" are here inserted.

[7] In the *First Circuit,* clause one of this rule reads as follows: "In the absence of a quorum on any day appointed for holding a term, or on any day to which the court is adjourned, any judge who attends shall adjourn the court from day to day; or, if no judge is present, the clerk shall so adjourn; and, in the absence of all the judges and the clerk, the marshal or his deputy shall so adjourn. But the court may, from time to time, as provided in Rule 3, enter orders directing an adjournment, or adjournments, for longer periods than from day to day, or *sine die.*" In the *Third Circuit* the words "and, in the absence of all the judges, the clerk may adjourn the court from day to day" are added. In the *Fourth Circuit,* in subdivision 1 of this rule the words "or from place to place," are inserted after the words "from time to time." (193 Fed. vi.) In the *Sixth Circuit,* the words "from time to time" are inserted in place of the words "from day to day." The following is also added to this subdivision: "or, in the absence of any judge, the clerk may adjourn court for successive intervals of one week until a judge attends." Subdivision 2 of this rule is omitted. (202 Fed. vi.) In the *Seventh Circuit* clause one reads: "If, at any term or session," etc. . . . "If, during a term or session," etc.: and in the *Ninth Circuit:* "If at any term or session," etc.

[8] In the *Second Circuit,* subdivision 1 provides that the clerk's office shall be kept in New York; in the *Third Circuit,* in the city of Philadelphia; in the *Fourth Circuit,* subdivision 1 of Rule 5 reads: "The clerk's office shall be kept at Richmond, Virginia." (193 Fed. vi); in the *Fifth Circuit,* subdivision 1 of Rule 5 reads: "The clerk's office shall be kept in the city of New Orleans;" in the *Sixth Circuit,* "The clerk's office shall be kept at Cincinnati." (202 Fed. vi); in the *Seventh Circuit:* "The clerk's office shall be kept at Chicago;" in the *Ninth Circuit:* "The clerk's office shall be kept at San Francisco, California."

[9] In the *Sixth Circuit,* subdivision 2, the words "while he shall continue to be clerk of this court" are omitted. (202 Fed.)

shall give bond in a sum to be fixed,[10] and with sureties to be approved, by the court, faithfully to discharge the duties of his office and seasonably to record the decrees, judgments, and determinations of the court,[11] and the bond shall be deposited for safe-keeping as the court may direct.

4. He shall not permit any original record or paper to be taken from the court-room or from the office without an order from the court.[12]

6. MARSHAL, CRIER, AND OTHER OFFICERS.[13]

1. Every marshal and deputy-marshal shall, before he enters on the duties of his appointment, take an oath in the form prescribed by section 782 of the Revised Statutes, and the marshal shall before he enters on the duties of his office, give bond in a sum to be fixed,[14] and with sureties to be approved, by the court, for the faithful performance of said

[10] In the *Fifth Circuit*, "in the sum of ten thousand dollars ($10,000)."

[11] In the *Second and Fourth Circuits*, here are inserted the words "A copy of such bond shall be entered on the journal of the court."

[12] In the *Second Circuit*, the following is added: "4. He shall carefully preserve in his office one copy of the printed record in every case submitted to the court for its consideration, and of all printed motions, briefs, and arguments filed therein." In the *Sixth Circuit*, the following is added to subdivision 4 of this rule: "or a judge thereof." (202 Fed. vi.) In the *Seventh Circuit* the following is added to this rule: "5. All fees collected by the clerk which are not properly taxable as costs in any case and which are not by law required to be by him deposited in the treasury of the United States, shall constitute a fund to be expended by the clerk under the direction of the court in the purchase of law books for the library of the court. 6. The clerk shall keep an accurate and itemized account of all moneys received by him officially, including costs and fees in cases in the court and fees and moneys collected on any account whatever, and shall deposit the same as received daily to his credit as clerk and separately from all individual accounts in a national bank designated by the senior judge; and at the end of each month and whenever required by the court or senior judge shall submit to the senior judge a detailed report showing by items all moneys received and all paid out during the month and the total balance on hand from each and all sources of receipt. Each report shall be accompanied by a statement over the signature of the cashier or other officer of the bank in which the deposit is kept of the amount in the bank to the credit of the clerk at the close of the last day included in the report." (91 Fed. iv.) In the *Ninth Circuit*, the words "except as provided in Rule 23" are added.

[13] In the *First Circuit* this rule was amended so as to read: "The marshal shall be in attendance during the sessions of the court, with such number of bailiffs, messengers, and other officers as the court may from time to time order." In the *Second Circuit* this rule is omitted, and Rule 6 is general Rule 7. In the *Third* and *Fourth Circuits*, the first subdivision is omitted. In the *Sixth Circuit*, the first subdivision of this rule is divided into two subdivisions as follows: "1. The crier and bailiffs of the District Court of any district where this court may be in session, are hereby authorized to act also during such session as crier and bailiffs of this court. 2. A crier or bailiff specially appointed for this court shall, before he enters on his duties, take an oath in the form prescribed by Section 782 of the Revised Statutes." (202 Fed. vi.) In the *Seventh Circuit*: "The crier and bailiffs of the court, before entering upon their duties, shall take an oath in the form prescribed by Section 782 of the Revised Statutes." In the *Eighth* and *Ninth Circuits* the first subdivision is omitted.

[14] In the *Fifth Circuit* the sum is fixed at $10,000. (60 Fed. lxxxiv.)

duties by himself and his deputies. Said bond shall be filed and recorded in the office of the clerk of the court.

2. The marshal and crier shall be in attendance during the sessions of the court, with such number of bailiffs and messengers as the court may, from time to time, order.[15]

7. ATTORNEYS AND COUNSELLORS.[16]

All attorneys and counsellors admitted to practice in the Supreme

[15] In the *Eighth Circuit* this subdivision reads: "1. The marshal of the district in which a term or session of the court is held and the crier shall be in attendance during the sessions of the court, with such number of bailiffs and messengers as the court may, from time to time, order." (188 Fed. viii.)

[16] In the *Second Circuit* this is Rule 6. In the *Fifth Circuit* this rule reads as follows: "All attorneys and counsellors admitted to practice in the Supreme Court of the United States, or any Circuit Court of the United States, upon filing certificate of such admission with the clerk of this court, and upon taking an oath or affirmation in the following form, viz.: 'I, ——— ———, do solemnly swear (or affirm) that I will demean myself as an attorney or counsellor of this court uprightly, and according to law, and that I will support the Constitution of the United States' (a copy of which shall be filed with the clerk), shall become attorneys and counsellors of this court; provided, however, that any attorney or counsellor eligible to admission as an attorney and counsellor of this court may be admitted to practice, on motion in open court, upon taking the oath or affirmation as prescribed and subscribing the roll." (90 Fed.) In the *Sixth Circuit:* "An attorney and counsellor admitted to practice and in good standing in the Supreme Court or in a District Court of the United States, or in the court of last resort in the state of his residence, may become attorney and counsellor in this court on taking an oath or affirmation as prescribed by Rule 2 of the Supreme Court of the United States, and upon subscribing the roll. On each admission the clerk will collect ten dollars ($10.00) to be applied to the purchase, repair, and rebinding of law books for the use of the court and bar. Every person taking the oath and paying such fee shall be entitled to a certificate of his admission, signed by the clerk." (228 Fed.) In the *Seventh Circuit:* "All attorneys and counsellors, admitted to practice in the Supreme Court of the United States or in any Circuit Court of the United States, or in the Supreme Court of a State in this circuit, may become attorneys and counsellors in this court on taking an oath or affirmation in the form prescribed by Rule 2 of the Supreme Court of the United States (3 Sup. Ct. vi), and on subscribing the roll." (91 Fed. v.) In the *Eighth Circuit* this rule reads as follows: "1. All attorneys and counsellors admitted to practice in the Supreme Court of the United States, or in any Circuit Court or District Court of the United States, or in the Supreme Court of any State in this circuit, may, upon motion of some member of the bar of this court, be admitted as attorneys and counsellors in this court on taking an oath or affirmation in the form prescribed by Rule 2 of the Supreme Court of the United States, and on subscribing the roll; but no fee shall be charged therefor. 2. And any attorney and counsellor admitted to practice in the Supreme Court of the United States or in the Supreme Court of any State or in the District or Circuit Courts of the United States for this circuit, may be admitted by order of this court to practice and may be enrolled as an attorney and counsellor of this court, thirty days after he furnishes to the clerk of this court a certificate of a clerk or judge of any one of the courts named that the applicant is an attorney of any one of said courts; and upon subscribing and forwarding to the clerk the following oath: 'I do solemnly swear (or affirm) that I will demean myself as an attorney and counsellor of the Circuit Court

Court of the United States, or in any Circuit Court [17] of the United States, shall become attorneys and counsellors in this court on taking an oath or affirmation in the form prescribed by Rule 2 of the Supreme Court of the United States, and on subscribing the roll; but no fee shall be charged therefor.[18]

8. PRACTICE.[19]

The practice shall be the same as in the Supreme Court of the United States, as far as the same shall be applicable.

9. PROCESS.

All process of this court shall be in the name of the President of the United States, and shall be in like form and tested in the same manner as process of the Supreme Court.[20]

of Appeals for the Eighth Circuit, uprightly and according to law; and that I will support the Constitution of the United States. So help me God.'" (188 Fed. viii.) In the *Ninth Circuit*, Rule 7 reads as follows: "All attorneys admitted to practice in the Supreme Court of the United States, or in any District Court of the Ninth Circuit, shall be deemed attorneys of the Circuit Court of Appeals for the Ninth Circuit; but such attorneys, on or before their first appearance in open court in said court, shall take an oath or affirmation, in the form prescribed by Rule 2 of the Supreme Court of the United States, and subscribe the roll of attorneys. All other persons who have been admitted to practice in the highest court of any State or Territory, upon presenting satisfactory evidence of good moral character and fair professional standing, may be admitted to practice in said court, upon taking the oath so prescribed, and subscribing the roll of attorneys."

[17] In the *Second Circuit*, add the words "or District" after the word "Circuit." In the *Fourth Circuit*, the words "District Court" are inserted in place of the words "Circuit Court." (233 Fed.)

[18] In the *Third Circuit* the following clause is added to the rule: "And all attorneys and counsellors of the Circuit Court of the United States for the Third Circuit shall be attorneys and counsellors of this court without taking any further oath." In the *Fourth Circuit*, the words "and paying to the clerk a fee of $5. The moneys received by the clerk under this rule shall be accounted for to the court and be expended under its direction for the purchase of law books for the court library," instead of the words "but no fee shall be charged thereof."

[19] In the *Second Circuit* this is Rule 7.

[20] In the *Sixth Circuit*, this rule is included in Rule 8, as subdivision 2. (118 C. C. A. ix.) And Rule 9 is as follows: "9. *Service of Papers*—1. Copies of all papers or proceedings filed by any party in any cause shall, at or before the time of filing, be served upon counsel representing each adverse interest and proof or acknowledgment of such service shall be endorsed upon each paper filed. The clerk may insist upon such proof as a prerequisite to filing, or may file and require the prompt furnishing of such proof, as he may in each case think proper. 2. Service may be personal or by mail. If personal, it shall consist of delivery at his office to counsel or to a clerk. If by mail, it shall consist in depositing the case in the post-office with postage paid, addressed to the counsel at his post-office address, which address shall include his street and number, unless the same are unknown. Each proof of service shall show a full compliance with this rule." (202 Fed. vii.)

10. BILL OF EXCEPTIONS.

The judges of the Circuit and District Courts shall not allow any bill of exceptions which shall contain the charge of the court at large to the jury in trials at common law upon any general exception to the whole of such charge. But the party excepting shall be required to state distinctly the several matters of law in such charge to which he excepts; and those matters of law, and those only, shall be inserted in the bill of exceptions, and allowed by the court.[21]

[21] In the *Second Circuit* this is Rule 9 and reads as follows: "The judges of the District Court shall not allow any bill of exceptions unless the same contain the whole charge of the court to the jury. No general exception to the whole of such charge shall be allowed, but the party excepting shall be required to state distinctly the several matters of law in such charge to which he excepts." In the *Third Circuit* the rule reads: "1. The judges of the District Courts shall not allow any general exception to the whole of the charge to the jury in a civil or a criminal trial at common law, nor shall a series of exceptions be allowed which produces the same result. But the party excepting shall state distinctly and separately the several matters in such charge to which he excepts, and only such matters shall be included in the bill of exceptions and allowed by the court. Exceptions to the charge or to the judge's action upon the requests for instruction shall be taken immediately on the conclusion of the charge before the jury retire, shall be specified in writing or dictated to the stenographer, and shall be specific and not general. 2. Exceptions to the admission or rejection of evidence shall be specific and not general, and the bill of exceptions to such admission or rejection shall contain only so much of the evidence admitted or offered and rejected as is necessary for the presentation and decision of the questions saved for review. Unless there be saved a question which requires the consideration of all the evidence, a bill of exceptions containing all of it shall not be allowed." In the *Fourth Circuit*, the words, "Circuit and," in the first line of this rule, are omitted, and the following subdivision is added to the end of this rule: "2. Only so much of the evidence shall be embraced in a bill of exceptions as may be necessary to present clearly the questions of law involved in the rulings to which exceptions are reserved, and such evidence as is embraced therein shall be set forth in condensed and narrative form, save as a proper understanding of the questions presented may require that parts of it be set forth otherwise." (233 Fed.) In the *Sixth Circuit*, Rule 10 is as follows: "1. The assignments of error required by Rule 11 shall be filed at or before the settling of the bill of exceptions. The evidence in a bill of exceptions shall not be set forth in full, but shall be stated in simple and condensed form, all parts not essential to the decision of some one of the questions presented by the assignments of error being omitted and the testimony of witnesses being stated only in narrative form, save that, if either party desires it and the judge so directs, any part of the testimony shall be reproduced in the exact words of the witness. 2. No general exception to the whole of any charge to a jury on trials at law shall be allowed in any bill of exceptions. Exceptions to a charge, in order to be allowed in a bill of exceptions, must be taken before the jury retires and must state distinctly the several matters of law to which exception is taken. In cases where exception is taken to part of a charge, and such exception may be affected by other parts or by the charge as a whole, the entire charge shall be included in the bill of exceptions." (202 Fed. vii.) In the *Seventh Circuit* the rule contains the following additions: "(2) A bill of exceptions shall contain of the evidence only such a statement as is necessary for the presentation and decision of questions saved for review, and unless there be saved a question which requires the consideration of all the evidence

11. ASSIGNMENT OF ERRORS.

The plaintiff in error or appellant shall file with the clerk of the court below, with [22] his petition for the writ of error or appeal, an assignment of errors,[23] which shall set out separately and particularly each error asserted and intended to be urged. No writ of error or appeal shall be allowed until such assignment of errors shall have been filed.[24] When the error alleged is to the admission or to the rejection of evidence, the assignment of errors shall quote the full substance of the evidence [25] admitted or rejected. When the error alleged is to the charge of the court, the assignment of errors shall set out the part referred to *totidem verbis*, whether it be in instructions given or in instructions refused.[26] Such assignment of errors shall form part of the transcript of the record, and be printed with it.[27] When this is not done, counsel will not be heard, except at the request of the court; and errors not assigned according to this rule will be disregarded, but the court, at its option, may notice a plain error not assigned.

12. OBJECTIONS TO EVIDENCE IN THE RECORD.[28]

In all cases of equity or admiralty jurisdiction, heard in this court, no objection shall be allowed to be taken to the admissibility of any deposition, deed, grant, exhibit, or translation, found in the record as

shall not be allowed. (3) No document shall be copied more than once in a bill of exceptions or in a transcript of the record of the case, but instead there shall be inserted a reference to the one copy set out. A motion for a new trial and orders and entries relating thereto shall not be set out in the transcript unless required by written praecipe, of which a copy shall also be set out. (4) The cost of unnecessary matter in the bill of exceptions or transcript or in the printed record shall not be recovered of the appellee or defendant in error, and in its discretion the court will in case of dispute appoint a referee to determine and report what was necessary therein, and will tax the cost of the reference as shall seem just."

[22] In the *Second Circuit* this is Rule 10; the words "his petition for" are omitted. In the *Sixth Circuit*, the following change occurs in this rule: The words, "The appellant shall file with the clerk of the District Court at or before the time of filing," are inserted in place of the words, "The plaintiff in error or appellant shall file with the clerk of the court below, with." (202 Fed. viii.)

[23] In the *Third Circuit* the words "as required by Section 997 of the Revised Statutes" are here inserted.

[24] In the *Third Circuit* the sentence, "No writ of error . . . shall have been filed," is omitted.

[25] In the *Sixth Circuit*, the words "of the evidence" are omitted. (202 Fed. viii.)

[26] In the *Third Circuit* the following is here inserted: "When the error alleged is based on the trial court's refusal to enter a judgment non obstante veredicto for the plaintiff in error on the whole record, the assignment shall state the reasons presented to the trial court for the entry of such judgment; when the error alleged is to a ruling upon the report of a master or referee, the assignment shall state the exception to the report and the action of the court upon it." In the *Seventh Circuit* the words "and shall state distinctly the grounds of objection to an instruction given" are here inserted.

[27] In the *Sixth Circuit* this sentence is omitted. (202 Fed. viii.)

[28] In the *Second Circuit* this is Rule 11.

evidence, unless[29] objection was taken thereto in the court below and entered of record;[30] but the same shall otherwise be deemed to have been admitted by consent.

13. SUPERSEDEAS AND COST BONDS.[31]

1. *Supersedeas* bonds in the Circuit and[32] District Courts must be taken, with good and sufficient security, that the plaintiff in error or appellant shall prosecute his writ or appeal to effect, and answer all damages and costs if he fail to make his plea good. Such indemnity, where the judgment or decree is for the recovery of money not otherwise secured, must be for the whole amount of the judgment or decree, including just damages for delay, and costs and interest on the appeal; but, in all suits where the property in controversy necessarily follows the suit, as in real actions and replevin, and in suits on mortgages, or where the property is in the custody of the marshal under admiralty process, or where the proceeds thereof, or a bond for the value thereof, is in the custody of the court, indemnity

[29] In the *Sixth Circuit*, the words "the record shows that" are inserted after the word "unless." (202 Fed. viii.)

[30] In the *Sixth Circuit*, the words "brought to the attention of the trial judge on the submission of the cause" are inserted in place of the words "entered of record." (202 Fed. viii.)

[31] In the *Sixth Circuit*, this rule is divided into two rules, namely, Rules 13 and 14, which are as follows: "13. *Allowance of writ of error or appeal*—1. An appeal from or writ of error to a District Court in the cases provided for in Sections 128, 129 and 130 of the Judicial Code approved March 3, 1911, may be allowed in term time or in vacation by the Circuit Justice, wherever acting, or by any Circuit Judge acting within the circuit, or by any District Judge acting within the district where the case was heard and authorized to hold court in that district; and the proper security may be taken and the citation be signed by him and he may also grant a supersedeas and stay of execution or of proceedings pending such writ of error or appeal." (202 Fed. viii.) "14. *Supersedeas and cost bonds*—1. Upon the allowance of any appeal to, or writ of error from, this court (except when allowed to a party proceeding in forma pauperis, or in other case where, by statute, no bond is required), the court or judge allowing shall take and approve a bond with good and sufficient security that the appellant shall prosecute his writ or appeal to effect, and answer all costs if he fail to make his plea good. 2. If the appeal or writ of error is to operate as a supersedeas, the court or judge shall, in the allowance, order that it have such effect upon the filing of the required bond, and in such case, the bond shall be conditioned to answer all damages and costs. Such indemnity, where the judgment or decree is for the recovery of money not otherwise secured, must be for the whole amount of the judgment or decree, including just damages for delay, and costs and interest on the appeal; but in all suits where the property in controversy necessarily follows the suit, as in real actions and replevin, and in suits on mortgages, or where the property is in the custody of the marshal under admiralty process, or "where the proceeds thereof, or a bond for the value thereof, are in the custody of the court, indemnity will be required only in an amount sufficient to secure the sum recovered for the use and detention of the property, and the costs of the suit and just damages for delay, and costs and interest on the appeal." (202 Fed. viii, ix.)

[32] In the *Second Circuit* this is Rule 12, and the words "circuit and" are omitted in subdivision 1. In the *Third, Fourth* and *Ninth Circuits* the words "Circuit and" are omitted in subdivisions 1 and 2.

in all such cases will be required only in an amount sufficient to secure the sum recovered for the use and detention of the property, and the costs of the suit and just damages for delay, and costs and interest on the appeal.

2. On all appeals from any interlocutory order or decree granting or continuing an injunction in a Circuit or District Court, the appellant shall, at the time of the allowance of said appeal, file with the clerk of such Circuit or District Court a bond to the opposite party, in such sum as such court shall direct, to answer all costs if he shall fail to sustain his appeal.[33]

14. WRITS OF ERROR, APPEALS, RETURN, AND RECORD.[34]

1. The clerk of the court to which any writ of error may be directed [35]

[33] In the *First Circuit* the second subdivision of this rule reads as follows: "On an appeal from an interlocutory order or decree, the appellant shall, at the time of the allowance thereof, file a bond to the adverse party in such sum as the judge who allowed the appeal shall direct, to answer all costs if he shall fail to sustain his appeal." In the *Second Circuit* par. 2 reads: "Bonds for costs shall be in the sum of $250 unless otherwise ordered by the judge approving the same." In the *Fourth Circuit*, subdivision 2 reads as follows: "2. On all appeals under Section 129 of the Judicial Code, the appellant shall at the time of the allowance of said appeal, if required by the judge of the court below, file with the clerk of such court a bond to the opposite party in such sum as such judge shall direct, for all costs and damages, or simply for all costs, as the said judge shall determine, if he shall fail to sustain his appeal." (233 Fed.) In the *Seventh Circuit*, clause 2 reads as follows: "2. On appeal from any interlocutory order of decree granting or continuing an injunction in a Circuit or District Court, the appellants shall at the time of an allowance of said appeal file with the clerk of such Circuit or District Court a bond to the opposite party in such sum as such court shall direct, to answer all costs if he shall fail to sustain his appeal." (Supplement to Dewhurst's Annotated Rules of Practice in United States Courts.) In the *Eighth Circuit* this subdivision reads as follows: "On all appeals from any interlocutory order or decree of a District Court, or a judge thereof, granting, continuing, refusing, dissolving or refusing to dissolve an injunction or appointing a receiver, the appellant shall, at the time of the allowance of said appeal, file with the clerk of such District Court a bond to the opposite party in such sum as such court shall direct, to answer all costs if he shall fail to sustain his appeal. ('The Judicial Code,' section 128, Act of March 3, 1911.)" (188 Fed. x.)

[34] In the *First Circuit* the following additions were made to this rule: *First.* To the sixth paragraph of Rule 14 is added: "The testimony in such a record shall embrace the *viva voce* proof in the District Court, if the same, or the substance thereof, has been reduced to writing with the approval of its judge. The reasonable cost of so reducing the same to writing may be taxed as a part of the costs of the record, except so far as allowed as costs in the District Court." *Second.* New paragraphs are added to Rule 14 as follows: "7. Further proof in instance causes in admiralty shall include only that which could not with diligence have been had at the trial below, or which was there rejected, or was omitted through misapprehension, provided the evidence be accompanied with a certificate of counsel showing reasonable excuse for the

[35] In the *Second Circuit* this is Rule 13, and the words "shall on demand of any party and payment of the clerk's fees" are here inserted. In the *Third Circuit*, after the word "directed," the following words are inserted: "Upon being paid or tendered his fees therefor."

shall make a return of the same by transmitting a true copy of the record,

misapprehension. Except by order of the court first obtained, merely cumulative proofs shall not be so taken; but for this purpose the evidence of witnesses who had different duties, interests, or opportunities of observation, will not ordinarily be held cumulative in cases of collision or other maritime tort. 8. Such further proof may be taken after the appeal is allowed, in the manner provided by law for depositions *de bene esse*, or by an examiner appointed by any circuit or district judge, or selected by the parties, or upon interrogatories and commissions as provided in Rule 13 of the Circuit Courts of this circuit, *mutatis mutandis*. It must be taken and filed forthwith after it is obtainable, but it cannot, except by order of the court, be taken or filed within thirty days before any session at which the cause may be heard, nor thereafterwards until the cause has been postponed to the next term or session. 9. Objections to further proof shall be filed with the magistrate and returned with the evidence. Within seven days after the evidence is taken, the party so objecting may file in print a motion to suppress the same, with a copy of the objections and a brief. The other party may within seven days thereafter file in print a counter-statement and brief. The objections and counter-statement, so far as they contain matters of fact *dehors* the record, shall be verified by affidavit. The court will consider the objections in advance of the trial, or in connection therewith, as it may in each case determine, and without oral argument, and will order suppressed evidence not rightfully taken. The party taking the evidence so suppressed shall pay the costs arising therefrom, including the printing thereof. 10. Nothing herein shall exclude applications for leave to take further proof, or objections thereto, in advance of the taking thereof, or objections touching the formalities of taking it; but the latter must be brought to the attention of the court forthwith after the evidence is filed." (150 Fed. xi.) "The time for the return of citations in cases from Porto Rico shall be two calendar months." In the *Second Circuit* strike out the words "Circuit and" and "Circuit or" wherever they occur in this rule. In the *Third Circuit* subdivision 1 is as follows: "1. Any appeal to this court, or writ of error from this court, allowable by law, may be allowed in term time or vacation, by the circuit justice, or by any of the circuit judges within this circuit, or by any district judge within the district where the case to be reviewed was heard or tried, who may also take the proper security, sign the citation, and, if he deem it proper so to do, grant a supersedeas and stay of execution or of proceedings pending such writ of error or appeal. Whenever an appeal or a writ of error to this court shall be allowed by a district judge, or shall be issued by the clerk of a District Court, the clerk of the District Court shall give immediate notice thereof to the clerk of this court." Subdivisions 1, 2, 3, 4 and 5 of the general rule become subdivisions 2, 3, 4, 5, 6, and 7 is as follows: "7. The records in cases of admiralty and maritime jurisdiction shall be made up in the same manner, as nearly as practicable, as are the records in equity cases." In the *Fourth Circuit*, Rule 14 is as follows: "1. The clerk of the court to which any writ of error may be directed shall (except as otherwise provided by Rule 23) make return of the same, by certifying under his hand and the seal of said court, in accordance with the act of Congress of February 13, 1911 (36 Stat. at Large, 901), and transmitting to the clerk of this court one of the printed transcripts of the record provided for by said act. In all cases of appeal and also in all cases of petition for revision in bankruptcy said clerk shall likewise certify, seal and transmit a copy of the printed transcript of the record to the clerk of this court. 2. In every printed transcript of the record the order of the parts thereof shall substantially follow the order in which the same were filed, entered or made, and shall contain a copy of such opinion or opinions of the trial judge as may have been filed. It shall be suitably indexed, and where any deposition or report of evidence requires more than one printed page the name of the deponent or witness shall be printed at the top of each page. And the foregoing shall,

bill of exceptions, assignment of errors, and all proceedings in the case, under his hand and the seal of the court.[86]

so far as may be applicable, apply to the printed addenda to records hereinafter provided for. 3. Except in cases where counsel shall agree by written and signed stipulation,—which shall be a part of the record,—as to what portions of the record and proofs of the case in the court below, shall be printed in the transcript of the record for use in this court, the trial judge shall have the power, upon application after reasonable notice to the opposing party or his counsel, to determine what shall be included in such transcript, and his determination shall be signed by him, and made part of the record; he shall include in such signed paper, such portions of the record and of the proofs as he may deem material for the proper disposition of the questions to be decided by this court, as also such parts as are specially required by these rules. But if any party desires printed any document or part of the record or proofs directed by the trial judge to be omitted, such party may print the same under separate cover and cause it to be certified and transmitted to this court as an addendum to the record. Such printing and certification shall be primarily at the cost of the party who requires it. The cover sheet of such addendum shall contain the title of the cause and shall plainly show that it is an addendum to the transcript and shall show at whose instance it was printed. 4. Whenever it shall be necessary or proper, in the opinion of this court or of the court below, that original papers of any kind should be inspected here, this court or the court below may make such rule or order for the safe-keeping, transporting and return of such original papers as to it may seem proper. 5. All appeals, writs of error, and citations must be made returnable not exceeding forty days from the day of signing the citation, whether the return day fall in vacation or in term time, and be served before the return day. 6. The transcript of the record in cases of admiralty and maritime jurisdiction shall include the matters which, by admiralty Rule 52 of the Supreme Court, are required to be included therein. 7. No transcript of the record and proofs shall (unless it be specifically otherwise ordered by the trial judge) contain a copy of the petition for writ of error or petition for appeal, the order granting writ of error or appeal, the writ of error, the appeal bond, the citation, the return of service or waiver of service of citation. In lieu thereof the originals of said documents shall be certified to this court within forty days of the date of the citation (to be returned to the court below with the mandate of this court, except the citation and writ of error), and in said transcript there shall be inserted a memorandum stating the date of the petition for writ of error or for appeal, the date of the order granting writ of error or allowing appeal, the date of the writ of error and date when copy thereof or copy of order allowing appeal is lodged in the office of the clerk of the court below for adverse parties, the date, penalty, the names of the obligors, the condition (whether for payment of costs and damages or for costs alone) of the appeal bond, the date of the citation, and the date of the service thereof or of the waiver of service thereof. No general replication in equity shall be copied into the transcription of the record, but in lieu thereof there shall be inserted a memorandum showing the date of filing of such replication and by whom filed. When a case has by writ of error or appeal been brought to this court the second time there shall only be copied in the record the proceedings subsequent to the former writ of error or appeal. It shall be the

[86] In the *Seventh Circuit:* "1. The clerk of the court to which any writ of error may be directed, shall make a return of the same by transmitting a true copy of the record, bill of exceptions, assignment of errors, and all proceedings in the case necessary to the hearing in this court, under his hand and the seal of the court. The clerk may require of the appellant or plaintiff in error a written precipe stating in detail what the transcript shall contain, and when a precipe is filed shall insert a copy thereof in the transcript." In the *Ninth Circuit,* after the word "record," is added: "opinion or opinions of the court."

2. In all cases brought to this court by writ of error or appeal [37] to review any judgment or decree, the clerk of the court by which such judgment or

duty of the trial judge in determining what shall constitute said transcript of the record, to direct the omission of all matter which in his judgment is unnecessary to the presentation of the issues to be passed upon by this court and especially to prevent unnecessary duplications in such transcript. And the clerk below shall not certify any transcript of the record and proofs unless it contains either the stipulation of counsel or the determination of the trial judge mentioned in section 3 of this rule. 8. Whenever the printed transcript of the record or any addendum thereto as certified by the clerk of the court below shall contain any corrections or insertions, it shall be the duty of the party filing the printed transcript or addendum in this court to correct all the copies of the same so as to correspond with the certified transcript or addendum." (233 Fed.) In the *Sixth Circuit*, this rule is numbered 15 and reads as follows: "15. *Records and returns on writs of error and appeals*—1. All appeals, writs of error and citations must be made returnable not exceeding thirty days from the day of allowing the appeal in open court or signing the citation, whether the return fall in vacation or in term time, and must be served before the return day. 2. The clerk of the District Court shall make return to any writ of error to, or appeal from, that court, by transmitting, certified under his hand and the seal of the court, a transcript of the record in the District Court, prepared as directed by other provisions of this rule. He shall make such return on or before the return day, unless the time therefor be extended as otherwise provided in these rules. 3. In all appeals, not in admiralty (and save in cases under general equity Rule 77), the transcript—the contents of which are to be determined pursuant to clauses (a) and (c) of general equity Rule 75—shall always include: (1) the statement of evidence; (2) the clerk's certificate showing what portions are included by request of each party; (3) any opinion or memorandum filed by the judge pertaining to the matter involved in the appeal; (4) the pleadings affecting the decree or order appealed from, and such order or decree; (5) all proceedings relating to the appeal and the security given thereon, together with a copy of the citation, if one there was, and the evidence of service; (6) in cases removed from the state court, the full transcript on removal; and (7) in bankruptcy, shall also contain the petition for adjudication and the order thereon. It shall omit: (1) all formal proceedings to bring into court parties who afterwards appear generally, unless such proceedings are involved in the desired review; and (2) all motions or petitions filed and all affidavits in connection therewith, and all orders made and proceedings had thereon, unless such matters are involved in the desired review. It shall carry, at the beginning of each paper, the name thereof, and the date when it was filed, omitting the title of the court and the cause and all formal endorsements. Orders and decrees shall carry a short, descriptive title with the date and entry and the name of the judge, but without other caption. Exhibits or documents shall not be duplicated, but a cross reference shall be made. 4. Upon writ of error from this court, the contents of the transcript shall be determined and the transcript made up in the same manner provided by clauses (a) and (c) of general equity Rule 75 and clause 3 of this rule, both applied as near as may be to an action at law. Such transcript shall contain also a copy of the bill of exceptions, the assignments of error and the writ of error. 5. The original citation with proof of service and the original writ of error shall be filed with the clerk of the court below and be by him transmitted with the transcript to the clerk of this court. 6. Whenever it shall be necessary or proper, in the opinion of the district judge, that original papers or exhibits of any kind shall be inspected in this court upon review, he may make such rule or order as to him may seem proper for the safe-keeping, transporting and return of

[37] In the *Second Circuit* the words "or petition to revise" are here inserted.

decree was rendered shall annex to and transmit with the record a copy of the opinion or opinions filed in the case.[38]

3. No case will be heard until a complete record, containing in itself, and not by reference, all the papers, exhibits, depositions, and other proceedings, which are necessary to the hearing in this court, shall be filed.[39]

4. Whenever it shall be necessary or proper, in the opinion of the presiding judge in any Circuit or [40] District Court, that original papers of any kind should be inspected in this court upon writ of error or appeal, such presiding judge may make such rule or order for the safe-keeping, transporting, and return of such original papers as to him may seem proper; and this court will receive and consider such original papers in connection with the transcript of the proceedings.

5. All appeals, writs of error, and citations must be made returnable [41] not exceeding thirty days [42] from the day of signing the citation, whether the return-day fall in vacation or in term-time,[43] and be served before the return-day.[44]

such original papers and exhibits; and this court will receive and consider such originals in connection with the transcript. 7. The record, in cases of admiralty and maritime jurisdiction, shall be made up as provided in general admiralty Rule 52. 8. On motion duly made, or on its own motion, this court will order portions to be stricken from the transcript, or additions to be made thereto by supplementary return, as may appear proper." (202 Fed. ix-xi.)

[38] In the *Eighth Circuit* added to subdivision 2 the words: "(and in cases at law a complete copy of the charge of the court to the jury.)" In the *Ninth Circuit*, after the word "record," the subdivision reads as follows: "The original writ of error and citation, or citation issued in the cause, and a certificate under seal stating the cost of the record and by whom paid."

[39] In the *Seventh Circuit* the subdivision 3 reads as follows: "No case will be heard until a complete record shall have been filed, containing in itself, and not by reference, all the papers, exhibits, depositions, and other proceedings necessary to the hearing in this court." In the *Eighth Circuit* this subdivision reads as follows: "No case will be heard until twenty-five copies of the printed transcript of the record, containing in themselves, and not by reference, all the papers, exhibits, depositions, sketches, drawing, photographs, maps, blue prints and other proceedings, which are necessary to the hearing in this court, printed title pages in the form prescribed in section 5 of Rule 26, chronological printed indexes of each and every item of their contents specifying the pages where evidence, testimony and exhibits including those in the body of any pleading, order or bill of exceptions may be found and briefly naming or describing each exhibit in addition to its number, together with a statement of the numbers, names and dates of issue of any patents, shall have been filed in this court." (188 Fed. x, xi.)

[40] In the *Third* and *Ninth Circuits* the words "Circuit and" are omitted.

[41] In the *Ninth Circuit* the words "at San Francisco, California," are here inserted.

[42] In the *Eighth Circuit* "sixty days." (188 Fed. xi.)

[43] In the *Second Circuit* the words "from the day of signing the citation, whether the return-day fall in vacation or in term time" are omitted. And subdivision 6 is also omitted.

[44] In the *Third Circuit* the following is added: "but the citation must be signed, and the bond for costs must be approved and filed, and the assignments of error submitted and filed, with the petition for the appeal or writ of error immediately after the appeal or writ of error is allowed: Provided, however, that every appeal taken from an interlocutory decree, under the

6. The record in cases of admiralty and maritime jurisdiction shall be made up as provided in general admiralty rule No. 52 of the Supreme Court.

15. TRANSLATIONS.[45]

Whenever any record[46] transmitted to this court upon a writ of error

seventh section of the act entitled 'An act to establish Circuit Courts of Appeals, and to define and regulate in certain cases the jurisdiction of the courts of the United States, and for other purposes,' approved March 3, 1891, and amendments to said section, shall be made returnable in ten days from the allowance of the appeal and the signing of the citation."

In the *Fifth Circuit* to the fifth subdivision these words are added: "Provided, however, that appeals taken from interlocutory decrees under the seventh section of the act entitled 'An act to establish Circuit Courts of Appeals and define and regulate in certain cases the jurisdiction of the courts of the United States and for other purposes,' approved March 3, 1891, and amendments thereto, shall be made returnable not exceeding ten days from the day of taking the same." In the *Seventh Circuit* this subdivision reads as follows: "All appeals, writs of error and citations must be made returnable not exceeding thirty days from the date on which the appeal is allowed, or the writ of error issued, whether the return fall in vacation or in term time, and be served before the return day. If a party be non-resident the citation and any other writ or notice necessary in the prosecution of the appeal or writ of error may be served upon such party's counsel or attorney of record, who for such purpose may not be discharged unless another resident be designated of record in the case upon whom service may be made." In the *Eighth Circuit:* "All appeals, writs of error, and citations must be made returnable not exceeding sixty days from the day of signing the citation, whether the return day fall in vacation or in term time, and be served before the return day."

[45] In the *Second and Sixth Circuits* this rule is omitted.

In the *Third Circuit* this is Rule 16, and Rule 15 is as follows:

"BAIL IN ERROR.

"1. Where a writ of error has been allowed in a criminal case, the justice or judge who allowed the writ, or any judge of the court which entered the judgment to be reviewed, shall have power to admit the plaintiff in error to bail for his appearance in such court on the determination of the proceedings on the writ of error to abide by and obey any order that may be made therein. The bond or recognizance for such appearance shall be substantially in the following form:

"United States of America, ... District of ..... ss.

"We (here insert name of defendant), residing at ..... and (here insert the name of surety), residing at ..... in the state of ....., acknowledge ourselves to be jointly and severally indebted to the United States of America in the sum of ..... dollars, lawful money of the United States of America, to be levied of our goods and chattels, lands and tenements, upon this condition: That if the said ....., the defendant, upon whose application a writ of error has been allowed by the United States Circuit Court of Appeals for the Third Circuit and is now pending, shall be and appear at the District Court of the United States for the ..... District of ..... upon the determination of the proceedings on said writ of error, and the receipt and filing of a mandate or other process or certificate showing the disposition thereof by the

[46] In the *Eighth Circuit*, the word "record" reads "transcript." (188 Fed. xi.)

or appeal shall contain any document, paper, testimony, or other proceeding, in a foreign language, and the record does not also contain a translation of such document, paper, testimony, or other proceeding, made under the authority of the inferior court or admitted to be correct, the record shall not be printed; but the case shall be reported to this court by the clerk, and the court will thereupon remand it back to the inferior court,[47] in order that a translation may be there supplied and inserted in the record.

16. DOCKETING CASES.[48]

1. It shall be the duty of the plaintiff in error or appellant to docket the case, and file the record thereof with the clerk of this court, by or

said Court of Appeals, or, within five days thereafter, to answer and obey whatever final order or judgment, except as to costs, shall be made in the premises, and not depart said court without leave thereof, then this recognizance to be void; otherwise, to remain in full force and virtue.

"..... [L. S.]
"..... [L. S.]
"..... [L. S.]

"Taken, acknowledged and subscribed, this ..... day of ....., A. D. 191.., in open court.

"....., Clerk of District Court."

In the *Fourth Circuit*, this rule is as follows: "Whenever any transcript of the record transmitted to this court shall contain any documents, papers, testimony or proceedings in a foreign language, and the transcript does not also contain a translation of the said documents, papers, testimony or proceedings made under the authority of the lower court, or admitted to be correct, the transcript of the record may be returned by this court to the lower court in order that a translation may there be supplied, printed and certified to this court." (233 Fed. x.)

[47] In the *Eighth Circuit* the following words are inserted after the words "to the inferior court" and before the words in "order that:" "and if the record is to be printed in the court below, it shall be reported to that court by its clerk." (188 Fed. xi.)

[48] In the *First Circuit* this rule reads as follows: "1. The plaintiff in error or appellant shall docket the case, and file the record thereof, on or before the return day, whether in vacation or in term time. But, for good cause shown, the justice or judge who signed the citation, or any circuit or district judge, may enlarge the time, the order of enlargement to be filed in this court. 2. If the plaintiff in error or appellant shall fail to comply with this rule, the defendant in error or appellee may have the cause docketed and dismissed whether in term time or vacation upon producing a certificate from the clerk of the court wherein the judgment or decree was rendered, stating the case, the return day of the citation, and that the writ of error or appeal was duly sued out or allowed. And the plaintiff in error or appellant shall not be entitled to docket the case, or file the record, after the same shall have been docketed or dismissed under this rule, unless by the order of the court after notice to the adverse party. But the defendant in error or appellee may, at his option docket the case and file the record; and, if the case is docketed and the record filed by the plaintiff in error or appellant within the time prescribed by this rule, or by the defendant in error or appellee at any time thereafter, the case shall stand for argument. 3. On the filing of the record, the appearance of the counsel for the party docketing the case shall be entered."

In the *Second Circuit* this is Rule 14.

before the return-day, whether in vacation or in term-time.[49] But, for

In the *Third Circuit* this is Rule 16, and the following is the first sentence in place of that in the general rule:

"FILING RECORDS, DOCKETING CASES AND ENTERING APPEARANCES.

"1. The plaintiff in error or appellant shall file the record of the case and cause it to be docketed by the clerk of this court on or before the return day of the citation, whether in vacation or in term."

In the *Fourth Circuit*, this rule reads as follows: "1. Except as otherwise provided by Rule 23, it shall be the duty of the appellant, plaintiff in error, or petitioner for revision in bankruptcy to cause to be printed and suitably indexed the transcript of the record (as well as any addendum to the record required by such party) and to deliver the same to the clerk or deputy clerk of the court below for certification, sealing and transmission to this court within forty days from the date of the citation or the filing of the petition for revision: and also on or before the expiration of the said forty days to file with the clerk of this court at least twenty-four printed copies of the said transcript and addendum above mentioned, if any. He shall also at the same time furnish to the adverse party at least three copies of the printed transcript of the record, including any addendum thereto printed at his instance. It shall also be the duty of appellant, plaintiff in error or petitioner for revision to docket the cause in this court on or before the return day, whether in term time or vacation. In case any appellee or defendant in error shall have required an addendum to the transcript of record, it shall be the duty of such party to file in the office of the clerk of this court, on or before the said return day, at least twenty-four printed copies of such addendum as well as one additional copy thereof, which shall have been duly certified by the clerk of the court below; and such party shall at the same time furnish to the adverse party at least three copies of said printed addendum. The time within which any of the acts in this service above mentioned are required to be done may for good cause shown be enlarged by the justice or judge who signed the citation or any judge of this court, provided the order of enlargement be made prior to the expiration of such time; such order to be filed with the clerk of this court. 2. If the plaintiff in error or appellant shall fail to comply with this rule, the defendant in error or appellee may have the cause docketed and dismissed upon producing a certificate from the clerk of the court wherein the judgment or decree was rendered, stating the case and certifying that such writ of error or appeal has been duly sued out or allowed. And in no case shall the plaintiff in error or appellant be entitled to docket the case and file the transcript of the record after the same shall have been docketed and dismissed under this rule, unless by order of the court. 3. But the defendant in error or appellee may, at his option, docket the case and file a copy of the record with the clerk of this court; and if the case is docketed and a copy of the record filed with the clerk of this court by the plaintiff in error or appellant within the period of time above limited and prescribed by this rule, or by the defendant in error or appellee at any time thereafter, the case shall stand for argument at the term. 4. Upon the filing of the transcript of the record in any case brought up by writ of error or appeal, the appearance of counsel for the party docketing the cause shall be entered by the clerk of this court as of course. 5. Defendants in error, or appellees, are required, at the time of entering their appearance by attorney, to make a deposit of $25.00, for account of costs to be incurred by them in this court. In case of affirmance, or dismissal, when all costs shall have been paid by the plaintiff in error, or appellant, the said deposit will be returned. This is applicable to all cases except when the United States is defendant in error or appellee." (233 Fed. x.)

[49] In the *Second Circuit* the words "whether in vacation or in term time" are omitted. In the *Ninth Circuit* the first sentence reads as follows: "1. It shall be the duty of the plaintiff in error or appellant to file the record thereof

good cause shown, the justice or [50] judge who signed the citation, or [51] any judge of this court, may enlarge the time by or before its expiration, the order of enlargement to be filed with the clerk of this court.[52] If the

and docket the case with the clerk of this court at San Francisco, California, by or before the return day, whether in vacation or in term time."

In the *Sixth Circuit* the rule is numbered 18 and reads as follows: "THE DOCKET—DOCKETING—DISMISSING. 1. The clerk shall enter upon the docket in their proper chronological order all cases brought to or in this court. 2. The appellant shall docket the case and file the record thereof with the clerk of this court by or before the return day, whether in vacation or in term time, and at the time of filing the record, the appellant shall deposit with the clerk the sum of thirty-five dollars as security for costs, except in cases in which the proper showing is made and an order of this court is entered thereon allowing the cause to proceed in forma pauperis, and except in the cases where, by statute, advance payment of costs is not required. For good cause shown, the justice or judge who signed the citation, or any judge of this court, may enlarge the time for return at or before its expiration, the order of enlargement to be returned with the record and filed with the clerk of this court. If the appellant fail to comply with this rule, the appellee may have the cause docketed and dismissed, upon producing a certificate from the clerk of the court wherein the said judgment or decree was rendered, stating the case and certifying that such writ of error or appeal has been duly sued out or allowed. In no case shall the appellant be entitled to docket the case and file the record after the same shall have been docketed and dismissed under this rule, unless by order of the court. 3. The appellee may, at his option, docket the case and file a copy of the record with the clerk of this court; and if the case is docketed and a copy of the record filed with the clerk of this court by the appellant within the period of time above limited and prescribed by this rule, or by the appellee at any time thereafter, the case shall stand for argument. 4. The appearance of the counsel docketing the case shall thereupon be entered upon the docket. 5. All subsequent papers filed, orders made and proceedings had, shall be noted upon the docket. 6. Whenever counsel for appellant and appellee shall, in vacation, sign and file with the clerk an agreement in writing directing the case to be dismissed and specifying the terms as to costs, on which terms it is to be dismissed, and shall pay to the clerk any fees due, he shall enter the case on his docket as dismissed and give to either party requesting it a copy of the agreement filed; but no mandate or other process on such dismissal shall be issued without the order of the court."

[50] In the *Second Circuit* the following words are inserted: "or any district judge within the district, or any judge of this court, may enlarge the time upon four days' notice of the application served before its expiration on the attorney for the opposite party, the order of enlargement to be filed with the clerk of the District Court and to be transmitted to this court with the transcript of record. If the plaintiff in error or appellant shall fail to comply with this rule, the defendant in error or appellee may have the cause docketed and dismissed by the court during the period covered by the sessions, and by the clerk after the sessions are concluded," in place of the words "or judge who signed the citation * * * may have the cause docketed or dismissed."

[51] In the *Third Circuit* the remainder of this sentence is stricken out and the following inserted: "or any Circuit or District judge may extend the return day thereof, the order for extension to be filed with the clerk of this court."

In the *Fifth Circuit* the words, "the justice or judge who signed the citation, or" are stricken out.

[52] In the *Third Circuit* this constitutes subdivisions 1, 2, 3, 4, and are as follows: "2. If the plaintiff in error or appellant shall fail to comply with the first section of this rule the defendant in error or appellee may cause the

plaintiff in error or appellant shall fail to comply with this rule, the defendant in error or appellee may have the cause docketed and dismissed, upon producing a certificate, whether in term-time or vacation, from the clerk of the court wherein the judgment or decree was rendered, stating the case, and certifying that such writ of error or appeal has been duly sued out or allowed. And in no case shall the plaintiff in error or appellant be entitled to docket the case and file the record after the same shall have been docketed and dismissed under this rule, unless by order of the court.

2. But the defendant in error or appellee may, at his option, docket the case and file a copy of the record with the clerk of this court; and, if the case is docketed and a copy of the record filed with the clerk of this court by the plaintiff in error or appellant within the period of time above limited and prescribed by this rule, or by the defendant in error or appellee at any time thereafter, the case shall stand for argument at the term.

3.[53] Upon the filing of the transcript of a record brought up by writ of error or appeal, the appearance of the counsel for the party docketing the case shall [54] be entered.[55]

case to be docketed without the filing of any record and have it dismissed, whether in term time or vacation, upon due proof of notice to the plaintiff in error or appellant of a motion for such dismissal, and upon producing a certificate from the clerk of the court wherein the judgment or decree was rendered, stating the case, the return day of the citation, and that the writ of error or appeal was duly sued out or allowed; and in no case shall the plaintiff in error or appellant be entitled to file the record or to have it docketed after the defendant in error or appellee shall have had the case dismissed under this section of this rule unless upon special order of the court. 3. Instead of having the case docketed for the purpose of having it dismissed under the provision of the second section of this rule, the defendant in error or appellee, on payment of the usual fees, may file the record and cause the case to be docketed by the clerk, and if the record be filed and the case docketed, either by the plaintiff in error or appellant, within the time prescribed by the first section of this rule, or by the defendant in error or appellee under the provision of this section, the case shall stand for argument. 4. On the filing of the record, the appearance of the counsel for the party docketing the case shall be entered, and on or before the return day of the citation, the counsel for the appellee or defendant in error shall also enter appearance for the appellee or defendant in error."

[53] In the *Second Circuit*, subdivisions 3 and 4 read as follows: "3. Petitions to revise orders in bankruptcy filed under the provision of Section 24B of the Bankruptcy Act, must be filed and served within ten days after the entry of the order sought to be revised and thereupon docketed, and a transcript of the record of the proceedings in the Bankruptcy Court of the matter to be revised must be filed within thirty days thereafter, but the judge of the Bankruptcy Court may for good cause shown enlarge the time for filing and serving the petition or filing the record, the order of enlargement to be made and filed with the clerk of the District Court before the expiration of the times hereby limited for filing and serving the petition and filing the record respectively, and to be transmitted to this Court with the transcript of record. 4. Upon the filing of any transcript of record the appearance of the counsel for the party docketing the case shall be entered."

[54] In the *Ninth Circuit* the words, "if said counsel be qualified under the provisions of Rule 7," are here inserted.

[55] In the *Fifth Circuit* the following paragraph is added: "4. In all cases

17. DOCKET.[56]

The clerk shall enter upon a docket all cases brought to and pending in the court in their proper chronological order, and such docket shall be

the plaintiff in error or appellant, on docketing a case and filing the record, shall enter into an undertaking to the clerk, with surety to his satisfaction for the payment of his fees, or otherwise satisfy him in that behalf." In the *Eighth Circuit* the following is added: "Note—A deposit of thirty-five dollars to secure clerk's costs is required before the record in a cause is filed and docketed." (188 Fed. xii.)

[56] In the *First Circuit* this rule reads as follows: "1. The clerk shall enter and number on the docket all cases consecutively, in their proper chronological order. 2. He shall print at least twenty days before the first Tuesday of October and of January, and the second Tuesday of April, a calendar of all the pending cases, arranged by districts in the following order: Maine, New Hampshire, Rhode Island, Massachusetts."

In the *Second Circuit* this is Rule 15.

In the *Third Circuit* this is Rule 18 and reads: "Docket and Argument Lists. 1. Upon the filing of the record in any case by the plaintiff in error or appellant and the payment by him of a deposit fee of forty dollars, the clerk shall enter the case, the record of which is so filed, upon the docket of this court; such docket shall have all its cases arranged in their proper chronological order. 2. The clerk shall prepare and cause to be printed, previous to the opening of each term of this court, an argument list of all cases the records of which shall have been filed with him not less than fifteen days before the opening of the term, which cases shall be put on the argument list in the chronological order of docketing the same, subject, however, to the following system of grouping: The first group shall be composed of the cases in which all the circuit judges shall be competent to sit; the second, of the cases in which all the circuit judges except the youngest in commission shall be competent to sit; the third, of the cases in which all the circuit judges except the next to the youngest in commission shall be competent to sit, and the fourth, of the cases in which all the circuit judges except the oldest judge in commission shall be competent to sit." In the *Fourth Circuit*, this rule reads as follows: "1. The clerk shall enter upon a docket all cases brought to and pending in the court in their proper chronological order. 2. All cases in which copies of the printed record are delivered to the adverse party or his counsel at least twenty days before any regular term or adjourned term shall stand for argument at the term holden next after the docketing of the case. 3. The clerk before each regular term shall print a docket containing all pending cases and such docket shall be called at every term or adjourned term. If a case is called for hearing at two terms successively, and upon the call at second term neither party is prepared to argue it, it will be dismissed at the cost of the plaintiff in error, appellant or petitioner for revision, unless sufficient cause is shown for further postponement. 4. By consent of counsel in writing filed with the clerk of this court, any cases not included in section 2 of this rule may be by the clerk placed at the foot of the argument docket and may be argued at any term or adjourned term, provided the briefs on both sides are filed before the case is called." (233 Fed. xi.) In the *Sixth Circuit*, this rule is included in the first five subdivisions of Rule 18 and reads as follows: "1. The clerk shall enter upon the docket in their proper chronological order all cases brought to or in this court. 2. The appellant shall docket the case and file the record thereof with the clerk of this court by or before the return day, another in vacation or in term time, and at the time of filing the record, the appellant shall deposit with the clerk the sum of thirty-five dollars as security for costs, except in cases in which the proper showing is made and an order of this court is entered thereon allowing the cause to proceed in forma pauperis, and except in the cases where, by statute, advance payment of

called at every term, or adjourned term; [57] and if a case is called for hearing at two terms successively, and upon the call at the second term neither party is prepared to argue it, it will be dismissed at the cost of the plaintiff in error or appellant, unless sufficient cause is shown for further postponement.

18. CERTIORARI.[58]

No *certiorari* for diminution of the record will be hereafter [59] awarded in any case, unless a motion therefor shall be made in writing, and the facts on which the same is founded shall, if not admitted by the other party, be verified by affidavit. And all [60] motions for such *certiorari* must be made at the first term of the entry of the case; otherwise the same will not be granted, unless upon special cause shown to the court, accounting satisfactorily for the delay.

19. DEATH OF A PARTY.[61]

1. Whenever, pending a writ of error or appeal in this court, either party shall die, the proper representatives in the personalty or realty of

costs is not required. For good cause shown, the justice or judge who signed the citation, or any judge of this court, may enlarge the time for return at or before its expiration, the order of enlargement to be returned with the record and filed with the clerk of this court. If the appellant fail to comply with this rule, the appellee may have the cause docketed and dismissed, upon producing a certificate from the clerk of the court wherein the said judgment or decree was rendered, stating the case and certifying that such writ of error or appeal has been duly sued out or allowed. In no case shall the appellant be entitled to docket the case and file the record after the same shall have been docketed and dismissed under this rule, unless by order of the court. 3. The appellee may, at his option, docket the case and file a copy of the record with the clerk of this court; and if the case is docketed and a copy of the record filed with the clerk of this court by the appellant within the period of time above limited and prescribed by this rule, or by the appellee at any time thereafter, the case shall stand for argument. 4. The appearance of the counsel docketing the case shall thereupon be entered upon the docket. 5. All subsequent papers filed, orders made and proceedings had, shall be noted upon the docket." (202 Fed. xii, xiii.) In the *Seventh Circuit* this rule reads: "The clerk shall prepare calendars of causes for the regular terms of this court, to be held on the first Tuesday of October in each year, and for each adjourned session, placing thereon in proper chronological order only cases in which, the record having been printed, briefs upon both sides have been filed seven days before the beginning of the term or session." In the *Ninth Circuit* as follows: "The clerk shall, upon payment to him by the appellant or plaintiff in error of a deposit of twenty-five dollars in each case, file the record and enter upon a docket all cases brought to and pending in the court in their proper chronological order."

[57] In the *Eighth Circuit* the following words are inserted after the words "adjourned term" and before the words "and if a case": "except cases from the districts of Colorado, Utah, Wyoming and New Mexico, which cases shall only be called at the September term, unless counsel otherwise stipulate, as provided in Rule 3." (188 Fed. xii.)

[58] In the *Third Circuit* this is Rule 20.

[59] In the *Second Circuit* this is Rule 16.

In the *Third* and *Eighth Circuits* the word "hereafter" is omitted.

[60] In the *Seventh Circuit* the word "any" is used in place of "all."

[61] In the *Second Circuit* this is Rule 17.

the deceased party, according to the nature of the case, may voluntarily come in and be admitted parties to the suit, and thereupon the case shall

In the *Third Circuit* this is Rule 21, and 19 is as follows: "ARGUMENTS, CONTINUANCES AND DISMISSALS. 1. The cases in the argument list shall be called for argument at each term, or adjourned term, and cases shall be argued on call unless the court shall for good cause otherwise order. 2. If the defendant in error or appellee fails to appear when his case is called for argument, the court may proceed to hear the argument on the part of the plaintiff in error or appellant and to give judgment according to the right of the case. 3. For good cause shown the court may order the continuance of any case for the term. 4. When a case is reached in the regular call, and there is no appearance for either party, it may be dismissed at the cost of the plaintiff in error or appellant. 5. Where no counsel appears for the plaintiff in error or appellant, and no brief has been filed for him, the defendant in error or appellee may have the writ of error or appeal dismissed at the cost of the defaulting party. 6. If a case is called for argument at two terms successively, and upon the call at the second term neither party is prepared to argue it, it will be dismissed at the cost of the plaintiff in error or appellant unless a sufficient cause is shown for further postponement. 7. Whenever the plaintiff and defendant in a writ of error pending in the court, or the appellant and appellee in an appeal, shall, by their attorneys of record, sign and file with the clerk an agreement in writing directing the case to be dismissed, and specifying the terms on which it is to be dismissed, as to costs, and shall pay to the clerk any fees that may be due to him, it shall be the duty of the clerk to enter the case dismissed, and to give to either party requesting it a copy of the agreement filed; but no mandate or other process shall issue without an order of the court. 8. Cases may also be dismissed in accordance with the second section of Rule 17, the first section of Rule 23 and the fourth section of Rule 24 of this court. 9. Except as in the preceding sections of this rule it is otherwise provided, no motion to dismiss a writ of error or an appeal will be heard unless previous notice of the motion has been given to the plaintiff in error or appellant or his counsel."

In the *Sixth Circuit*, this rule is numbered 16 and reads as follows: "1. Whenever a party to a case pending in this court shall die, the personal representative may suggest the death upon the record, filing evidence of his representative capacity, and designating counsel, and thereupon the case shall stand as revived in behalf of or against the interest of the deceased party, and the cause shall proceed as in other cases. 2. Where a party to a case pending in this court shall die and his personal representative does not, within sixty days after such death, appear under clause 1, any other party in interest may suggest such death upon the record, filing evidence of the due appointment of a personal representative, and thereupon, and without notice, the court or any judge thereof will make an order that such personal representative appear and designate counsel. In default of such appearance, within thirty days after service on such personal representative of a certified copy of such order, the adverse party, on proof of such service and without further notice, may have, from this court, an order either to revive the cause and direct that it proceed as to the interest held by the deceased party or to dismiss the case as to such interest, as may be by the court thought proper. 3. If the death of a party is brought to the attention of this court, and proceedings are not taken under clause 1 or clause 2 sufficiently to dispose of the resulting situation, the court will, on its own motion, direct such steps to be taken as are proper to dispose of the case or expedite the hearing. 4. Whenever any party to a suit pending in a District Court shall die, and because of such death and because of the absence of any personal representative of the deceased within the jurisdiction of the District Court and any means of compelling the appointment of such a representative within such jurisdiction the adverse party is not able to have the case revived in the District Court and to proceed with the desired review in this

be heard and determined as in other cases; and, if such representatives shall not voluntarily become parties, then the other party may suggest the death on the record, and thereupon, on motion, obtain an order that, unless such representatives shall become parties within sixty days, the party moving for such order, if defendant in error,[62] shall be entitled to have the writ of error or appeal dismissed, and if the party so moving shall be plaintiff in error,[63] he shall be entitled to open the record, and, on hearing, have the judgment or decree reversed, if it be erroneous; provided, however, that a copy of every such order shall be personally served on said representatives at least thirty days before the expiration of such sixty days.

2. When the death of a party is suggested, and the representatives of the deceased do not appear within ten days after the expiration of such sixty days, and no measures are taken by the opposite party within that time to compel their appearance, the case shall abate.

3. When either party to a suit in a Circuit or[64] District Court of the United States shall desire to prosecute a writ of error or appeal to this court from any final judgment or decree rendered in the Circuit or[65] District Court, and, at the time of suing out such writ of error or appeal, the other party to the suit shall be dead, and have no proper representative within the jurisdiction of the court which rendered such final judgment or decree, so that the suit cannot be revived in that court, but shall have a proper representative in some State or Territory of the United States, or in the District of Columbia, the party desiring such writ of error or appeal may procure the same, and may have proceedings on such judgment or decree superseded or stayed in the same manner as is now allowed by law in other cases, and shall thereupon proceed with such writ of error or appeal as in other cases; and, within thirty days after the filing of the record in this court, the plaintiff in error or appellant shall make a suggestion to the court, supported by affidavit, that the said party was dead when the writ of error or appeal

court, the adverse party desiring a review may proceed as if such death had not occurred, and may have supersedeas as in other cases, serving all required papers and notices upon such persons as, in the judgment of the District Court, will be most likely to give notice to all persons interested in the estate, and as may be directed by the District Court. When the record in such a case has been filed in this court, the same proceedings shall be had as specified in clauses two and three, or the Court will take such proceedings as may to it seem advisable to bring in the proper parties." (202 Fed. xi, xii.)

[62] In the *Second Circuit* the following words are inserted: "or appellee, shall be entitled to have the writ of error or appeal dismissed and if the party so moving shall be plaintiff in error or appellant," in place of the words "shall be entitled * * * shall be plaintiff in error."

In the *Fourth Circuit*, subdivision 1, after the words "if defendant in error," the words "or appellee" are inserted. (193 Fed. xii.)

[63] In the *Fourth Circuit*, subdivision 1, after the words "plaintiff in error," the words "or appellant" are inserted. (193 Fed. xii.)

[64] In the *Second, Third, Fourth and Ninth Circuits*, subdivision 3, the words "Circuit or" are omitted.

[65] In the *Second, Third, Fourth and Ninth Circuits*, subdivision 3, the words "Circuit of" are omitted.

was taken or sued out, and had no proper representative within the jurisdiction of the court which rendered such judgment or decree, so that the suit could not be revived in that court, and that said party had a proper representative in some State or Territory of the United States, or in the District of Columbia, and stating therein the name and character of such representative; and the State or Territory or district in which such representative resides; and, upon such suggestion, he may on motion obtain an order that, unless such representative shall make himself a party within ninety days, the plaintiff in error or appellant shall be entitled to open the record, and, on hearing, have the judgment or decree reversed if the same be erroneous; provided, however, that a proper citation reciting the substance of such order shall be served upon such representative, either personally or by being left at his residence, at least thirty days before the expiration of such ninety days: provided, also, that in every such case, if the representative of the deceased party does not appear within ten days after the expiration of such ninety days, and the measures above provided to compel the appearance of such representative have not been taken within the time as above required, by the opposite party, the case shall abate; and provided, also, that the said representative may at any time, before or after said suggestion, come in and be made a party to the suit, and thereupon the case shall proceed, and be heard and determined as in other cases.

20. DISMISSING CASES.[66]

Whenever the plaintiff and defendant in a writ of error pending in this court, or the appellant and appellee in an appeal, shall, by their attorneys of record, sign and file with the clerk an agreement in writing directing the case to be dismissed, and specifying the terms on which it is to be dismissed, as to costs, and shall pay to the clerk any fees that may be due to him, it shall be the duty of the clerk to enter the case dis-

[66] In the *Second Circuit* this is Rule 18.

In the *Third Circuit* this rule is omitted.

In the *Sixth Circuit*, this rule is included in Rule 18, as subdivision 6, and reads as follows: "6. Whenever counsel for appellant and appellee shall, in vacation, sign and file with the clerk an agreement in writing directing the case to be dismissed and specifying the terms as to costs, on which terms it is to be dismissed, and shall pay to the clerk any fees due, he shall enter the case on his docket as dismissed and give to either party requesting it a copy of the agreement filed; but no mandate or other process on such dismissal shall be issued without the order of the court." (202 Fed. xiii.) In the *Seventh Circuit* this rule reads as follows: "Whenever the parties to a writ of error or an appeal shall, by their attorneys of record, sign and file with the clerk an agreement in writing directing the case to be dismissed, and specifying the terms on which it is to be dismissed, in respect to costs, and shall pay to the clerk any fees that may be due to him, the clerk shall enter the case dismissed and shall give to either party requesting it a copy of the agreement filed, but no mandate or other process shall issue without an order of the court." In the *Eighth Circuit* the following words take the place of the remainder of this rule after the words "it shall be the duty of the clerk:" "seasonably to present such agreement to the court for its consideration and determination." (188 Fed. xiv.)

missed, and to give to either party requesting it a copy of the agreement filed; but no mandate or other process shall issue without an order of the court.[67]

21. MOTIONS.[68]

1. All motions to the court shall be reduced to writing, and shall contain a brief statement of the facts and objects of the motion.[69]

2. One hour on each side shall be allowed to the argument of a motion, and no more, without special leave of the court, granted before the argument begins.[70]

3. No motion to dismiss, except on special assignment by the court, shall be heard, unless previous notice has been given to the adverse party, or the counsel or attorney of such party.

[67] In the *Fourth Circuit*, the following new matter is added to this rule: "No attorney's docket fee shall be taxed in a case dismissed under this rule." (283 Fed. xiii.)

[68] In the *First Circuit* this rule reads as follows: "1. The motion day shall be the first Tuesday of every stated session of the court, and any other Tuesday while the court shall remain in session. 2. All motions to the court shall be reduced to writing, and shall contain a brief statement of the facts and objects of the motion. 3. All motions to dismiss writs of error or appeals (except motions to docket and dismiss under Rule 16) or to advance cases, or for a writ of *certiorari*, and other special motions, shall be printed, and be accompanied by printed briefs. 4. No motion to dismiss, except on special assignment by the court, shall be heard, unless previous notice has been given to the adverse party or his counsel. 5. Any motion, of which counsel shall have given notice to the clerk in advance, shall be entered on the clerk's list in the order in which he receives notice thereof, and shall have priority in that order before other motions, unless otherwise specially ordered by the court. 6. Half an hour on each side shall be allowed to the argument of a motion, and no more, without special leave of the court granted before the argument begins." In the *Second Circuit* this is Rule 19. In the *Sixth Circuit*, this rule is numbered 24 and is as follows: "1. Motions shall be filed with the clerk and shall contain a brief statement of the facts and of the objects of the motion, and be accompanied by such affidavits as are thought proper. 2. Counsel making the motion shall serve a copy thereof and of the accompanying papers and a notice of hearing upon the adverse counsel, and also copy of any brief or argument to be presented in support of the motion. Such notice may be for any day after four days from the service. The opposing party may, on or before the day named in the notice or within any extension of time made by the court or a judge thereof, file counter showing or brief; and the motion will then stand submitted, unless oral argument is directed. Except by stipulation, no motion will be considered without acknowledgment or proof of such notice. 3. Upon motions, there will be no oral argument, except by leave of the court first obtained; and in such case, the court will fix the day for hearing and the time to be allowed for argument, and the clerk will notify counsel." (202 Fed. xvii.) In the *Ninth Circuit*, when motions are typewritten, an original and three copies must be filed.

[69] In the *Second Circuit* the following words are added: "Four days' notice of the motion shall be given to the adverse party." In the *Ninth Circuit* the following words are added to subdivision 1: "and shall be served upon opposing counsel at least five days before the day noticed for the hearing."

[70] In the *Second Circuit* this subdivision is omitted. In the *Third Circuit* this rule is number 22, and subdivision 8 is omitted. In the *Seventh* and *Ninth Circuits* one-half hour is allowed on each side for argument.

22. PARTIES NOT READY.[71]

1. Where no counsel appears, and no brief has been filed for the plaintiff in error or appellant, when the case is called for trial, the defendant may have the plaintiff called, and the writ of error or appeal dismissed.

2. Where the defendant fails to appear when the case is called for trial, the court may proceed to hear an argument on the part of the plaintiff, and to give judgment according to the right of the case.

[71] In the *First Circuit* the following paragraph was added before subdivision 1: "On the first Tuesday of October and of January, and on the second Tuesday of April, the court, except as may, from time to time be otherwise ordered, will commence calling cases for argument in the order in which they stand on the calendar, and proceed from day to day during the session in the same order; but no case from the district of Massachusetts shall be called before the second Tuesday of the session;" and after subdivision 8 the following: "5. If either of the parties is ready when the case is called, the same may be heard; and, if neither party is ready, the case may be dismissed, or be postponed to the next session, as the court may order. 6. If a case is called for hearing at two stated sessions successively and, on the call of the second session, neither party is prepared to argue it, it will be dismissed at the cost of the plaintiff in error or appellant, unless sufficient cause is shown for further postponement." 7. The court will not hear arguments on Mondays or Saturdays, unless for special cause it shall so order. 8. Five cases are liable to be reached on the coming in of the court on each day. 9. Revenue and other cases which concern the United States, and which also involve or affect some matter of general public interest, and criminal cases, and cases once adjudicated by this court on their merits and again brought up by writ of error or appeal, may be advanced by order of the court. 10. Two or more cases involving the same question may, by leave of the court, be heard together, to be argued as one case or more, as the court may order. 11. No agreement of counsel to pass or postpone a case, or to substitute one case for another, shall become effective except on leave. In the *Second Circuit* this is Rule 20 and reads as follows: "Where no counsel appears, and no brief has been filed for the party seeking review of the decision below, when the case is called for hearing, the party successful below may have the party seeking review called and the writ of error, appeal or petition to revise dismissed. 2. Where the party successful below fails to appear when the case is called for hearing, the court may proceed to hear an argument on the part of the party seeking review, and to give judgment according to the right of the case. 3. When a case is reached in the regular call of the docket, and there is no appearance for either party, the case shall be dismissed at the cost of the party seeking review." In the *Third Circuit* this rule is omitted. Rule 22 is original Rule 21. In the *Fourth Circuit* this rule reads: "1. When a case is called for hearing, and no counsel appears and no brief has been filed for the plaintiff in error or appellant, the defendant in error or appellee may have the adverse party called and the writ of error or appeal dismissed. 2. Where the defendant in error or appellee fails to appear when the case is called for hearing, the court may proceed to hear argument on the part of the plaintiff in error or appellant, and to give judgment according to the right of the case. 3. When a case is reached in the regular call of the docket and no counsel appears for either party and no submission of the case is asked, the case may be dismissed at the cost of the plaintiff in error or appellant." (233 Fed.) In the *Sixth Circuit* the rule reads: "1. Upon the expiration of the time limited for filing briefs, the case shall stand for hearing when reached. 2. A calendar, containing all cases docketed and not heard, shall be printed by the clerk for the October, January and April sessions. The cases on the calendar which stand for hearing under

3. When a case is reached in the regular call of the docket, and there is no appearance for either party, the case shall be dismissed at the cost of the plaintiff.

23. PRINTING RECORDS.[72]

The counsel for the plaintiff in error or appellant shall print and file with the clerk of the court, at least six days before the case is called for

clause 1 will be called for argument in their order (as far as practicable) on the calendar, except as special advancements may have been made. 3. By leave of court and on motion of either party (1) cases entitled by statute to precedence, (2) criminal cases, (3) appeals, writs of error or petitions to revise in bankruptcy matters, and (4) cases which are for the second time in this court,—may be advanced and set for a designated session. The court may also, on its own motion or for good cause shown on motion of either party, advance any case to be heard at any session, though the time permitted under the rules for filing briefs may not have expired at the day set for hearing. 4. Not more than three cases will be heard on one day (counting, however, as one case, two or more which are heard together). The call for the next day shall, at the adjournment of court, be exhibited in the clerk's office. Counsel choosing to rely on the judgment of the clerk as to the probable time of hearing any case must do so at their own risk. 5. When the case is called, if either party is ready, the case will be heard. If there is no appearance for either party, the case will be dismissed. If the appellant does not appear by counsel or by printed brief but the appellee does appear, the case will be dismissed. If the appellant appears and the appellee does not, the court will hear the appellant. 6. By agreement of counsel in open court or by stipulation filed in the clerk's office, hearing may be continued once to any later session during the term or from the last session of one term to the first session of the next term, but not to a later day during the same session. Subsequent continuances can be made only by the court and will be only for reasons satisfactory to the court; and engagement of counsel in other courts will not be considered good cause. 7. Two or more cases, involving the same question, may, by order of the court, be heard together, but they must be argued as one cause." In the *Fifth* and *Seventh Circuits* the word "defendant" and the words "the plaintiff called, and" are omitted from the first subdivision. The second subdivision reads: "2. If the appellee or defendant in error fails to appear when the case is called for trial, the court may proceed to hear argument on the part of the plaintiff in error or appellant and to give judgment according to the right of the case." In the subdivision 3, after the word "party," these words are inserted: "and no brief on file for appellant or plaintiff in error," and after "cost" these words: "of the appellant or plaintiff in error." (91 Fed. x.) In the *Eighth Circuit* the words "in error or appellant" are inserted after "plaintiff" in the third line of the first paragraph, third line of the second paragraph, and last line of the third paragraph; and the words "in error or appellee," in the first line of subdivision 2, are inserted after the word "defendant." (188 Fed. xiv.) In the *Ninth Circuit* the first word in the second paragraph is "when" instead of "where;" the first word in the third paragraph is "where" instead of "when;" and "in error or appellant" is added after "plaintiff" in the last line of paragraph 3.

[72] In the *First Circuit* this rule reads as follows: "1. In all cases, the plaintiff in error or appellant, on docketing a case and filing the record, shall enter into an undertaking to the clerk, with surety to his satisfaction, for the payment of his fees, or otherwise satisfy him in that behalf. 2. The clerk shall cause an estimate to be made of the cost of printing the record, and of his fee for preparing it for the printer, and shall notify to the party docketing the case

argument, twenty copies of the record, unless a different order as to such printing is made by the court, either of its own motion, or upon applica-

the amount of the estimate. If he shall not pay it within a reasonable time, the clerk shall notify the adverse party, and he may pay it. If neither party shall pay it, and for want of such payment the record shall not have been printed when the case is reached at the regular call of the docket, the case may be dismissed. 3. Upon payment by either party of the amount estimated by the clerk, twenty-five copies of the record shall be printed under the clerk's supervision, for the use of the court and of counsel. 4. The clerk shall take to the printer the original transcript on file, but shall cause copies to be made for the printer of such original papers sent up under Rule 14, or other original papers, as are necessary to be printed. 5. The clerk shall supervise the printing, and see that the printed copies are properly indexed; and he shall distribute printed copies to the judges and the reporter, from time to time, as required, and three copies to the counsel for each party. An additional number of copies may be printed at the request of either party for his own use and at his own expense, or by order of the court. 6. The parties may stipulate in writing that parts only of the record shall be printed, and the case may be heard on the parts so printed; but the court may direct the printing of other parts of the record. 7. The clerk may receive from either party, and use as parts of the printed record, so far as the same may be of proper and convenient size and type, any portions which have been printed in any other court and also printed copies of patents and other exhibits, allowing the party furnishing the same such sum therefor as the clerk deems reasonable, to be added to and form a part of the cost of printing. 8. If the actual cost of printing the record, together with the fee of the clerk, shall be less than the amount estimated and paid, the amount of the difference shall be refunded by the clerk to the party paying it. If the actual cost and clerk's fee shall exceed the estimate, the excess shall be paid to the clerks before the delivery of a printed copy to either party or his counsel. 9. In case of reversal, affirmance, or dismissal, with costs, the cost of printing the record and the clerk's fee shall be taxed against the party against whom costs are given, and shall be inserted in the body of the mandate or other proper process." In the *Second Circuit* this is Rule 21 and reads as follows: "In cases which fall within the provisions of the act of February 13, 1911, the plaintiff in error or appellant will print the record and serve copies thereof in accordance with the provisions of said act. In other cases on the filing of the transcript, the clerk shall forthwith cause fifteen copies of the same to be printed, and shall furnish three copies thereof to each party, at least thirty days before the argument, and shall file nine copies thereof in his office. The parties may stipulate in writing that parts only of the record shall be printed, and the case may be heard on the parts so printed; but the court may direct the printing of other parts of the record. The clerk shall be entitled to demand of the appellant, or plaintiff in error, the cost of printing the record, before ordering the same to be done. If the record shall not have been printed when the case is reached for argument, for failure of a party to advance the costs of printing, the case may be dismissed. In case of reversal, affirmance, or dismissal, with costs, the amount paid for printing the record shall be taxed against the party against whom costs are given." (235 Fed.) In the *Third Circuit* the rule is as follows: "PRINTING AND DISTRIBUTING RECORDS. 1. It shall be the duty of the clerk, immediately after the record of any case shall have been filed with him and docketed and the deposit fee of forty dollars shall have been paid, to notify counsel for all parties that he will print only the parts of the record mentioned in the second section of this rule, specifying what those parts shall be, and to notify the counsel for plaintiff in error or appellant of his estimate of the cost of printing such parts of the record and of his fee for preparing the parts for the printer, indexing the same and supervising the printing thereof. He shall print no other parts of the record unless, within ten days after such

tion made at least ten days before the case is called for argument; and shall furnish three copies of the printed record to the adverse party

notice, he receives from some one or more of the counsel a written certificate that in his or their judgment other specified parts thereof should be printed in order to enable this court properly to decide the questions raised, in which event the parts so certified as necessary shall also be printed. The court may, in its discretion, direct the printing of other parts of the record, and, in lieu of printing patents or other exhibits, separate printed copies thereof, not less than ten in number, may be filed with the clerk. If other parts of the record than those specified in his notice shall be required to be printed by any of the counsel, or by this court, the clerk shall immediately notify the counsel for the plaintiff in error or appellant of his estimate of the additional cost of preparing, printing and indexing such other parts. The plaintiff in error or appellant shall pay to the clerk, within ten days after notice of any estimate, the amount thereof, in default of which the writ of error or appeal may be dismissed upon the motion of the opposite party, or by the court of its own motion. 2. By writing filed either with the clerk of this court, or with the clerk of the court below, the plaintiff in error or the appellant may waive the provisions of the act of Congress approved February 13, 1911; and if the act be waived the printing, indexing, supervising, and distributing shall be done by the clerk of this court as heretofore under provisions of Rule 23; and the clerk shall then be entitled to charge the supervising fee of twenty-five cents per printed page, as provided by Rule 29. When the record is printed below, the parties and the clerk of the District Court, and (when the record is printed in the Court of Appeals) the clerk of this court shall be careful to avoid as far as possible the duplication of material in order to reduce the costs and fees attendant upon the printing the record. 3. Unless additional parts of the record shall be required to be printed under the provisions of the first section of this rule, the clerk shall print, for the use of the court, only the following parts thereof: In writs of error—(a) The docket entries. (b) The pleadings upon which the case was tried. (c) The bill of exceptions. (d) The motion and reasons for judgment non obstante veredicto, if any. (e) The opinion of the court below, if any. (f) The charge to the jury, if any. (g) The verdict of the jury, if any. (h) The judgment entered. (i) The assignments of error. In appeals—(a) The docket entries. (b) The pleadings on which the case was heard and determined. (c) The evidence, if any, on which it was heard and determined. (d) The report of the examiner, master, auditor, referee or other officer who first decided the case, if any. (e) The exceptions to that report, if any. (f) The opinion of the court, if any. (g) The judgment or decree entered. (h) The assignments of error. In bankruptcy and other cases not being strictly within either of the above classes, the printed record shall conform as nearly as may be practicable to the record in appeal. 4. The clerk shall cause twenty-five copies of the record to be printed, and three copies thereof to be furnished to the counsel of the plaintiff in error or appellant, and also three copies to each of the counsel who shall have entered appearance for any of the other parties, and the remaining copies to be filed in his office, all, if possible within thirty days after the payment to him of the amount of his estimate made under the provisions of the first section of this rule. 5. The clerk shall supervise the printing of the record, have it properly indexed and distribute printed copies thereof to the judges of the court from time to time as required. 6. If the actual cost of printing the record and the clerk's fee of twenty-five cents per page for preparing the record for the printer, indexing the same, supervise the printing and distributing the copies, shall be less than the amount estimated and paid, the clerk shall refund the difference to the party paying the same, but if they shall exceed the clerk's estimate the amount of such excess shall be paid to the clerk before he shall file the printed copies of the record or deliver any of them to the parties. 7. In case of reversal, affirmance, or

at least six days before the argument. The parties may stipulate in writing that parts only of the record shall be printed, and the case may be heard

dismissal, with costs, the actual cost paid for printing the record by the party in whose favor costs are awarded, and the clerk's fee for supervising the printing, etc., where such fee is paid by the party against whom costs are given and shall be inserted in the body of the mandate or other proper process. 8. Each printed record shall show, by a note or memorandum, the time when each pleading or document was filed, and shall contain at the tops of its pages running titles of its contents. 9. In any case where the record, or any part thereof, has been printed in the court below, the same may be embodied in and used as the printed record of this court; Provided, the manner and style of the printing shall correspond with the requirements of the several sections of this rule for printing done under the supervision of the clerk of this court; but the plaintiff in error or appellant shall pay to the clerk of this court, not only the deposit fee of forty dollars upon filing the record and having it docketed, but also the fee prescribed by Rule 29 for preparing the record for the printer, indexing the same, supervising the printing and distributing the copies thereof. 10. The clerk shall, on or before the conclusion of each case, collect and file for preservation in this court three copies of the printed record and of each brief, printed motion and argument submitted in such case, and shall, immediately after the mandate in any case shall have been sent down to the lower court, notify the defeated party in this court, that unless he removes the remaining copies of the record and briefs within ten days after notice so to do, the same will be destroyed." In the *Fourth Circuit* as follows: "This rule shall apply only to cases in which counsel for all parties to any cause pending in this court, or about to be brought into this court, shall by stipulation, in writing, filed with the clerk of the court below, agree to be governed by the terms thereof. 1. [9]The transcript may be made and the record printed as has been heretofore the practice of this court, and the same shall, subject to the provisions of Sections 3, 6 and 7 of Rule 14, be made up by the clerk of the court below and transmitted to this court under his hand and seal as heretofore. 2. All records in such cases shall be printed under the supervision of the clerk of this court by such printer and at such rate as this court may designate. In such cases, upon the payment of the estimated cost of printing, together with the supervising and other fees established by law (which amount shall be deposited with the clerk within ten days after notice thereof), the clerk shall cause to be printed thirty-five copies of the record, twenty-five copies of which shall be filed for the use of the court, three copies furnished to the adverse party, and the remaining copies to be delivered to the appellant, plaintiff in error or petitioner. 3. The parties may stipulate in writing that parts only of the transcript of the record shall be printed, and the case may be heard on the parts so printed, but the court may direct the printing of other parts of the record. 4. If the record shall not have been printed when the case is reached on the regular call of the docket, the case may be dismissed. 5. In case of reversal, affirmance, or dismissal, with costs, the amount paid for the printing of the record and the clerk's fees for supervising the same, shall be taxed against the party against whom costs are given. 6. In cases brought here under this rule it shall be the duty of the plaintiff in error or appellant to docket the case and file the record thereof with the clerk of this court by or before the return day, whether in vacation or in term time, but for good cause shown the justice or judge who signed the citation, or any judge of the court, may enlarge the time by or before its expiration, the order of enlargement to be filed with the clerk of this court. If the plaintiff in error or appellant shall fail to comply with this rule, the defendant in error or appellee may have the cause docketed and dismissed upon producing a certificate from the clerk of the court wherein the judgment or decree was rendered, stating the case and certifying that such writ of error or appeal has been duly sued out or allowed. And in no case shall the plaintiff in error or appellant be entitled to docket the case and file

on the parts so printed, but the court may direct the printing of other

the record after the same shall have been docketed and dismissed under this rule, unless by order of the court. 7. But the defendant in error or appellee may, at his option, docket the case and file a copy of the record with the clerk of this court; and if the case is docketed and a copy of the record filed with the clerk of this court by the plaintiff in error or appellant within the period of time above limited and prescribed by this rule, or by the defendant in error or appellee at any time thereafter, the case shall stand for argument at the term. 8. Upon the filing of the transcript of a record brought up by writ of error or appeal, the appearance of the counsel for the party docketing the case shall be entered as of course." (Additional notes at the end of these rules.) (233 Fed.) In the *Fifth Circuit:* "1. The clerk shall upon the docketing of a case, forthwith cause an estimate to be made of the cost of printing the record and of his fee for preparing it for the printer and supervising the printing, and shall notify the party docketing the case of the amount of the estimate. If he shall not pay it within fifteen days in ordinary cases, and within three days in preference cases, after the date of such notice, the clerk shall notify the adverse party, and he may pay it. If neither party shall pay it, and for want of such payment the record shall not have been printed when a case is reached for hearing, the case may be dismissed at the discretion of the court. 2. The clerk shall cause the record in all cases to be printed forthwith after the payment of such estimate, and shall immediately thereafter furnish to the counsel of each party whose appearance shall have been entered, three copies of the printed record, taking a receipt therefor, and the parties may, by written stipulation filed prior to the printing of the record, agree that only parts of the record shall be printed, and the same may be heard only on the parts so printed, but the court may direct the printing of other parts of the record. 3. The clerk shall not take to the printer the original transcript on file, but shall cause copies to be made for the printer of such original papers sent up under Rule 14, or other original papers, as are necessary to be printed. 4. The clerk shall cause at least twenty-five copies of the record to be printed, and may print a larger number on the request of either party on payment of the amount necessary for the printing of such extra copies. 5. The clerk shall supervise the printing and see that the printed record is properly indexed. There shall be omitted from the printed transcripts the following: (1) Commissions to take testimony, and the formal captions to all depositions and the certificates of commissioners as to the taking of the depositions, except in cases where objections have been made to the depositions on account of defects in caption or certificate. (2) All process in the nature of subpoenas, citations, summons and subpoenas in chancery, unless from the assignment of errors it appears that some issue is raised which makes it necessary for the court to inspect such writs, and then only such as are involved. In every transcript wherein any pleading, exhibit or other paper appears at more than one place, such pleading, exhibit or other paper shall be printed at the place it first appears in said transcript and not thereafter; but the omission shall be indicated by apt notations and references to the pages of the printed record where it appears. The clerk shall distribute the printed copies to the judges of the court and to the reporter from time to time, as required. If the cost of printing the record, together with the clerk's fee for supervising the same, shall be less than the amount estimated and paid, the difference shall be refunded by the clerk to the party paying the same. If the actual cost and the clerk's fee shall exceed the clerk's estimate, the amount of such excess shall be paid to the clerk before he shall deliver or file the printed record or any copies thereof. 6. In case of reversal, affirmance or dismissal with costs, the amount of the costs of the printing of the record and of the clerk's fees for supervising the same shall be taxed against the party against whom costs are given, and shall be inserted in the body of the mandate or other proper process. 7. The clerk shall receive from either party, and use as parts of the printed record so far as the same

parts of the record. If the record shall not have been printed when the

may be of proper size and type, any portions which may have been printed in any other court, and also printed copies of patents and exhibits, allowing the party furnishing the same such sum therefor as the clerk deems reasonable, to be added to and form a part of the costs of printing. 8. When the transcript presented to the clerk for docketing shows that the plaintiff in error or appellant has been found by the District Court, or the judge thereof, to be a poor person within the purview and meaning of the act of Congress approved June 25th, 1910, entitled "An act to amend section one, chapter two hundred and nine, of the United States Statutes at Large, volume twenty-seven, entitled 'An act providing when plaintiff may sue as a poor person and when counsel shall be assigned by the court,' and to provide for the prosecution of writ of error and appeals in forma pauperis, and for other purposes" (see 36 Statutes at Large, part 1, page 866); and, as such poor person, has been authorized by said court or judge to prosecute appellant proceedings under said act of Congress, the clerk will file the transcript and docket the case without prepayment of fees or costs or for the printing of the record, and without requiring security therefor; and to this extent paragraph 4, Rule 16, is amended, and Rule 24 is so far amended as to dispense with printed briefs in in forma pauperis cases. (235 Fed.) In the *Sixth Circuit*, this rule is numbered 19 and reads: "1. In cases where the record is printed by the appellant under act of February 13, 1911, he shall file with the clerk twenty-five printed copies thereof within the time as limited or extended for making return to writ of error or appeal. The clerk shall examine the printed records so offered to ascertain whether the transcript complies with Rule 15, and also, whether the printed records comply with the statute and are properly indexed. If, in his judgment, they are insufficient in any particular, he shall bring the matter to the attention of the court, which will thereupon make such order as to it may seem proper for corrected or supplementary return and printed records. As soon as the printed records are approved as filed or perfected as ordered, the clerk shall deliver one copy to each counsel or group of counsel representing a separate interest, and shall continue such distribution as counsel subsequently appear. 2. The clerk shall, from time to time and as directed by the senior circuit judge, receive proposals for printing such records as are to be printed by the clerk, which proposals shall be submitted to such judge, who will, in his discretion, award such printing to the most satisfactory bidder; and the same shall be done, during the period of such award, by the person to whom it is made. 3. In cases where appellant is not proceeding under such statute, the clerk shall at once, upon the docketing of the case, cause an estimate to be made of the cost of printing the record, including his supervising fee as provided in the table of costs following Rule 27, and notify counsel for appellant of the estimated amount, which shall be paid to the clerk within ten days after such notice. If not so paid, the case may be dismissed upon motion or by the court upon its own motion. Supplemental estimates and payments thereof shall be made, if necessary; any excess payment shall be refunded, when the printing is finished. When the record was printed upon a former review of the same case, and enough old records to be reasonably sufficient for use upon the hearing are on file or available, the use of such old records, in lieu of printing, will be permitted, upon the order of the presiding judge, and to the extent specified in such order. 4. At once, upon the payment of such estimate, the clerk shall cause twenty-five copies of the record to be printed forthwith, shall file the same and shall distribute three copies of the same to counsel for each separate adverse interest then or thereafter appearing. Before printing, he shall examine the transcript to ascertain whether it complies with Rule 15, and if, in his judgment, it omits anything required by that rule, he shall submit the matter to the court, which will make such order as to it may seem proper regarding a corrected or supplementary return; and the printing shall be delayed until the filing of any further return so ordered. In

case is reached in the regular call of the docket, the case may be dis-

printing, the clerk shall omit any matters contained in the transcript which, by Rule 15, are required to be omitted. If the appellant shall in writing and before the record is printed, request the clerk so to do, he shall print fifty copies instead of twenty-five. If the appellee shall request such additional copies to be printed, the clerk shall comply with such request, if the appellee, upon demand, advances to him the estimated cost of printing the additional twenty-five copies. If, later, a review in the Supreme Court is sought, the clerk shall deliver such twenty-five copies to the party seeking a review; but if such additional records are wanted by the party who did not pay for the printing thereof, the clerk shall require payment to him of the actual cost of such additional printing and shall refund the same to the party who had paid therefor. 5. Where the record is printed by the appellant, he shall file therewith proof by affidavit of the actual cost of such printing, including the amount paid to the clerk in the District Court for the transcript. The amounts paid to the clerk of the District Court for the manuscript transcript and to the clerk of this court for printing and for his fees in connection therewith, or the amounts so shown to have been paid below by appellant (not exceeding, for printing, the amount which printing and supervision by the clerk of this court would have cost) shall form a part of the costs of the cause in this court and shall be taxed against the party against whom the costs are given and shall be inserted in the mandate or other proper process." (202 Fed. xiii, xiv.) In the *Seventh Circuit:* "1. In all cases the plaintiff in error or appellant on docketing a case and filing the record shall enter into an undertaking to the clerk with surety to be approved by the clerk for the payment of all costs which shall be incurred in the cause, shall deposit with the clerk twenty-five dollars to be applied to the payment of costs and fees, and from time to time when necessary shall, on the demand of the clerk, make further deposits for that use. 2. The clerk, upon the docketing of a case, shall forthwith cause an estimate to be made of the cost of printing the record and of his fees for preparing it for the printer and for supervising the printing thereof, and shall at once notify the attorney for the plaintiff in error, or appellant, of the amount of such estimate, which shall be paid to the clerk within ten days after such notice. If not so paid, the writ of error or appeal may be dismissed upon the motion of the opposite party, or by the court of its own motion. 3. The clerk shall cause the record in each case to be printed forthwith after the payment of such estimate, and shall immediately thereafter furnish to each of the respective parties at least three copies of the printed record, taking a receipt therefor. The parties may, by written stipulation filed with or prior to the filing of the record, agree that only parts of the record shall be printed, and the case will be heard on the parts so printed only, unless the court shall direct the printing of other parts. 4. The clerk shall cause at least twenty-five copies of the record to be printed and may print a larger number on the request of either party on payment of the amount necessary for the printing of such extra copies. 5. The clerk shall supervise the printing, and see that the printed record is indexed properly, and in a manner to indicate briefly the character of each document and exhibit referred to. He shall distribute the printed copies to the judges of the court from time to time as required. If the cost of printing the record, together with the clerk's fee for supervising the same, shall be less than the amount estimated and paid, the difference shall be refunded by the clerk to the party paying the same. If the actual cost and the clerk's fee shall exceed the estimate, the amount of the excess shall be paid to the clerk before he shall deliver or file the printed record or copies thereof. 6. In case of reversal, affirmance or dismissal with costs, the amount of the cost of the printing of the record and of the clerk's fee for supervising the same, shall be taxed against the party against whom costs are given, and shall be inserted in the body of the mandate or other proper process. 7. Upon the clerk's producing satisfactory evidence by affidavit, or by the acknowledgment of the parties or their sureties or attor-

missed. In case of reversal, affirmance, or dismissal with costs, the amount

neys, an attachment shall issue against such parties or their sureties respectively, to compel the payment of said fees. 8. The clerk shall adopt a uniform size for the printing of all records, shall have them printed in small pica type, on clear white paper, with a margin of not less than an inch and a half, shall show by note or memorandum on the margin the time when each pleading or document was filed, and at the top of the pages shall insert running titles of their contents. 9. The briefs of attorneys shall be printed, and shall conform as nearly as practicable to the size of the printed record. 10. The clerk shall, on or before the conclusion of each case, collect and file or otherwise preserve together one copy of the printed record and of each brief, printed motion, and argument submitted therein. 11. In any case where the record shall have been printed in the court below, in substantial conformity to these rules, the presiding judge may on the application of the plaintiff in error or appellant order that such printed record be used in place of the printing hereinbefore provided for. But the clerk shall prepare and cause to be printed and attached to such record an index, and shall be paid the same fees for the indexing and supervising thereof as if printed under his supervision. 12. The clerk of this court shall obtained sealed proposals for the printing hereinbefore provided for, which proposals shall be submitted to the senior circuit judge of the court, who may award such printing to the lowest and best bidder, and all such printing shall be done by the person to whom the same is so awarded, except in emergencies, when printing may be done by another at the same or less price. And when a case shall be heard upon the record printed below, the costs for printing shall be taxed on the basis of actual cost not exceeding the rate of the accepted bid. 13. The fees of the clerk of this court shall be those prescribed by the Supreme Court February 28, 1898." (See 202 Fed. xix.) In the *Eighth Circuit:* "1. In cases brought to this court in which the plaintiff in error or appellant elects to waive the printing of record under the provisions of the act of Congress, entitled 'An act to diminish the expense of proceedings on appeals and writ of error or of certiorari,' approved February 13, 1911, and file a typewritten or manuscript transcript of the record in this court, such plaintiff in error or appellant may within twenty days after the allowance of any writ of error serve on the adverse party a copy of a statement of the parts of the record which he thinks necessary for the consideration of the errors assigned, and file the same, with proof of service thereof, with the clerk of this court; the adverse party, within twenty days thereafter, may designate in writing and file with the clerk additional parts of the record which he thinks material, and, if he shall not do so, he shall be held to have consented to a hearing on the parts designated by the plaintiff in error or appellant. If parts of the record shall be designated by one or both of the parties, the clerk shall print those parts only; and the court will consider nothing but those parts of the record in determining the questions raised by the errors assigned. If at the hearing it shall appear that any material part of the record has not been printed, the writ of error or appeal may be dismissed, or such other order made as the circumstances may appear to the court to require. If the defendant in error or appellee shall have caused unnecessary parts of the record to be printed, such order as to costs may be made as the court shall think proper. 2. On the filing of the transcript in every such case the clerk shall cause thirty copies of the same, or the parts thereof designated under this rule, to be printed, and such additional number of copies as counsel for either of the parties may direct, and shall furnish three copies of the record so printed to each party at least sixty days before the argument. 3. In cases brought to this court in which the record has been printed and used upon the hearing in the court below, and which substantially conform to the printed records in this court, the plaintiff in error or appellant upon application to and by leave of this court, may furnish to the clerk twenty-five copies of such record, used on the hearing in the court below, to be used in the preparation of the printed record in this court; and the clerk's fee for preparing

paid for printing the record shall be taxed against the party against whom costs are given.

the record for the printer, indexing same, supervising the printing and distributing the copies, shall be computed as if said record so furnished had been printed under his supervision. 4. The clerk shall be entitled to demand of the plaintiff in error or appellant the cost of printing the record before ordering the same to be done. 5. If the record shall not have been printed when the case is reached for argument, for failure of the party to advance the costs of printing, the case may be dismissed. 6. In case of reversal, affirmance or dismissal with costs, the amount paid for printing the record shall be taxed against the party against whom costs are given. 7. In any case brought to this court, in which the record has been printed, in which a writ of certiorari shall be granted under the provision of Rule 18 of this court the return to such writ of certiorari shall be printed in the same manner as the record was. 8. If in any cause in which the record or a portion thereof has been printed it shall be made to appear to this court that the printed transcript does not substantially conform to the requirements of the rules of this court, it may be rejected and stricken from the files and such order relative thereto may be entered as the court shall deem proper." (188 Fed. xvi.) In the *Ninth Circuit:* "1. All records excepting in cases prosecuted under the act of February 13, 1911, shall be printed under the supervision of the clerk of this court, and upon the docketing of a cause, he shall cause an estimate to be made of the expense of printing the record, and his fee for preparing it for the printer and supervising the printing, and shall notify the party docketing the case of the amount of the estimate. If the amount so estimated is not promptly paid over to the clerk and for want of such payment the record shall not have been printed when a case is reached for argument, the case shall be dismissed. 2. Upon payment of the amount estimated by the clerk, eighty copies of the record shall be printed, under his supervision, for the use of the court and of counsel. 3. In cases of appellate jurisdiction the original transcript on file shall be taken by the clerk to the printer. But the clerk shall cause copies to be made for the printer of such original papers sent up under Rule 14, section 4, as are necessary to be printed; and the whole of the record in cases of original jurisdiction. 4. In all cases, excepting those prosecuted under said act of Congress, the clerk of this court shall prepare the record for the printer, index the same, supervise the printing and distribute the printed copies to the judges and the reporter, and one or more printed copies to the counsel for the respective parties. 5. In cases prosecuted under the act of Congress in which it is necessary to print records or other matter under the supervision of the clerk of this court, the clerk shall prepare such records or other matter for the printer, index the same, supervise the printing and distribute the printed copies to the judges and the reporter and one or more printed copies to the counsel for the respective parties. 6. If the expense of printing and supervision shall be less than the amount estimated and paid, the clerk shall refund the difference to the party paying same. If the expense is greater than the estimate the amount of such excess shall be paid to the clerk before he shall file the printed record or deliver copies to the parties or their counsel. 7. In case of reversal, affirmance or dismissal, with costs, the amount paid for printing the record and of the clerk's fee shall be taxed against the party against whom costs are given. 8. The plaintiff in error or appellant may, upon filing the record in this court, file with the clerk a statement of the errors on which he intends to rely, and of the parts of the record which he thinks necessary, for the consideration thereof, and forthwith serve on the adverse party a copy of such statement. The adverse party within ten days thereafter, may designate in writing, filed with the clerk, additional parts of the record which he thinks material, and, if he shall not do so, he shall be held to have consented to a hearing on the parts designated by the plaintiff in error or appellant. If parts of the record shall be so designated by one or both of the parties, or if such parts be distinctly designated by stipu-

24. BRIEFS.[73]

1. The counsel for the plaintiff in error or appellant shall file with the

lation of counsel for the respective parties, the clerk shall print those parts only; and the court will consider nothing but those parts of the record, and the errors so stated. If at the hearing it shall appear that any material part of the record has not been printed, the writ of error or appeal may be dismissed, or such other order made as the circumstances may appear to the court to require. If the defendant in error or appellee shall have caused unnecessary parts of the record to be printed, such order as to costs may be made as the court shall think proper. All statements and stipulations filed hereunder shall distinctly and accurately refer to the pages of the original certified record, as well as the documents to be printed or omitted. 9. At the time of filing the record and docketing the cause, counsel for the plaintiff in error or appellant in patent cases may furnish the clerk with copies of patent office drawings and specifications to be used as inserts, and the same, if in proper form and of convenient size, shall be used in printing the record. 10. In all cases prosecuted to this court in which records or other matter shall be printed under the supervision of the clerk of this court, his fee for preparing the same for the printer, supervising the printing, indexing and distributing the copies, shall be twenty-five cents for each printed page of the record and index, as provided by law." (231 Fed.)

[73] In the *Second Circuit* this is Rule 22, Day Calendar and Briefs, and subdivision 1 reads as follows: "1. Cases shall be placed by the clerk on the day calendar for argument in their order of docketing, but (unless it be otherwise specially ordered) not until thirty days after the printed record has been filed by one of the parties, or such record has been served on the parties, if the printing be done by the clerk. The party seeking review of the action of the court below shall file with the clerk ten copies of a printed brief and serve two copies thereof on each opposing counsel, within twenty days after the printed record has been filed or served as above provided. Appellees, respondents and defendants in error shall in like manner file and serve their briefs within thirty days after said filing or serving of the printed record. If when a cause appears on the day calendar briefs shall not have been filed in accordance with this rule, such disposition of the cause shall be made as the court may order." In the *Third Circuit*, subdivisions 1, 2, 3 are as follows: "1. In each case in which the printed record has been delivered by the clerk to the counsel for the plaintiff in error or appellant sixty or more days before the first day of the term, such counsel shall file twenty copies of his brief with the clerk not less than thirty days before the first day of such term; in each case in which the printed record has been delivered by the clerk to such counsel between thirty days and sixty days before the first day of such term, twenty copies of such brief shall be filed with the clerk not less than twenty days before the first day of such term; and in all other cases twenty copies of such brief shall be filed with the clerk not more than fifteen days after receipt of such printed record. Within the same time such counsel shall give to counsel for the defendant in error or appellee not less than five copies of such brief. 2. This brief shall contain, in the order here stated: (a) The names of the parties and the nature of the proceedings. (b) A short abstract of the bill or declaration or petition, and of the plea or answer. (c) A statement of the question or questions involved, which shall be in the briefest and most general terms, without names, dates, amounts or particulars of any kind whatever. (d) A concise abstract or statement of the case. (e) The assignments of error relied on, and, where any assignment of error is based on any bill of exceptions or any part of a bill of exceptions, a reference to the particular page of the record where the exception may be found. (f) Argument on the part of the plaintiff in error or appellant, which shall exhibit a clear statement of the points of law or fact to be discussed, with a reference to the

clerk of this court, at least six [74] days before the case is called for argument, twenty copies of a printed brief, one of which shall, on application,[75] be furnished to each of the counsel engaged upon the opposite side.[76]

2. This brief shall [77] contain, in order here stated:—

(1) A concise abstract or statement of the case, presenting succinctly the questions involved, in the manner in which they are raised.

(2) [78] A specification of the errors relied upon, which, in cases brought up by writ of error, shall set out separately and particularly each error asserted and intended to be urged; and, in cases brought up by appeal, the specification shall state, as particularly as may be, in what the decree is alleged to be erroneous. When the error alleged is to the admission or

pages of the record and the authorities relied upon in support of each point. When a statute of a state is cited, so much thereof as may be deemed necessary to the decision of the case shall be printed at length. 3. At least five days before the case is called for argument, the counsel for the defendant in error or appellee shall file with the clerk twenty printed copies of his brief, and give not less than five copies thereof to the counsel for the plaintiff in error or appellant. His brief shall be of a like character with that required of the plaintiff in error or appellant, except that no specification of errors shall be required, and no statement of the case unless that presented by the plaintiff in error or appellant is controverted." In the *Ninth Circuit*, subdivision 1 reads: "1. The counsel for the plaintiff in error or appellant shall file with the clerk of this court twenty copies of a printed brief, and serve upon counsel for the defendant in error or the appellee one copy thereof, at least fifteen days before the case is called for argument." (231 Fed.)

[74] In the *Fourth Circuit*, fifteen days before every term or adjourned term. In the *Seventh Circuit*, "within twenty days after the date of the delivery by the clerk of the printed record." In the *Eighth Circuit*, forty days.

[75] In the *Fourth Circuit*, the word "forthwith" is inserted in place of the words "on application." (193 Fed. xv.)

[76] In the *Fifth Circuit*, subdivision 1 reads as follows: "The counsel for the plaintiff in error, appellant or petitioner, shall file with the clerk of this court at least fifteen days in ordinary cases, and five days in preference cases, before the case is called for argument, twenty copies of a printed brief, one to be signed in handwriting by an attorney of this court, who has entered an appearance in the case; one copy of the brief shall, on application, be furnished to each of the counsel engaged upon the opposite side." In the *Sixth Circuit*, this is Rule 20, and the first subdivision thereof reads: "1. Counsel for appellant, within twenty-five days after the filing of the printed copies of the record, shall file with the clerk twenty printed copies of a brief." (202 Fed. xiv.)

[77] In the *Second Circuit*, subdivision 2 begins as follows: "2. The brief for plaintiff in error, appellants and petitioners to revise shall contain, in order here stated." In the *Eighth Circuit*, after the word "shall" and before the word "contain," the following words are inserted: "be printed on unglazed paper, and it and all quotations contained therein shall be in substantial conformity with the size and type prescribed by Rule 26 for the printing of records and shall." (188 Fed. xvi.)

[78] In the *Second Circuit* this reads as follows: "(2) A specification of the errors relied upon, which in cases brought up by writ of error, shall set out separately and particularly each error asserted and intended to be urged; and in cases brought up by appeal or petition to revise the specification shall state, as particularly as may be, in what the decree or order is alleged to be erroneous." This subdivision is omitted in the *Fourth* and *Sixth Circuits*.

to the rejection of evidence, the specification shall quote the full substance of the evidence admitted or rejected. When the error alleged is to the charge of the court, the specification shall set out the part referred to *totidem verbis*, whether it be in instructions given or in instructions refused. When the error alleged is to a ruling upon the report of a master, the specification shall state the exception to the report, and the action of the court upon it.

(3) A brief of the argument, exhibiting a clear statement of the points of law or fact to be discussed, with a reference to the pages of the record and the authorities relied upon in support of each point. When a statute of a State is cited, so much thereof as may be deemed necessary to the decision of the case shall be printed at length.

3. [79] The counsel for a defendant in error or an appellee shall file with the clerk twenty printed copies of his brief [80] at least three [81] days before the case is called for hearing. His brief shall be of a like character with that required of the plaintiff in error or appellant, except that no specification of errors shall be required, and no statement of the case,[82] unless that presented by the plaintiff in error or appellant is controverted.

4. [83] When there is no assignment of errors, as required by section 997 of the Revised Statutes, counsel will not be heard, except at the request

[79] In the *Second Circuit* subdivision reads: "3. The brief of defendants in error, appellees and respondents shall be of a like character with that required of the party seeking review, except that no specification of errors shall be required, and no statement of the case, unless that presented by the plaintiff in error, or appellant, is controverted." In the *Fourth Circuit*, this subdivision reads: "3. The counsel for defendant in error or appellee shall file with the clerk of this court, at least five days before every term or adjourned term, twenty copies of a printed brief, one of which shall forthwith be furnished by the clerk to each of the counsel of record engaged upon the opposite side. His brief shall be of a like character with that required of the plaintiff in error or appellant, except no statement of the case shall be required, unless that presented by the plaintiff in error or appellant is controverted." (233 Fed.) In the *Sixth Circuit*, this is Rule 20, and subdivision 3 thereof reads as follows: "33. Within thirty days after service of appellant's brief, counsel for appellee shall file with the clerk twenty printed copies of his brief, which shall be of like character to that required of appellant, except that no statement of the case shall be required." (202 Fed. xiv.)

[80] In the *Eighth Circuit*, instead of the words "twenty printed copies of his brief" the following words are inserted: "twenty copies of his brief printed on unglazed paper and in substantial conformity with the size and type prescribed by Rule 26 for the printing of records." (188 Fed. xvi, xvii.) In the *Ninth Circuit* the words "and serve upon counsel for plaintiff in error or appellant one copy thereof" are here inserted.

[81] In the *Fifth Circuit*, five days. In the *Eighth Circuit*, ten days. In the *Seventh Circuit*, "within twenty days after the filing of the brief of the plaintiff in error or appellant."

[82] In the *Seventh Circuit* this is subdivision 3, and the following is added: "Either party, at or before the argument of the cause, may file a supplemental brief strictly confined to matter in reply to the brief of the opposite party."

[83] This subdivision is omitted in the *Fourth Circuit*. In the *Sixth Circuit*, this subdivision is: "4. Subsequent briefs may be filed by either party; by the appellant, not less than twenty days, and by the appellee, not less than ten

of the court, and errors not specified according to this rule [84] will be disregarded; but the court, at its option, may notice a plain error [85] not assigned or specified.

5. [86] When, according to this rule, a plaintiff in error or an appellant is in default, the case may be dismissed on motion; and, when a defendant in error or an appellee is in default, he will not be heard, except on consent of his adversary, and by request of the court.

6. [87] When no counsel appears for one of the parties, and no printed brief or argument is filed, only one counsel will be heard for the adverse party; but if a printed brief or argument is filed, the adverse party will be entitled to be heard by two counsel. [88]

days, before the case is put on call for argument. Later briefs will not be received by the clerk or by the court without permission of the court or one of the judges thereof." (202 Fed. xiv, xv.)

[84] In the *Seventh Circuit* the words "and Rule 11" are inserted.

[85] In the *Seventh Circuit* the remainder of this subdivision reads: "involving the merits of the case, though not assigned or specified, and though the question be not saved according to the strict rules of practice, if it be apparent of record that the point was contested and not waived in the court below."

[86] In the *Second Circuit* subdivision 5 reads as follows: "5. Where both parties allege error in the proceedings below, the original plaintiff or petitioner shall be considered appellant for the purposes of this rule." In the *Third* and *Fourth Circuits* this subdivision is numbered 4. (193 Fed. xv.) In the *Sixth Circuit* this subdivision is: "5. Every brief of more than twenty pages shall contain, on its front fly leaves, a subject index with page references, the subject index to be supplemented by a list of all cases referred to, alphabetically arranged, together with references to the pages of the brief where the cases are cited." (202 Fed. xv.)

[87] In the *Second Circuit* subdivision 6 reads: "6. Plaintiffs in error, appellants and petitioners to revise may file with the clerk and serve on opposing counsel at least one day before argument a reply brief. No further briefs shall be filed without special leave of the court." In the *Third* and *Fourth Circuits* this subdivision is numbered 5. (193 Fed. xv.) In the *Sixth Circuit*, this subdivision is: "6. At or before the time of filing any brief, two copies thereof shall be served upon each adverse counsel who has appeared in this court, and if there has been no appearance here for appellee, then upon his counsel in the court below; and the clerk shall require proof or acknowledgment of such service to be filed with the briefs." (202 Fed. xv.)

[88] In the *First Circuit* the following subdivision is added: "7. Every brief of more than twenty pages shall contain on its front fly leaves a subject index with page references, the subject index to be supplemented by a list of all cases referred to, alphabetically arranged, together with references to pages where the cases are cited." (244 Fed.) In the *Second Circuit* the following is Rule 24: "1. A petition for rehearing may be filed within fifteen days from the filing of the opinion of this court in the clerk's office. It must be printed and briefly and distinctly state its grounds and be supported by certificate of counsel and will not be granted or permitted to be argued unless a judge who concurred in the judgment desires it and a majority of the court so determines. 2. If a petition for rehearing be filed within the time herein limited no mandate shall issue pending the disposition of said petition." In the *Fourth Circuit*, the following subdivision is added: "6. Counsel for either party may file with the clerk of this court twenty printed copies of a reply brief, pFovided the same are filed at least three days before the case is reached in its regular order on the argument docket." (233 Fed.) In the *Sixth Circuit*, the following subdivision is added: "7. When an appellant is in default under clause 1 of this rule, the case may be dismissed on motion, or

25. ORAL ARGUMENTS.[89]

1. The plaintiff in error or appellant in this court shall be entitled to open and conclude the argument of the case; but when there are cross-appeals, they shall be argued together as one case, and the plaintiff in the court below shall be entitled to open and conclude argument.[90]

further time may be granted; when an appellee is in default under clause 3 of this rule, the appellant may bring such default to the attention of the court by motion for a summary judgment of reversal, and thereupon the court will entertain such a motion, or grant further time, as may seem proper; at the hearing, a party who has not filed a brief as required by this rule, will not be heard orally, unless the court shall so request." (202 Fed. xv.) In the *Seventh Circuit*, subdivision 2 reads: "This brief shall contain, in the order here stated, and under the respective titles, 'Statement of Case,' 'Errors Relied Upon,' and 'Brief of Argument.'" To subdivision 3 is added: "Either party, at or before the argument of the cause, may file a supplemental brief strictly confined to matter in reply to the brief of the opposite party." In subdivision 4 after "rule" is inserted, "and Rule 11, *ante*;" and after "notice a plain error," the rule reads, "involving the merits of the case, though not assigned or specified, and though the question be not saved according to the strict rules of practice, if it be apparent of record that the point was contested and not waived in the court below."

[89] In the *Second Circuit* this is Rule 23. Subdivision 1 is the same as in general Rule 25. Subdivisions 2 and 3 are as follows: "2. Only one counsel will be heard for each party on the argument of a case, except by leave of the court. 3. Upon motions and appeals from orders granting or refusing a preliminary injunction or appointing a receiver, and upon appeals and petitions to revise in bankruptcy, one-half hour on each side; upon writs of error three-quarters of an hour on each side, and in other cases where there are no difficult questions of law and the amount involved does not exceed $500, only one-half hour on each side will be allowed. No more time than above specified will be allowed without special leave of the court granted before argument begins." In the *Sixth Circuit* this rule is numbered 23 and reads: "1. Cases will not be taken upon briefs, without oral argument, except by permission of the court on special application made before the case is reached. 2. The appellant shall be entitled to open and to conclude. Cross appeals or cross writs of error shall be argued together as one case, and the plaintiff below shall be considered as appellant under this rule. 3. Two counsel, and no more (unless by special permission), may be heard for each party; but where no brief is filed and no counsel is heard for one party, only one counsel will be heard for the adverse party. 4. One hour and one-half on each side will be allowed for argument, and no more, unless by leave of the court granted before the argument begins. The time thus allowed may be apportioned between the counsel on the same side at their discretion, provided that a fair opening of the case is made by the appellant." (202 Fed. xvi, xvii.) In the *Fourth Circuit*, the following is added to this subdivision: "Where there are cross writs of error the court may direct that they be argued together. In such event the plaintiff in the court below shall be entitled to open and conclude the argument." (233 Fed.) In the *Fifth Circuit* subdivision 3 reads as follows: "(3) One hour will be allowed for the plaintiff in error or appellant to open and present his case, and one hour will be allowed to the defendant in error or appellee to answer; thirty minutes will then be allowed to the plaintiff in error or appellant to reply. No more time will be allowed for argument without special leave of the court."

[90] In the *Seventh Circuit* these words are added to this rule: "4. Reading at length from briefs or reported cases shall not be indulged." In the *Eighth Circuit* one hour and fifteen minutes is allowed on each side for argument. In

2. Only two counsel will be heard for each party on the argument of a case.

3. Two hours on each side will be allowed for the argument, and no more, without special leave of the court, granted before the argument begins. The time thus allowed may be apportioned between the counsel on the same side at their discretion: provided, always, that a fair opening of the case shall be made by the party having the opening and closing arguments.[91]

26. FORM OF PRINTED RECORDS, ARGUMENTS, AND BRIEFS.[92]

All records, arguments, and briefs, printed for the use of the court, must

the *Ninth Circuit* subdivision 3 is omitted, and the following is added: "3. Upon appeals from orders granting or refusing a preliminary injunction or appointing a receiver, and upon appeals in habeas corpus matters and upon appeals and petitions to revise in bankruptcy, one-half hour on each side; upon writs of error three-quarters of an hour on each side, and in other cases one hour on each side will be allowed. No more time than above specified will be allowed without special leave of the court granted before the argument begins. The time thus allowed may be apportioned between the counsel on the same side at their discretion, provided always that a fair opening of the case shall be made by the party having the opening and closing argument. 4. Any case entitled to be heard at any term or session of the court may be submitted by either or both of the parties on briefs. Consent to submit a case on briefs may be filed at any time prior to, or at the time the case is reached for hearing." (246 Fed.)

[91] In the *Fourth Circuit:* "All transcripts of record, addenda thereto, arguments, and briefs printed for the use of this court shall be in small pica type, 24 pica 'ems' to a line, on unglazed paper, with an index, and a suitable cover, containing the title of the court, the cause, and the court from which the case is brought into this court, and the number of the case. Size of pages to be 9¼x6¼ inches, except that in patent cases the size of the pages shall be 10¾x7⅝ inches; that is to say, large enough to bind in copies of Patent Office drawings and specifications without folding. So much of the record as was printed in the court below may be used in this court if it conforms to this rule." (233 Fed.) In the *Fifth Circuit,* the word "record" in the first line is omitted and the following is added: "And as well as all quotations contained therein and the covers thereof must be printed in clear print never smaller than small pica and on unglazed paper."

[92] In the *Second Circuit* this rule is numbered 24, and reads: "All arguments and briefs printed for the use of the court must be printed upon a page eleven inches long by seven inches wide, and must have a margin of at least two inches in width." In the *Sixth Circuit* this is Rule 21, and reads as follows: "1. Records printed by the clerk shall be of uniform size, printed in small pica type, twenty-four pica type, 24 pica ems to a line, 48 lines to a page, solid, with index, and suitable cover containing the title of the court and cause, the court from which the case is brought to this court, and the number of the case; size of pages to be 9½ by 6½ inches, except that in patent cases the size of the pages will be 10¾ by 7⅝ inches; that is to say, large enough to bind in copies of Patent Office drawings and specifications without folding. The type shall be of a clear, strong face, substantially equivalent to that in which this rule is printed, and the paper shall be wholly unglazed. Each page shall carry, as a running head, in addition to the 48 lines, the name of the paper or of the witness testifying, as found on that page. Each pleading, order, exhibit or other paper shall be separated from the preceding matter by a two-inch space, and shall be headed by its title, in black-face capitals, and its filing date (e. g., 'ANSWER—Filed February 15, 1913'). The full title of the court and cause

be in such form and size that they can be conveniently bound together, so as to make an ordinary octavo volume.

below shall be given on the title page; elsewhere, both shall be omitted. 2. Printed arguments and briefs of attorneys shall conform, as far as practicable, to the size and style of the printed record, but shall contain about 36 lines to the page, and be leaded with at least two-point leads." (202 Fed. xv.) In the *Seventh Circuit* this rule was repealed by the adoption of Rule 35, and Rule 28 was amended by changing it from 28 to 26 (see Rule 28 *infra*). In the *Eighth Circuit* this rule reads: "1. All transcripts of record, arguments and briefs for the use of this court, except in patent causes as hereinafter provided, shall be printed on unglazed paper not less than 6¼ inches in width by 9½ inches in length, including a sufficient margin so that they can be conveniently trimmed and bound in volumes. The paper should equal a weight of 80 pounds per ream on basis of size of sheet 25 by 38 inches. 2. All records and briefs in patent causes may be printed on unglazed paper, of the weight as provided in section 1 of this rule, of such size that copies of letters patent may be inserted therein without folding, but the size of such records and briefs in patent causes shall not be less than 7½ inches wide and 9½ inches long so that the records and briefs can be conveniently trimmed and bound in volumes. 3. All records, briefs, supplemental transcripts and returns to writs of certiorari shall be printed in clear eleven point or small pica type (never smaller than ten point), of 26 pica or 28 small pica ems to a line and 52 lines, including running head, solid, per printed page, containing substantially 1,400 small pica ems. Where testimony or depositions by question and answer are printed the answer shall follow on same line as the question whenever the same can be done. 4. All indexes to records and tabular exhibits, which from their nature require smaller type, may be printed in eight point or brevier type. 5. All covers for records shall be printed in a neat and workmanlike manner on substantial paper equal to a weight of 96 pounds per ream on the basis of a sheet 25 by 40 inches, and shall contain in conspicuous type the following matter, viz.: *First:* Transcript of record. *Second:* United States Circuit Court of Appeals, Eighth Circuit. *Third:* The abbreviation for number 'No.' followed by a blank line ¾ of an inch in length. *Fourth:* The title of the cause as will be docketed in this court, viz.: ————, Appellant (or Plaintiff in Error) as the case may be, vs. ————, Appellee (or Defendant in Error). *Fifth:* The words 'In Error to (or 'Appeal from') as the nature of the case may require, followed by the correct title of the trial court. 6. Unless otherwise expressly directed by counsel, the full titles of the court and cause once correctly shown in the printed transcript shall not be repeated when unchanged. There shall be placed at the head of each subsequent pleading, etc., a brief designation of its character. Unless otherwise expressly directed by counsel, the indorsements on pleadings, etc., shall not be printed in full; it shall be sufficient to print: 'Filed in the ——— Court on ———,' giving the correct date and name of the court. The date of all orders and decrees and the name of the judge or judges making them shall always appear. In printed transcripts the pleadings, orders, testimony of witnesses, etc., shall be separated by a face rule three inches long. The clerk shall indicate to the printer the appropriate places therefor. When inserts are folded several times to conform to the size of the printed record, stubs should be inserted at the binding side of the record to equalize the space occupied by the folds. Unmounted photographs should be used when copies of such are required in printed records. As this rule is intended primarily for the guidance of the printer his attention should be directed thereto before the record or brief is printed. A sample copy of a printed record will be furnished by the clerk of this court on application therefor. Records and briefs not printed in substantial conformity with the provisions of this rule will not be accepted or filed." (188 Fed. xvii, xviii, xix.) In the *Ninth Circuit:* "1. All records printed for the use of the court must be printed on unglazed paper, nine and one-quarter inches long and six and

27. COPIES OF RECORDS AND BRIEFS.[93]

The clerk shall[94] carefully preserve in his office one copy of the printed record in every case submitted to the court for its consideration, and of all printed motions, briefs, and arguments filed therein.

28. OPINIONS OF THE COURT.[95]

1. All opinions delivered by the court shall, immediately upon the delivery thereof, be handed to the clerk to be recorded.[96]

2. The original opinions of the court shall be filed with the clerk of this court for preservation.[97]

3. Opinions printed under the supervision of the judge delivering the same need not be copied by the clerk into a book of records; but, at the end of each term, the clerk shall cause such printed opinions to be bound in a substantial manner into one or more volumes, and when so bound they shall be deemed to have been recorded, within the meaning of this rule.[98]

one-quarter inches wide. The printed page exclusive of any marginal note, reference or running head, must be seven inches long and four inches wide, excepting in patent cases where counsel furnish to the clerk at the time of docketing the cause Patent Office drawings and specifications for insertion. In such cases the margin of the record may be sufficiently enlarged to accommodate such drawings and specifications. The record must be properly indexed. Pica double-leaded is the only mode of composition allowed. 2. All arguments, briefs, and petitions for rehearing, printed for the use of the court, must be printed on unruled white writing paper, nine and one-quarter inches long and six and one-quarter inches wide. The printed page, exclusive of any marginal note, reference, or running head, must be seven inches long and four inches wide. Pica double-leaded is the only mode of composition allowed." (231 Fed.)

[93] In the *Second* and *Third Circuits* this rule is omitted. In the *Fourth Circuit:* "The clerk shall cause to be bound two copies of the printed record in every case, and of all printed motions, briefs and arguments filed therein; one copy to be carefully preserved in his office, and one copy for the use of the court library. The cost of the same to be paid for by the clerk out of the revenues of his office. (223 Fed.) In the *Sixth Circuit* this rule is omitted. In the *Seventh Circuit* this rule was repealed by Rule 35, and the number of Rule 29 was changed to 27. (See Rule 29.)

[94] In the *Eighth Circuit,* after the words "The clerk shall" and before the words "carefully preserve," the following words are inserted: "cause to be bound in volumes in a substantial manner and shall". (188 Fed. xix.)

[95] In the *Fifth Circuit* the rule reads: "The original opinions of the court shall be filed with the clerk of this court for preservation, and when so filed the same shall be deemed to have been recorded within the meaning of this rule." (208 Fed.)

[96] In the *Second Circuit* this is Rule 25. In the *Third Circuit* this is Rule 26, and reads: "1. All written opinions delivered by the court shall be filed by the clerk." In the *Fourth Circuit* this first subdivision reads: "1. All opinions delivered by the court shall be printed under the supervision of the judge delivering the same, or of one of the circuit judges, the cost of such printing to be paid by the clerk out of the revenues of his office and charged to the litigants in the respective cases, to be taxed and allowed as other costs."

[97] Subdivision 2 omitted in *Third* and *Sixth Circuits.*

[98] In the *Third Circuit* subdivision 3 is omitted. In the *Fourth Circuit* the subdivision 3 reads: "The clerk of this court shall from time to time cause two sets of the printed opinions of this court to be bound in a substantial manner

29. REHEARINGS.[99]

A petition for rehearing after judgment can be presented only at the term at which judgment is entered, unless by special leave granted during the

into volumes, one set to be kept in the clerk's office and one set to be kept in the court library." In the *Sixth Circuit* subdivision 2 is as follows: "2. The clerk shall cause to be printed any manuscript opinion filed with him. An opinion printed under the supervision of the clerk or of a judge need not be copied into a book of records; but at the end of each term, the clerk shall cause such printed opinions to be bound in a substantial manner into one or more volumes, and when so bound, they shall be deemed to have been recorded within the meaning of this rule." (202 Fed. xvii.) In the *Seventh Circuit* this rule is number 26. In the *Ninth Circuit* this entire rule reads: "The original opinions of the court shall be filed with the clerk of this court for preservation, and when so filed the same shall be deemed to have been recorded within the meaning of this rule." In the *Eighth Circuit* subdivision 3 is changed as follows: After the word "printed", in the first line, the words "or prepared" are inserted; and after the word "printed", in the third line, the words "or original" are inserted. (188 Fed. xix.)

[99] In the *First Circuit* this rule reads: "A petition for a rehearing after judgment may be filed at the term at which the judgment is entered, and within one calendar month after such entry, and not later, unless by leave granted during the term. It must be in print, in the form and style required by Rule 26, and it must briefly and distinctly state its grounds, and be supported by a certificate of counsel. It will not be granted, or permitted to be argued, unless a judge who concurred in the judgment desires it and a majority of the court so determines. Provided, whenever a judgment is entered within less than a month before the term adjourns, the petition may be filed within a month after the entry of judgment, and with the same effect after the term as though filed before the adjournment." In the *Second Circuit* this is Rule 26 and reads as follows: "1. A petition for rehearing may be filed within fifteen days from the filing of the opinion of this court in the clerk's office. It must be printed and briefly and distinctly state its grounds and be supported by certificate of counsel, and will not be granted or permitted to be argued unless a judge who concurred in the judgment desires it and a majority of the court so determines. 2. If a petition for rehearing be filed within the time herein limited no mandate shall issue pending the disposition of said petition." Rule 29 reads as follows: "Taxing Cost—Order—Mandate. 1. Upon the filing of any decision by this court the clerk shall forthwith, or at any later time, if the court thinks justice requires it, enter the proper order, and will thereupon prepare and tax the bill of costs, giving to the parties reasonable time to file with him their proposed orders and bills of costs, with proof of service of the same upon their opponents. 2. A mandate or other proper process in the nature of a *procedendo* may issue at any time on order of this court, but unless otherwise ordered shall issue at the expiration of fifteen days from the filing of the opinion of this court in the clerk's office unless delayed by the filing of the petition for rehearing. 3. If application for *certiorari* from the Supreme Court be made, application to stay the mandate pending such *certiorari* shall be made only to this court, except in vacation, when such application for stay of mandate may be made to any judge of this court. During recesses any judge of this court is authorised to grant an order to show cause (with stay) why the issuance of mandate should not be withheld, making, however, such order to show cause returnable at the next motion day of this court." In the *Third Circuit* this is Rule 27 and reads: "1. A petition for rehearing a cause may be filed with the clerk at any time within thirty days after the entry therein of the final judgment or final decree of this court, and if the term within which such judgment or decree shall have been entered, shall expire during said period of thirty days, the judgment or decree, and the record on which the same shall

term, and must be printed, and briefly and distinctly state its grounds, and be supported by certificate of counsel; and will not be granted, or permitted to be argued, unless a judge who concurred in the judgment desires it, and a majority of the court so determines.

30. INTEREST.[100]

1. In cases where a writ of error is prosecuted in this court, and the judgment of the inferior court is affirmed, the interest shall be calculated

have been entered, shall nevertheless remain subject to the control of this court until the full expiration of the time herein allowed for the filing of the petition: Provided, however, that no such petition shall be filed after this court, by any order made within such period of thirty days, shall have directed the immediate issue of a mandate or other process in the nature of a procedendo (see Rule 30). The petition shall be printed, shall briefly and distinctly state the reasons for a rehearing, and shall be supported by the certificate of counsel." In the *Fourth Circuit*, this rule reads as follows: "A petition for rehearing can be presented only within thirty days after judgment is entered, unless by special leave granted before the expiration of said thirty days; and must be printed, and briefly and distinctly state its grounds, and be supported by a certificate of counsel; and will not be granted, or permitted to be argued, unless a judge who concurred in the judgment desires it, and a majority of the court so determine. But such petition shall not operate to stay the mandate or other process provided for in Rule 32, except by special order of the court." (233 Fed. xvii.) In the *Fifth Circuit* insert after "entered," "and within twenty days after such entry." and after "grounds," insert "without argument." In the *Sixth Circuit*, this is Rule 28 and reads as follows: "A petition for rehearing after judgment can be presented only within thirty days (at the same or succeeding term) after the day when the printed opinion of the court is filed, and can be obtained by counsel for the parties (which date the clerk will note upon the docket), unless by special leave granted during such thirty days by the court or a judge thereof, and must be printed, and briefly and distinctly state its grounds, and be supported by certificate of counsel, and will not be granted, or permitted to be argued, unless a judge who concurred in the judgment desires it and a majority of the court so determines." (202 Fed. xix.) In the *Seventh Circuit* this rule is numbered 27, and reads as follows: "A petition for rehearing must be filed within thirty days after entry of judgment or decree, or after filing of the opinion, shall be in print, and be served forthwith by copy upon the opposing party, who, within twenty days from such service, may file a printed answer, and the petition shall be determined without oral arguments, unless otherwise ordered. If a petition be not filed within the time allowed, and upon the overruling of a petition, the clerk shall, without special order, issue the mandate of the court to the court below. Twenty copies of such petition or answer shall be filed with the clerk of this court." In the *Eighth Circuit* the following takes the place of the first part of this rule up to the words "briefly and distinctly": "1. A petition for rehearing may be presented and filed within sixty days after the date of the judgment or decree, and jurisdiction to hear and decide the questions presented thereby is reserved, notwithstanding the lapse of the term within the sixty days. 2. Such petition for rehearing must be printed and twenty copies thereof filed with the clerk and must." (188 Fed. xix, xx.) In the *Ninth Circuit* the rule reads: A petition for rehearing may be presented within 30 days after judgment. It must be printed, and briefly and distinctly state its grounds, and be supported by certificate of counsel that in his judgment it is well founded, and that it is not interposed for delay. Twenty printed copies must be filed with the clerk of this court. (208 Fed.)

[100] In the *Second Circuit* this is Rule 27. In the *Sixth Circuit* this is Rule

and levied, from the date of the judgment below until the same is paid, at the same rate that similar judgments bear interest in the courts of the State or Territory [101] where such judgment was rendered.[102]

2. In all cases where a writ of error shall delay the proceedings on the judgment of the inferior court, and shall appear to have been sued out merely for delay, damages at a rate not exceeding ten per cent., in addition to interest, shall be awarded upon the amount of the judgment.

3. The same rule shall be applied to decrees for the payment of money in cases in equity, unless otherwise ordered by this court.

4. In cases in admiralty, damages and interest may be allowed, if specially directed by the court.[103]

26 and reads as follows: "1. Where a judgment or decree of the District Court at law, in equity, bankruptcy or admiralty, requiring the payment of money, is affirmed by this court, interest thereon from its date and until payment shall be calculated and levied at the same rate borne by similar judgments or decrees in the courts of the state where such District Court sits. 2. Where, in any such case, the review in this court has delayed proceedings to collect the award in the District Court, and shall appear to this court to have been had or prosecuted merely for delay, damages at a rate not exceeding ten per cent. of the award, and in addition to interest, may be imposed by this court." (202 Fed. xvii.) In the *Seventh Circuit* this is Rule 28. Subdivision 1 reads as follows: "1. When a judgment for the payment of money is affirmed by this court, the interest thereon shall be calculated and levied from the date of the judgment below until the same is paid, and at the same rate that similar judgments bear interest in the courts of the state where such judgment was rendered.

[101] In the *First, Third, Fourth, Sixth* and *Seventh Circuits,* the words "or territory" are omitted.

[102] In the *Seventh Circuit* subdivision 5 is added: "5. In cases where money is paid into court, any party interested may move for an order that the clerk deposit the same under the direction of the court. On deposits so made, the clerk shall account for such interest as he may have collected on the fund."

[103] In the *Second Circuit* this is Rule 28. In the *Third Circuit* the following subdivision is added: "7. In pursuance of the act of Congress of February 19, 1897 (29 St. at L. 536, c. 263) and of the order of the Supreme Court of January 10, 1898, as amended February 28, 1898 (90 Fed. clxxi), the following table of fees and costs is established for this court: (See in connection with this rule the table of costs in 202 Fed. xix.) In the *Fourth Circuit,* see subdivision 7 of this rule for table of fees and costs. (283 Fed. xviii.) In the *Sixth Circuit,* this is Rule 27 and reads as follows: "1. Where any case shall be dismissed out of this court for lack of jurisdiction herein, only such costs as are incidental to hearing and determining the question of jurisdiction will be awarded; in all other cases (except when provided by statute or general rule), upon the final disposition of a proceeding in this court, costs will be awarded to the party here prevailing, unless the court, by special direction, denies, otherwise awards or apportions the costs. 2. In cases to which the United States is a party, no costs in this court will be awarded. 3. In denying or apportioning costs under clause 1, the court will enforce, as far as possible, the duty of each party to confine within the limits prescribed by Rules 10 and 15 the bill of exceptions, statement of evidence and transcript. 4. The cost of stenographers' transcripts of testimony used in settling a bill of exceptions or a statement of evidence, will not be taxed in this court, but shall be awarded and taxed by the court below after mandate, as this court may direct, or, lacking such direction, as to that court shall seem proper. 5. When costs are allowed, it shall be the duty of the clerk to insert the amount thereof in the body of the mandate or other process sent to the court below, and annex to the same a

31. COSTS.[104]

1. In all cases where any suit shall be dismissed in this court, except where the dismissal shall be for want of jurisdiction, costs shall be allowed to the defendant in error or appellee, unless otherwise agreed by the parties.

2. In all cases of affirmance of any judgment or decree in this court, costs shall be allowed to the defendant in error or appellee, unless otherwise ordered by the court.

3. In cases of reversal of any judgment or decree in this court, costs shall be allowed to the plaintiff in error or appellant,[105] unless otherwise ordered by the court. The cost of the transcript of the record from the court below shall be taxable in that court as costs in the case.[106]

bill of items taxed in detail. 6. The proper fees of the clerk therefor shall be paid before any transcript of the record in any case shall be transmitted to the Supreme Court." (202 Fed. xix.) See in connection with this rule the table of Costs established by the Supreme Court for the Circuit Court of Appeals, February 28, 1898. (202 Fed. xix.) In the *Seventh Circuit* this is Rule 29 and reads as follows: "1. When any suit shall be dismissed in this court, except for want of jurisdiction, costs shall be allowed to the defendant in error or appellee, unless otherwise agreed by the parties. 2. In every case of a judgment or decree affirmed in this court costs shall be allowed to the defendant in error or appellee unless otherwise ordered by the court. 3. In every case of reversal of a judgment or decree in this court costs shall be allowed to the plaintiff in error or appellant unless otherwise ordered by the court. The costs of the transcript of the record from the court below shall be taxable in that court as costs in the case. 4. No costs shall be allowed in this court for or against the United States. 5. When costs are allowed in this court, it shall be the duty of the clerk to insert the amount thereof in the body of the mandate, or other proper process, sent to the court below, directing to award execution thereupon and to annex to the same the bill of items taxed in detail. 6. In all cases certified to the supreme court or removed thereto by certiorari or otherwise, the fees of the clerk of this court shall be paid before a transcript of the record shall be transmitted to the Supreme Court. 7. The fees of the clerk of this court, as prescribed by order of the Supreme Court, made February 28, 1898, are as follows: (See table in 202 Fed. xix.)" In the *Ninth Circuit* subdivision 1 reads: "1. In all cases where any suit shall be dismissed in this court, costs shall be allowed to the defendant in error or appellee, unless otherwise ordered by the court."

[104] In the *Eighth Circuit* the clause "except when the dismissal shall be for want of jurisdiction" is omitted.

[105] In the *Ninth Circuit* the words "including the cost of the transcript from the court below" are here inserted.

[106] In the *Second Circuit* subdivision 3 reads: "In cases of reversal of any judgment, decree or order in this court, costs shall be allowed to the party seeking review, unless otherwise ordered by the court. The cost of the transcript of the record from the court below shall be taxable in this court as part of such costs, and the clerk of the court below shall send to the clerk of this court with the transcript of record a certificate of the cost of such transcript." In the *Fourth Circuit*, instead of the last sentence of this subdivision, the following is inserted: "The cost of the transcript of the record and proofs from the court below, and the expense of printing the same, when printed below, shall be taxable in that court as costs in the case. The expense of printing, however, shall be taxed at actual cost (to be shown by the affidavit of the printer), but in no event to exceed twenty cents per folio of one hundred words." (233 Fed.) In the *Eighth Circuit*, instead of the second sentence in subdivision 3 of this rule the following is inserted: "Where the record has been

4. Neither of the foreging sections shall apply to cases where the United States are a party, but in such cases no costs shall be allowed in this court for or against the United States.[107]

5. When costs are allowed in this court, it shall be the duty of the clerk to insert the amount thereof in the body of the mandate, or other proper process, sent to the court below, and annex to the same the bill of items taxed in detail.[108]

6. In all cases certified to the Supreme Court or removed thereto by *certiorari* or otherwise, the fees of the clerk of this court shall be paid before a transcript of the record shall be transmitted to the Supreme Court.[109]

32. MANDATE.[110]

In all cases finally determined in this court, a mandate, or other proper process in the nature of a *procedendo*, shall be issued, on the order of this

printed in this court under the provisions of sections one and two of Rule 23, the cost of printing thirty copies of the transcript of record from the court below shall be taxed as costs in the case, unless otherwise ordered by this court, but no allowance shall be made for the amount paid to the clerk of the court below for the written or typewritten transcript of the record. Where the record has been printed in the court below and a copy of such printed record certified to this court the cost of printing twenty-five copies of such record or portion thereof shall be taxable as costs in the case in the court below, unless otherwise ordered by this court." (188 Fed. xx.)

[107] In the *Seventh Circuit* this rule is numbered 29 and this subdivision reads: "4. No costs shall be allowed in this court for or against the United States."

[108] In the *Fourth Circuit* the words "in detail" are omitted. (193 Fed. xviii.)

[109] In the *Eighth Circuit* the following is added to subdivision 6 of this rule: "except that no fee shall be charged or collected for any printed record or portion thereof, required by law to be used by the clerk in the preparation of such transcript of the record." (188 Fed. xxi.) In the *Ninth Circuit* this is added to the rule: "7. Upon the clerk's producing satisfactory evidence, by affidavit or the acknowledgment of the parties of their sureties, of having served a copy of any bill of fees due by them, respectively, in this court, on such parties or their sureties, an attachment shall issue against such parties or sureties respectively to compel payment of said fees." (208 Fed.)

[110] In the *First Circuit* this rule reads: "In every case finally determined, a mandate, or other proper process in the nature of a *procedendo*, shall be issued to the court below, for the purpose of informing that court of the proceedings in this court, so that further proceedings may be had in the court below as to law and justice may appertain. Such mandate, or other process, may issue at any time on the order of the court; but, unless otherwise ordered, it shall issue as of course after two calendar months from the entry of judgment, unless a petition for a rehearing has been filed and remains undisposed of." In the *Second Circuit* Rule 32 reads as follows: "Allowance of Appeals and Writs of Error—Bail. 1. An appeal or writ of error may be allowed in term time or vacation by the circuit justice or by any circuit judge within the circuit or by any district judge within his district, and the proper security be taken and the citation be signed by him, and he may also grant a supersedeas and stay of execution or of proceedings, pending such writ of error or appeal. 2. Where such writ of error from this court is allowed in the case of a conviction of an infamous crime, or in any other criminal case in which it will lie, the district court or the judge thereof, or any circuit judge of the circuit or the circuit justice, shall have power, after the citation is served, to admit the accused to bail in such amount as may be fixed." In the *Fourth Circuit* the following

court, to the court below, for the purpose of informing such court of the proceedings in this court, so that further proceedings may be had in such court as to law and justice may appertain.[111]

33. CUSTODY OF PRISONERS ON HABEAS CORPUS.[112]

1. Pending an appeal from the final decision of any court or judge

is added: "Such mandate, or other process, may issue at any time on the order of the court; but, unless otherwise ordered, it shall issue as of course after the expiration of thirty days from the date of the judgment or decree." See also note 99—*Second Circuit*. In the *Fifth Circuit* as follows: "Mandates shall issue at any time after twenty-one days from the date of the decision, unless an application for a rehearing has been granted or is pending. A copy of the opinion of this court shall accompany the mandate when a new trial or further proceedings are to be had in the lower court, and the charge for such copy shall be taxed in the costs of the case. Provided, that in all cases entitled to precedence in this court under section 7 of the act approved March 3, 1891, the mandate or other proper process may be issued by the clerk after the expiration of seven days from the date of the decision, unless otherwise ordered by the court or one of the judges thereof." In the *Sixth Circuit* this is Rule 29 and reads as follows: "In all cases finally determined in this court, a mandate, or other process in the nature of a *procedendo*, shall be issued on the order of this court to the court below, for the purpose of informing such court of the proceedings in this court, so that further proceedings may be had in such court as to law and justice may appertain. Such mandate shall not issue until time has elapsed for filing a petition to rehear, as defined by Rule 28; and no mandate or other process of *procedendo* shall issue when a petition to rehear is pending, unless specially ordered. Every mandate shall be accompanied by a copy of the opinion filed in the cause in which it is issued, and the charge for the same shall be taxed in the costs of the case. In cases not requiring special form of process, the mandate (unless otherwise directed by the court or a judge thereof) shall be issued by the clerk upon the expiration of time for filing rehearing petition, or upon the denial of such petition, and as well in vacation as in term time." (202 Fed. xix.) In the *Seventh Circuit* this rule is number 30. In the *Eighth Circuit* the following is added to this rule: "[Note—By an order entered March 30, 1911, the clerk is directed to issue a mandate or other proper process, to the court below, in all cases, 60 days after the final disposition thereof, except in cases where it shall be otherwise expressly ordered.]" (188 Fed. xxi.) In the *Ninth Circuit* this rule reads as follows: "In all cases finally determined in this court, a mandate or other proper process in the nature of a *procedendo* shall, upon the payment of any costs due in the case, be issued, as of course from this court to the court below, for the purpose of informing such court of the proceedings in this court, so that further proceedings may be had in such court as to law and justice may appertain. Such mandate, if not stayed by the order of the court, shall be issued on the expiration of thirty days from the date of such final determination unless within said time a petition for rehearing be filed, in which case the mandate shall be stayed until five days after the determination of such petition."

[111] In the *Third Circuit* the rule is numbered 30 and the following is added: "Such mandate or other process may issue at any time on the order of the court, and when not otherwise ordered, it shall issue as of course at the expiration of thirty days from the date of entering the final judgment or final decree of this court."

[112] In the *Second Circuit* this is Rule 30. Rule 33 reads: "Security for Clerk's Fees. 1. In all cases the plaintiff in error or appellant on docketing a case and filing a record, and a petition on filing a petition to revise shall enter into an undertaking with the clerk for the payment of his fees or otherwise satisfy

declining to grant the writ of *habeas corpus*, the custody of the prisoner shall not be disturbed.[113]

2. Pending an appeal from the final decision of any court or judge discharging the writ after it has been issued, the prisoner shall be remanded to the custody from which he was taken by the writ, or shall, for good cause shown, be detained in custody of the court or judge, or be enlarged upon recognizance, as hereinafter provided.

3. Pending an appeal from the final decision of any court or judge discharging the prisoner, he shall be enlarged upon recognizance, with surety, for appearance to answer the judgment of the appellate court, except where, for special reasons, sureties ought not to be required.

34. MODELS, DIAGRAMS, AND EXHIBITS OF MATERIAL.[114]

1. Models, diagrams, and exhibits of material, forming part of the evidence taken in the court below, in any case pending in this court, on writ of error or appeal, shall be placed in the custody of the marshal[115] of this court at least ten days before the case is heard or submitted.[116]

2. All models, diagrams, and exhibits of material, placed in the custody of the marshal[117] for the inspection of the court on the hearing of a case, must be taken away by the parties within one month after the case is decided. When this is not done, it shall be the duty of the marshal[118] to

him in that behalf." In the *Third Circuit* this is Rule 31. In the *Sixth Circuit* this rule is numbered 32. (202 Fed. xx.) In the *Seventh Circuit* this rule is numbered 31.

[113] In the *Second Circuit* the words "by bail or otherwise" are added.

[114] In the *Second Circuit* this is Rule 31. Rule 34 is as follows: "Adding Cases to General Calendar. Thirty days after the record in any cause has been printed and filed with the clerk he shall add the cause to the General Calendar. After the first Monday in March, in any term, no cause, except a writ of error in a criminal case, shall be added to the General Calendar for that term without a motion therefor being made in open court." In the *Sixth Circuit*, this rule is numbered 30 and reads: "1. Physical exhibits, not returned with the record but which are to be used on the hearing, shall be placed in the custody of the marshal of this court at least ten days before the case is heard or submitted. 2. All such physical exhibits shall be taken away by the parties promptly after the mandate issues. When this is not done, it shall be the duty of the marshal to notify the counsel in the case, by mail or otherwise, of the requirements of this rule, and if the articles are not removed within reasonable time after the notice is given, he shall destroy them or make such other disposition of them as to him may seem best." (202 Fed. xix.) In the *Seventh Circuit* this rule is numbered 32.

[115] In the *Second Circuit* the following words shall follow "clerk of this court before argument begins," instead of "marshal * * * or submitted." In the *Fourth Circuit*, the word "clerk," is inserted in place of the word "marshal," throughout. (233 Fed.)

[116] In the *Second Circuit* subdivision 2 reads as follows: "Three copies must be furnished for the use of the court of any maps, charts, plans, diagrams or other papers or documents which it is intended to refer to on the argument, and which are not contained in the transcript of record as certified from the court below."

[117] In the *Second Circuit* "clerk."

[118] In the *Second Circuit* the words "when this is done" are omitted and instead of "marshal" the word "clerk."

notify the counsel in the case, by mail or otherwise, of the requirements of this rule,[119] and, if the articles are not removed within a reasonable time after the notice is given, he shall destroy them, or make such other disposition [120] of the mandate of this court by the court below.

[119] In the *Second Circuit* the remainder of this subdivision reads: "and if articles are not removed within the time above specified, he shall destroy them, or make such other disposition of them as to him may seem best."

[120] In the *Third Circuit* this is Rule 32, and the words "of them as to him may seem best" are added.

ADDITIONAL RULES.

In the *First Circuit* there is this additional rule: *Rule 35. "Error in criminal cases.*—On or after the allowance of a writ of error in a criminal case cognizable by this court, the justice or judge who allowed the writ, or the court which entered the judgment, or any judge thereof, shall have power to admit to bail the plaintiff in error, according to the rules of law applicable to this case." (90 Fed. ix.) *Rule 36. "Petitions in bankruptcy cases.*—1. On the filing of a petition for the exercise of the power of superintendence and revision vested in this court by the act to establish a uniform system of bankruptcy throughout the United States, approved July 1, 1898, or under any acts which may hereafter be passed in addition thereto or amendatory thereof, the clerk shall issue, as of course an order to show cause, returnable two weeks from the date thereof, which shall be served by copy on each of the adverse parties named in the petition as a person against whom relief is desired, or his solicitor in the proceeding in the District Court, at least one week before the return day of the order, which service shall be made by the marshal or his deputy in the district where the party or solicitor served resides. 2. Within one calendar month after the return day of the order to show cause, either party may demur, plead or answer; but the determination of any demurrer, plea or answer, shall be final, and no order to plead over will be allowed; and any party may secure in his answer all the advantages of a demurrer or plea, or both, by inserting therein the proper allegations therefor. No demurrer shall be general, and no cause of demurrer shall be allowed unless specifically set forth therein. 3. There shall be no pleadings in reply by the petitioner; but any new matter properly in reply shall be available without the same being pleaded in the petition, or otherwise. 4. A motion to dismiss may be filed within the time allowed for a demurrer, plea or answer; or the subject matter thereof, if it relates to the substance of the proceeding or to the jurisdiction of the court, may be availed of on demurrer, plea or answer, by proper allegations; and whenever a motion to dismiss is seasonably filed, the time for filing demurrer, plea or answer, will run from the day on which an order may be entered overruling the motion. Every motion to dismiss shall be filed in print, accompanied with a printed brief; and each of the opposing parties shall forthwith be served by the clerk, through the mail or otherwise, with a copy of the motion and of the brief, and he may file, in print, a brief in reply within two weeks. At the expiration of the time allowed for filing the brief in reply, the motion and briefs will be distributed by the clerk to the circuit judges, and to the district judge, senior in commission, who is not disqualified. Thereupon, the motion will be disposed of by the court on the briefs, unless, at its own suggestion, or for good cause shown, the court shall order oral arguments. 5. So much of Rule 14 as relates *viva voce* proofs in the District Courts, or to further proof in instance causes in admiralty shall apply to appeals and petitions authorized by the act aforesaid, or by acts hereafter passed additional thereto or amendatory thereof; provided any record on any such appeal or petition may be supplemented by any matter agreed to in writing by the parties and filed with the clerk. 6. The rules with reference to records, printing and briefs, and all other rules, except as herein modified, shall apply to the proceedings to which this order relates. 7.

Nothing herein shall prevent the court, from time to time, from making, for special cause, orders diminishing or enlarging the times named herein, or any other orders suitable to expedite the proceeding or to prevent injustice." (94 Fed. iii.) *Rule 37.* "Appeals and writs of error from and to the District Court of the United States for the District of Porto Rico, and from the Supreme Court of the District of Porto Rico whenever by law they can be taken, shall be taken within six calendar months from the time when the right to such an appeal or writ of error accrues, and not afterwards, by filing a claim for the appeal in the registry of the court appealed from, or by suing out a writ of error from the Court of Appeals, or from the court or judge in Porto Rico, as the case may be." (235 Fed.) *Rule 38.* "Petitions to superintend and revise under clause 'b,' section 24, Bankruptcy Law, shall be filed within thirty days from the date of the proceeding sought to be revised, but shall not operate as a supersedeas unless upon order of the judge who passed the order in question or one of the judges of this court."

In the *Second Circuit: Rule 35, adopted May 3, 1897.* "1. An appeal or writ of error from a Circuit Court or a District Court to this court in the cases provided for in sections 6 and 7 of the act entitled 'An act to establish Circuit Courts of Appeals and to define and regulate in certain cases the jurisdiction of the courts of the United States and for other purposes, approved March 3, 1891, and acts to amend said act, approved February 18, 1895, and January 20, 1897, may be allowed in term time or vacation by the circuit justice or by any circuit judge within the circuit, or by any district judge within his district, and the proper security be taken and the citation be signed by him, and he may also grant a *supersedeas* and stay of execution or of proceedings, pending such writ of error or appeal. 2. Where such writ of error from this court is allowed in the case of a conviction of an infamous crime or in any other criminal case in which it will lie, the District Court, or the judge thereof, or any circuit judge of the circuit shall have power, after the citation is served, to admit the accused to bail in such amount as may be fixed." *Rule 36, May, 1898.* "1. In all cases the plaintiff in error or appellant on docketing a case and filing a record, shall enter into an undertaking with the clerk, for the payment of his fees or otherwise satisfy him in that behalf. 2. At the expiration of ten days after a case has been decided, the order or decree thereon will be entered by the court, and the clerk will thereupon prepare and tax the bill of costs and issue the mandate. Within said ten days the parties may file with the clerk their proposed orders or decrees and bills of costs with proof of service of the same upon the opposing attorneys." *Rule 37, May 3, 1907.* "In the preparation of briefs any citations made from Federal Cases must be accompanied by the citation of the original report of the case, or, when the case is not elsewhere reported than in the Federal Cases, by a statement to that effect." *Rule 38, May 3, 1897.* "Petitions to review orders in bankruptcy filed under the provisions of section 24*b* of the Bankruptcy Act, must be filed and served within ten days after the entry of the order sought to be reviewed, and a transcript of the record of the proceedings in the bankruptcy court of the matter to be reviewed must be filed and the cause docketed within thirty days thereafter, but the judge of the bankruptcy court may for good cause shown enlarge the time for filing the petition or record, the order of enlargement to be made and filed with the clerk of this court before the expiration of the times hereby limited for filing the petition and record respectively."

In the *Third Circuit* the following order was made December 7, 1892: "It is ordered that hereafter there shall be but a single court docket and no 'special docket' and cases shall be placed thereon as follows: I. Those cases on the trial or hearing of which both of the circuit judges shall be competent to sit. II. Those cases on the trial or hearing of which the circuit judge oldest in commission shall be competent to sit. III. Those cases on the trial or hearing of which the circuit judge youngest in commission shall be competent to sit. Under and with respect to each of these three general divisions, there shall be placed first in order upon the docket those cases in which the district judge

assigned for the term shall be competent to sit, and immediately thereafter the cases in which he will not be competent to sit. Subject to the foregoing, the cases shall be arranged in proper chronological order. The clerk in making his docket shall not set down for argument any cause for any Saturday of the term for which such docket is intended, and this court will meet on said days for consultation only."

In the *Fourth Circuit: Rule 35. "Saturday Conference Days.* The clerk in making his docket shall not set down for argument any cause for any Saturday of the term for which such docket is intended, and this court will meet on said days for consultation only." (233 Fed.) *Rule 36. "Bankruptcy.* 1. Upon the filing of the petition for review as provided for in section 24(b) of the act to establish a uniform system of bankruptcy throughout the United States, approved July 1, 1898, the clerk of this court shall docket the cause, and shall forthwith serve a certified copy of the petition upon the respondent or respondents, or his or their solicitor, through the mail or otherwise, together with a notice to the respondent or respondents, to answer, demur, or move to dismiss the said petition, within fifteen days from the date of such notice. Petitions to review orders in bankruptcy filed under the provisions of section 24-b of the Bankruptcy Act must be filed within ten days after the entry of the order sought to be reviewed, but any judge of this court may, for good cause shown, enlarge the time for filing the petition, provided, the order of enlargement is made before the expiration of the time hereby limited for filing the petition. Said order to be filed with the clerk of this court. 2. The petitioner shall cause a certified printed transcript of the record and proceedings of the bankruptcy court of the matter to be reviewed, to be filed in the clerk's office of this court within forty days from the date of the filing of his petition for review. 3. By consent of all parties to the cause, by stipulation in writing filed with the clerk of this court, the petitioner may cause a transcript of the record and proceedings of the bankruptcy court of the matter to be reviewed to be filed in the clerk's office of this court in lieu of a certified printed transcript as above mentioned, and thereupon the clerk of this court shall cause the record to be printed as provided in the 23rd rule of this court, and furnish counsel on both sides with three copies each. 4. And such causes shall stand for hearing in their regular order. But either side may, upon ten days' notice given to the opposing counsel, have the cause heard, either at term time, or in vacation, or in chambers, upon the briefs, unless at its own suggestion, or for good cause shown, the court shall order oral argument. 5. That all causes coming up by appeal as provided in section 25 of said bankruptcy act shall stand for hearing in this court, either in term time or in vacation, and may be called up by either party upon ten days' notice, as provided in section 4 of this rule. 6. All rules of this court (except as herein modified) shall apply to the proceedings in bankruptcy to which this rule relates. 7. Nothing herein shall prevent the court, from making, for special cause, orders diminishing or enlarging the times named herein, or any other order suitable to expedite the proceeding or to prevent injustice." *Rule 37.* The foregoing rules shall be in force on and after April 1, 1912. *Rule 38.* On and after February 1, 1913, the contents of transcripts of record on appeal in equity and admiralty causes and on appeal (as distinguished from petitions for revision) in bankruptcy causes, shall be governed by Rules 75, 76 and 77 of the Rules of Practice for the Courts of Equity of the United States, promulgated by the Supreme Court of the United States, November 4, 1912, which rules are as follows:

In the *Fifth Circuit: Rule 35. "Order in relation to assignments of cases for hearing.* Unless otherwise ordered by the senior circuit judge, thirty days prior to the opening of a regular session of this court the clerk is directed to assign cases for hearing as follows: At Atlanta, Georgia, four cases per day for the first three days of each week; at Montgomery, Alabama, four cases per day for the first three days of each week; at Fort Worth, Texas, four cases per day for the first three days of each week; at New Orleans, Louisiana, two cases per day for the first three days of each week. The above assignments shall

be made in accordance with existing law regulating the return of appeals, writs of error and other appellate proceedings in the Fifth Judicial Circuit, provided that cases entitled by law to preference in hearing and bankruptcy cases shall be first assigned, and cases whether preference or not may, upon stipulation of the parties filed with the clerk, be assigned for hearing at any other place or session of this court designated in such stipulation. Except as hereinabove provided, the assignment of cases at New Orleans, Louisiana, shall be grouped by states, so as to permit the hearing of cases from one state before the cases from the next state in order shall be called." *Rule 36.* "*Assignment of judges.* It is ordered that, whenever a full bench of three judges shall not be made up by the attendance of the associate justice of the Supreme Court assigned to the circuit and of the circuit judges, so many of the district judges in the order of seniority of their respective commissions, and qualified to sit, as may be necessary to make up a full court of three judges, are hereby designated and assigned to sit in this court; provided, however, that the court may at any time, by particular assignment, designate any district judge to sit as aforesaid." *Rule 37. "Writs of error in criminal cases.* 1. Writs of error to review criminal cases tried in any District or Circuit Court of the United States within this circuit, which may be reviewed under the provisions of the act of March 3, 1891, creating this court, and the act of Congress amendatory thereof, approved January 20, 1897, may be allowed in term time or in vacation by the circuit justice assigned to this circuit, by either of the circuit judges, or by any district judge who presided on the trial, and the proper security be taken, and the citation be signed by him, and he may also grant a *supersedeas* and stay of execution or proceedings pending the determination of such writ of error. 2. Where such writ of error is allowed in any criminal case as aforesaid, the Circuit or District Court, before which the accused was tried, or the trial judge, or the circuit justice assigned to the circuit, or either of the circuit judges shall have the power, after the citation has been duly served, to admit the accused to bail in such amount as may be fixed, such bail bond to be, as near as may be, in the form prescribed in the appendix to these rules." For the appendix to this rule see 90 Fed. xcvii. *Rule 38.* "Petitions to superintend and revise, under clause 'b,' section 24, Bankruptcy Law, shall be filed within thirty days from the date of the proceedings sought to be revised, but shall not operate as a *supersedeas* unless upon order of the judge who passed the order in question, or one of the judges of this court."

In the *Sixth Circuit: Rule 17. "Proceedings in forma pauperis.* 1. Applications for leave to proceed in this court pursuant to the act of July 20, 1892, as amended June 25, 1910, must be by special motion with notice under Rule 24. If made before return is filed in this court, notice shall be served upon the adverse counsel in the District Court. The showing by affidavit must be sufficient to satisfy this court that the appellant is entitled to the benefit of the act. 2. If appellant was plaintiff or complainant below, he must, with his application to this court, make it appear whether or not any other person—attorney, counsel, or otherwise—is beneficially interested in the recovery sought, and, if so, that every such person is, because of his poverty, unable to pay, or give security for, the costs from which appellant seeks to be excused." (202 Fed. xii.) *Rule 22. "The hearing calendar.* 1. Upon the expiration of the time limited for filing briefs, the case shall stand for hearing when reached. 2. A calendar, containing all cases docketed and not heard, shall be printed by the clerk for the October, January and April sessions. The cases on the calendar which stand for hearing under clause 1 will be called for argument in their order (as far as practicable) on the calendar, except as special advancements may have been made. 3. By leave of court and on motion of either party (1) cases entitled by statute to precedence, (2) criminal cases, (3) appeals, writs of error or petitions to revise in bankruptcy matters, and (4) cases which are for the second time in this court,—may be advanced and set for a designated session. The court may also, on its own motion or for good cause shown on motion of either party, advance any case to be heard at any session, though

the time permitted under the rules for filing briefs may not have expired at the day set for hearing. 4. Not more than three cases will be heard on one day (counting, however, as one case, two or more which are heard together). The call for the next day shall, at the adjournment of court, be exhibited in the clerk's office. Counsel choosing to rely on the judgment of the clerk as to the probable time of hearing any case must do so at their own risk. 5. When the case is called, if either party is ready, the case will be heard. If there is no appearance for either party, the case will be dismissed. If the appellant does not appear by counsel or by printed brief but the appellee does appear, the case will be dismissed. If the appellant appears and the appellee does not, the court will hear the appellant. 6. By agreement of counsel in open court or by stipulation filed in the clerk's office, hearing may be continued once to any later session during the term or from the last session of one term to the first session of the next term, but not to a later day during the same session. Subsequent continuances can be made only by the court and will be only for reasons satisfactory to the court; and engagement of counsel in other courts will not be considered good cause. 7. Two or more cases, involving the same question, may, by order of the court, be heard together, but they must be argued as one cause." 202 Fed. xv, xvi. *Rule 31. Library.* All moneys collected by the clerk, the disposition of which is not directed by law, shall constitute a fund to be expended by the clerk under the direction of the presiding judge, in the purchasing, repairing and rebinding of law books for the library of the court; and it shall be his duty to render to the court, for its examination and approval, an annual account of such moneys received by him and of his disbursements thereof." (202 Fed. xx.) *Rule 33. Mandamus and prohibition.* 1. The alternative writ of mandamus will not be issued, but, on proper showing, an order to show cause will be made. 2. The party desiring a writ of mandamus or prohibition shall file his petition therefor and showing in support thereof together with such brief or memorandum as he may desire. These need not be, at this time, printed, and notice need not be given. He shall deposit ten dollars with the clerk on account of fees. The clerk shall enter the application on his docket, and informally submit the papers to the court. 3. If the court is of opinion that the application justifies a hearing, an order to show cause will be entered returnable as promptly as the situation permits; if of contrary opinion, an order of denial will be made, and the clerk shall notify the applicant accordingly, enter the case on his docket as closed and return to the applicant the surplus, if any, of the fee deposited. 4. If such order to show cause is made, the clerk shall deliver a certified copy to the applicant, who shall cause the same to be served within the time and in the manner fixed in the order. An answer or return shall be filed on or before the return day as specified in the order or as extended by a judge of this court. Unless within ten days after the filing of such answer or return the appellant makes special motion to award and frame an issue, or, if an issue is framed, then upon the return of the proceedings thereon, and unless the court orders a hearing as upon motion, the matter shall stand for hearing upon the calendar, and the clerk shall receive the remaining twenty-five dollars of the usual fee deposit, estimate and require a deposit for printing and print the record, briefs shall be filed and the matter, in all respects proceed like other docketed causes." (202 Fed. xx, xxi.) *Rule 34. Petitions to revise in bankruptcy.* "A petition to revise under section 24b of the Bankruptcy Act, may be filed only within twenty days from the entry of the order of which revision is sought; but the judge of the bankruptcy court may, upon notice and for good cause shown, enlarge the time for filing the petition; the order of enlargement to be filed with the petition. The petition shall contain: 1. A petition to revise shall contain: First, a concise history of so much of the proceedings before the referee and the District Court as may be necessary to make plain the errors assigned; second, an assignment of the errors in respect to which revision in matter of law is sought; third, as exhibits to the petition, copies certified by the Clerk of the District Court of each paper or proceeding relied upon to support the errors assigned;

and fourth, any findings of fact that may be filed pursuant to clause 2 hereof; but a petition to revise shall not be filed so late as to delay the hearing of any appeal that may have been taken in the same manner; and it may incorporate, by reference and without repeating, any parts of the return in such appeal. 2. Whenever the District Court has made any order in a proceeding in bankruptcy which involves or depends upon facts made to appear otherwise than solely by the pleadings in the matter, and the District Judge is notified in writing by any party that he intends to file a petition to revise and deems findings of fact to be necessary, it shall be the duty of the District Judge, as soon as possible, to make and file with the clerk of the District Court his findings of fact in such matter. 3. At or before the filing of such petition, a complete copy thereof shall be served upon counsel for each separate, adverse interest, and the petition, when offered for filing, shall contain due proof or acknowledgment of such service. 4. Unless within ten days after the filing of such petition an adverse party in interest shall file an answer denying the accuracy of the exhibits to the petition, or setting out as exhibits certified copies of additional papers or proceedings which are thought to bear upon the errors assigned, the accuracy and completeness of the exhibits shall be presumed to be admitted. Such answer may also incorporate, by reference, any orders or records in any co-pending appeal. 5. Upon the coming in of such answers or the expiration of such ten days, such petition shall stand for hearing, and the clerk shall estimate and require deposit for and cause the record to be printed, and briefs shall be filed, all as in other causes." (202 Fed.; 261 Fed.)

In the *Seventh Circuit* there are the following additional rules: *Rule 33. "The library.* 1. The library of the court shall be under the general supervision and custody of the clerk of the court. 2. No book shall be removed from the library except by or upon the written order of a Federal Judge or the United States District Attorney for his own use in Chicago, except that during the sessions of the court any lawyer who has a case upon the docket, upon written application to the clerk, and upon the clerk's written order, may take from the library not exceeding three volumes at a time, being responsible for the return thereof within twenty-four hours, and in default of return shall pay to the clerk, for the library fund, twice the value thereof, but if returned in good condition, one dollar for each day's detention beyond the limited time." *Rule 34. Writs of error in criminal cases.* "1. Writs of error from this court to review criminal cases tried in any District or Circuit Court of the United States within this circuit, may be allowed in term time or in vacation by the circuit justice assigned to this circuit, or by any of the circuit judges within the circuit, or by any district judge within his district, and the proper security be taken, and the citation signed by him, and he may also grant a supersedeas and stay of execution or proceedings, pending the determination of such writ of error. 2. Where such writ of error is allowed in the criminal cases aforesaid, the Circuit Court or the District Court before which the accused was tried, or the district judge of the district wherein he was tried, within his district, or the circuit justice assigned to this circuit, or after the citation has been duly served, to admit the accused to bail and to fix the amount of such bail." (235 Fed.)

In the *Eighth Circuit* there are the following additional rules: *Rule 35. Writs of error in criminal cases.* "1. Writs of error to review criminal cases tried in any District Court of the United States within this circuit, which may be reviewed under the provisions of 'The Judicial Code,' approved March 3, 1911, may be allowed in term time or in vacation by the circuit justice assigned to this circuit, or by either of the circuit judges within the circuit, or by any district judge within his district, and the proper security taken, and the citation signed by him, and he may also grant a supersedeas and stay of execution or proceedings, pending the determination of such writ of error. 2. Where such writ of error is allowed in the criminal cases aforesaid, the District Court before which the accused was tried, or the district judge of the district wherein he was tried, within the district, or the circuit justice assigned to the circuit, or the circuit

judges within the circuit, shall have the power, after the citation has been duly served, to admit the accused to bail in such amount as may be fixed, such bail bond to be, as near as may be, in the form prescribed in the appendix to these rules." (188 Fed. xxii.) *Rule 36. "Petitions to revise.* A petition to revise under the provisions of Section 24*b*, of the bankruptcy law, approved July 1, 1898, shall be filed and docketed as an original action in this court, and be entitled '————————, Petitioner, v. ————————, Respondent,' and shall specifically designate the respondent or respondents upon whom the petitioner desires notice to be served, and a sufficient number of copies of such petition shall be furnished the clerk at the time of filing so that a copy may be served upon each of the respondents." (188 Fed. xxii.) *Rule 37. "Order of court.* 1. Before the filing of a petition to revise, the same shall be presented to the court, or one of the circuit judges, for leave to file same and for an order fixing the return day to the notice required by law. 2. When such petition is accompanied by a written consent that the petition to revise may be filed and a waiver by the respondent or respondents, or their counsel, of such notice, no notice will be issued. In such cases the case will be docketed by the clerk." (188 Fed. xxii, xxiii.) *Rule 38. "Notice.* The notice to be given, as provided by law, shall be issued by the clerk of this court, under the seal thereof, and shall be addressed to the respondent or respondents and be served by the marshal, unless an acknowledgment or acceptance of service thereof is made by the respondent or respondents, or their counsel." (188 Fed. xxiii.) *Rule 39. "Response.* The response to the petition, when the respondent elects to make a written response, shall be filed within thirty days after the service of the notice or the filing of a waiver thereof." (188 Fed. xxiii.) *Rule 40. "Printing of record.* 1. The clerk shall cause the petition and exhibits thereto, if any, and the order, notice and response, if any, to be printed as soon as convenient after the response is filed or the time for filing such response has expired and shall distribute the printed copies of same to counsel for the respective parties, as soon as the same are printed." (188 Fed. xxiii.) *Rule 41. "Briefs and arguments.* Twenty copies of the brief and argument in behalf of petitioner shall be printed and filed twenty days before the day set for the hearing and twenty copies of the brief and argument for the respondent or respondents shall be printed and filed eight days before the day of hearing." (188 Fed. xxiii.) *Rule 42. "Hearing.* 1. Petitions to revise filed in vacation, shall be assigned by the clerk for hearing in their regular order at the next session or term of the court in the same manner as appeals and writs of error in other cases. 2. Petitions to revise filed during a session of the court, when a sufficient showing of urgency is presented, may be set for hearing at that term and upon such terms and conditions as the court may direct. 3. Petitions to revise assigned by the clerk in their regular order as provided in section 1 of this rule, when such assignment is for a day near the close of the session, may be advanced by order of the court and set for an earlier day, upon good cause shown therefor by either of the parties." (188 Fed. xxiii, xxiv.) *Rule 43. "Costs.* 1. The costs and fees now provided by law in cases upon appeal or writ of error, shall, so far as the same are applicable, be taxed on petitions to revise. 2. Upon the determination of a petition to revise such order as to costs will be made as the court may deem necessary." (188 Fed. xxiv.) *Rule 44. "Procedendo.* 1. In all cases on a petition to revise wherein the action or decree of the District Court, complained of, is disapproved by this court, the clerk shall, at the expiration of thirty days from and after the date of entering the decree in this court, issue process in the nature of a *procedendo* to the said District Court for the purpose of informing such court of the proceedings in this court, so that further proceedings may be had in such District Court in conformity with the decree of this court. 2. In all cases on petition to revise, wherein the action or decree of the District Court, complained of, is approved and confirmed, or said petition dismissed, by this court the clerk shall, at the expiration of thirty days certify a copy of such decree to the District Court." (188 Fed. xxiv.) *Rule 45. "Appeals and writs of error in bankruptcy cases.* 1. The appeals and writs of error provided for by section 25 of

the bankruptcy law, approved July 1, 1898, shall be governed by the same rules and regulations as to costs and procedure as are provided by this court for appeals and writs of error in other cases." (188 Fed. xxiv.)

In the *Ninth Circuit: Rule 35. "Assignment of causes for hearing.* Thirty days prior to the opening of any calendar session of the court, the clerk is directed to assign causes for hearing at the rate of one case for the first day of each term or session, and two cases per day for each of the ensuing court days of such term or session. Causes shall be grouped by States, and assignments made, so as to permit the hearing of causes from one State before the causes from the next State in order shall be called; causes from the Northern District of California shall be assigned for hearing last. Any causes entitled by law to preference in hearing shall be first assigned and take precedence over other causes from the same State. 2. No change of the day assigned for hearing will be made except by order of the court for reasons shown, and no term or session of the court will be extended beyond the foot of the calendar as made up pursuant to the provisions of this rule. 3. Ten days before each calendar session of the court the clerk shall prepare and cause to be printed a calendar of the causes assigned for the approaching session." (231 Fed.) *Rule 36. "Terms and sessions of the court.* 1. One term of this court shall be held annually on the first Monday of October and adjourned sessions on the first Monday of each month in the year. All sessions shall be held at San Francisco unless otherwise especially ordered by the court. 2. The October, February and May sessions shall be known as calendar sessions, and shall be sessions for the trial of all causes that shall have been placed upon the calendar in pursuance of Rule 35. 3. A term of this court shall be held annually in the city of Seattle in the State of Washington and in the city of Portland in the State of Oregon. The Seattle term shall be held beginning upon the second Third in September, and the term at Portland shall be held following the adjournment thereof. All appeals and writs of error from the District Courts for the Districts of Washington, the transcripts of which shall be filed in this court between the first day of April and the first day of August of each year, shall be heard at said annual term in the city of Seattle, unless it be stipulated by the parties thereto that they be heard at San Francisco. All other appeals and writs of error from said District Courts for those districts shall be heard at San Francisco, unless it be stipulated by the parties thereto that they be heard at said annual term in the city of Seattle. All appeals and writs of error from the District Courts for the District of Oregon, the transcripts of which shall be filed in this court between the first day of April and the first day of August of each year, shall be heard at said annual term in the city of Portland, unless it be stipulated by the parties thereto that they be heard at San Francisco. All other appeals and writs of error from said District Court for that district shall be heard at San Francisco, unless it be stipulated by the parties thereto that they be heard at said annual term in the city of Portland. Appeals and writs of error from the District Courts for the Districts of Iowa and Montana, and from the District Courts of Alaska may, upon the stipulation of the parties thereto, be heard at the annual term to be held either at Seattle or Portland. All cases assigned for hearing at Seattle or Portland shall be placed upon calendar by the clerk to be called on the opening day of the term at Seattle and set for hearing during the Seattle and Portland terms, respectively." *Rule 37. "Photograph of Chinese to be attached to bail bond.* Whenever, in cases of deportation of Chinese, the defendant be admitted to bail pending appeal, before the bond be approved and the party released from custody a photograph of the defendant shall be attached to said bond."

ADMIRALTY RULES OF THE CIRCUIT COURT OF APPEALS FOR THE SECOND AND NINTH CIRCUITS

Edited by Martha Van Praag.

The following are the rules in Admiralty adopted in the Second Circuit on July 1, 1892, 50 Fed. VIII; in the Ninth Circuit, on May 21, 1900, 100 Fed. III, with the subsequent amendments.

RULE I.

APPEALS AND NEW PLEADINGS.

An appeal to the Circuit Court of Appeals shall be taken by filing in the office of the clerk of the District Court, and serving on the proctor of the adverse party, a notice signed by the appellant or his proctor that the party appeals to the Circuit Court of Appeals from the decree complained of.

The appeal shall be heard on the pleadings and evidence in the District Court, unless the appellate court, on motion, otherwise order.

RULE II.

NOTICE AND BOND.

SECTION 1. When a notice of appeal is served, the appellant shall file in the clerk's office of the District Court a bond for costs of the appeal, with sufficient surety, in the sum of $250, conditioned that the appellant shall prosecute his appeal to effect and pay the costs, if the appeal is not sustained. Such security shall be given within ten days after filing the notice, or the appeal shall be deemed abandoned, and the decree of the court below enforced, unless otherwise ordered by a judge of this court.

SEC. 2. And if the appellant desires to stay the execution of the decree of the court below, the bond which he shall give shall be a bond with sufficient surety in such further sum as the judge of the District Court or a judge of this court shall order, conditioned that he will abide by and perform whatever decree may be rendered by this court in the cause, or on the mandate of this court by the court below.

SEC. 3. The appellant shall, on filing either of such bonds, give notice of such filing, and of the names and residences of the sureties, and if the appellee, within two days, excepts to the sureties, they shall justify, on notice, within two days after such exception.

RULE III.

REVIEW IN PART ONLY.

The appellant may also, at his option, state in his notice of appeal that he desires only to review one or more questions involved in the cause, which questions must be clearly and succinctly stated; and he shall be concluded in this behalf by such notice, and the review upon such an appeal shall be limited to such question or questions.

RULE IV.

APOSTLES ON APPEAL TO CONTAIN.

SECTION 1. The apostles, on an appeal to this court, shall, in cases where a general notice of appeal is served, consist of the following:

(1) A caption exhibiting the proper style of the court and the title of the cause, and a statement showing the time of the commencement of the suit; the names of the parties, setting forth the original parties and those who have become parties before the appeal, if any change has taken place; the several dates when the respective pleadings were filed; whether or not the defendant was arrested, or bail taken, or property attached, or arrested, and if so, an account of the proceedings thereunder; the time when the trial was had, and the name of the judge hearing the same; whether or not any question was referred to a commissioner, or commissioners, and if so, the result of the proceedings and report thereon; the date of the entry of the interlocutory and final decrees; and the date when the notice of appeal was filed.

(2) All the pleadings, with the exhibits annexed thereto.

(3) All the testimony and other proof adduced in the cause.

(4) The interlocutory decree and any order of the court which appellant may desire to have reviewed on the appeal.

(5) Any report of a commissioner or commissioners to which exception may have been taken, with the order or orders of the court respecting the same, and the exceptions to the report, and so much of the testimony taken in the proceeding as may be necessary to a review of the exceptions.

(6) All opinions of the court, whether upon interlocutory questions or finally deciding the cause.

(7) The final decree, and the notice of appeal; and

(8) The assignments of error.

SEC. 2. All other papers shall be omitted unless otherwise ordered by the judge who heard the cause.

SEC. 3. Where the appellant shall appeal specially and seek only to review one or more questions involved in the cause, the apostles may, by stipulation between the proctors for the respective parties, contain only such papers and proceedings and evidence as are necessary to review the questions raised by the appeal.

ADDITIONAL ADMIRALTY RULES OF THE CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

RULE V.

CERTIFYING RECORD.

The appellants shall, within thirty days after giving notice of appeal procure to be filed in this Court the apostles in accordance with the provision of the Act of February 13, 1911.

RULE VI.

NEW ALLEGATIONS, ETC.

Upon sufficient cause shown, this court or any judge thereof, may allow either appellant or appellee to make new allegations or pray different relief, or interpose a new defense, or make new proofs. Application for such leave may be made at any time after the perfecting of the appeal to this court, and within fifteen days after the filing in this court of the apostles, and upon at least four days' notice to the adverse party or his attorney of record.

RULE VII.

NEW PLEADINGS—NEW TESTIMONY.

If leave be granted to make new allegations, pray different relief or interpose a new defense, the moving party shall, within ten days thereafter, serve such new pleading, duly verified, on the adverse party, who shall, if such pleading be a libel, within twenty days answer on oath.

If leave be given to take new testimony, the same may be taken and filed within thirty days after the entry of the order granting such leave, and the adverse party may take and file counter-testimony within twenty days after such filing.

RULE VIII.

NEW TESTIMONY—HOW TAKEN.

Such testimony shall be taken by deposition before any United States Commissioner, or by notary public, upon reasonable notice in writing given to the opposite party; or by commission issued out of this Court with interrogatories annexed. Upon proper cause shown, the Court may grant an open commission.

RULE IX.

PRINTING NEW PLEADINGS AND TESTIMONY.

If new pleadings are filed or testimony taken in this court, the same shall also be printed and furnished by the clerk, as in the 21st general rule provided.

RULE X.

WRIT OF INHIBITION.

A writ of inhibition may be awarded by this court on motion of the appellant, to stay proceedings in the court below when circumstances require.

RULE XI.

EXTENSION OF TIME.

The time specified in the foregoing rules for any proceeding may be extended by order of a judge of this court.

RULE XII.

WHEN RULES OF DISTRICT COURTS TO APPLY.

In all matters, in civil causes of admiralty and maritime jurisdiction, not expressly provided for by the foregoing rules of this court, the rules of practice of the District Court of the district in which the cause was decided, being in force at the time (not being inconsistent with these rules), will be adopted so far as may seem proper.

RULE XIII.

The following of the General Rules of this Court and no others, shall be deemed Admiralty Rules, viz: Rules, 3, 4, 5, 6, 8, 10, 11; Section 4, Rule 13; Rules 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26; Section 3 of Rule 27; Rules 28, 29, 31, 33 and 34.

ADDITIONAL ADMIRALTY RULES OF THE CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

RULE V.

CERTIFYING RECORDS.

The appellants shall, within thirty days after giving notice of appeal, procure to be filed in this court the apostles certified by the clerk of the District Court, or in case of a special appeal, the stipulated record.

RULE VI.

IF APPEARANCE OF APPELLEE NOT ENTERED.

If the appellee does not cause his appearance to be entered in this court within ten days after service on his proctor of notice that the apostles are filed in this court, the appellant may proceed *ex parte* in the cause, and have such decree as the nature of the case may demand.

RULE VII.

NEW ALLEGATIONS, ETC.

Upon sufficient cause shown, this court or any judge thereof, may allow either appellant or appellee to make new allegations or pray different relief, or interpose a new defense, or make new proofs. Application for such leave may be made at any time after the perfecting of the appeal to this court, and within fifteen days after the filing in this court of the apostles, and upon at least four days' notice to the adverse party or his attorney of record.

RULE VIII.

NEW PLEADINGS—NEW TESTIMONY.

If leave be granted to make allegations, pray different relief or interpose a new defense, the moving party shall, within ten days thereafter, serve such new pleading, duly verified, on the adverse party, who shall, if such pleading be a libel, within twenty days answer on oath.

If leave be given to take new testimony, the same may be taken and filed within thirty days after the entry of the order granting such leave, and the adverse party may take and file counter-testimony within twenty days after such filing.

RULE IX.

NEW TESTIMONY—HOW TAKEN.

Such testimony shall be taken by deposition before the clerk of this court, or any United States commissioner, or any clerk of a District or Circuit Court of the United States, or any notary public upon reasonable notice, in writing, given to the opposite party or his attorney of record, either in this court or in the court below, which notice must state the name or names of the witness or witnesses and the time and place of taking his or their deposition or depositions; or by commission issued out of this court with interrogatories annexed. Upon sufficient cause shown, the court may grant an open commission.

RULE X.

PRINTING NEW PLEADINGS AND TESTIMONY.

If new pleadings are filed or testimony taken in this court, the same shall also be printed and furnished by the clerk, as in the 23d General Rule provided.

RULE XI.

MOTIONS.

All motions shall be made upon at least four days' notice.

RULE XII.

EXTENSION OF TIME.

The time specified in the foregoing rules for any proceeding may be extended by order of a judge of this court.

VI

BANKRUPTCY LAW

Adopted July 1, 1898 (30 St. at L. 544), as amended February 5, 1903 (32 St. at L. 279), and June 15, 1906 (34 St. at L. 267), June 25, 1910 (36 St. at L. 838), March 2, 1917 (39 St. at L. 999), Jan. 7, 1922 (42 Stat. at L. —).

An act to establish a uniform system of bankruptcy throughout the United States.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled.

CHAPTER I.

Bankruptcy.

DEFINITIONS.

Definitions.

Section 1. MEANING OF WORDS AND PHRASES.—a The words and phrases used in this Act and in proceedings pursuant hereto shall, unless the same be inconsistent with the context, be construed as follows: (1) "A person against whom a petition has been filed" shall include a person who has filed a voluntary petition; (2) "adjudication" shall mean the date of the entry of a decree that the defendant, in a bankruptcy proceeding, is a bankrupt, or if such decree is appealed from, then the date when such decree is finally confirmed; (3) "appellate courts" shall include the circuit courts of appeals of the United States, the supreme courts of the Territories, and the Supreme Court of the United States; (4) "bankrupt" shall include a person against whom an involuntary petition or an application to set a composition aside or to revoke a discharge has been filed, or who has filed a voluntary petition, or who has been adjudged a bankrupt; (5) "clerk" shall mean the clerk of a court of bankruptcy; (6) "corporations" shall mean all bodies having any of the powers and privileges of private corporations not possessed by individ-

—"A person against whom a petition has been filed."

—"adjudication."

—"appellate courts."

—"bankrupt."

—"clerk."

—"corporations."

uals or partnerships, and shall include limited or other partnership associations organized under laws making the capital subscribed alone responsible for the debts of the association; (7) "court" shall mean the court of bankruptcy in which the proceedings are pending, and may include the referee; (8) "courts of bankruptcy" shall include the district courts of the United States and of the Territories, the supreme court of the District of Columbia, and the United States court of the Indian Territory, and of Alaska; (9) "creditor" shall include anyone who owns a demand or claim provable in bankruptcy, and may include his duly authorized agent, attorney, or proxy; (10) "date of bankruptcy," or "time of bankruptcy," or "commencement of proceedings," or "bankruptcy," with reference to time, shall mean the date when the petition was filed; (11) "debt" shall include any debt, demand, or claim provable in bankruptcy; (12) "discharge" shall mean the release of a bankrupt from all of his debts which are provable in bankruptcy, except such as are excepted by this Act; (13) "document" shall include any book, deed, or instrument in writing; (14) "holiday" shall include Christmas, the Fourth of July, the Twenty-second of February, and any day appointed by the President of the United States or the Congress of the United States as a holiday or as a day of public fasting or thanksgiving; (15) a person shall be deemed insolvent within the provisions of this Act whenever the aggregate of his property, exclusive of any property which he may have conveyed, transferred, concealed, or removed, or permitted to be concealed or removed, with intent to defraud, hinder or delay his creditors, shall not, at a fair valuation, be sufficient in amount to pay his debts; (16) "judge" shall mean a judge of a court of bankruptcy, not including the referee; (17) "oath" shall include affirmation; (18) "officer" shall include clerk, marshal, receiver, referee, and trustee, and the imposing of a duty upon or the forbidding of an act by any officer shall include his successor and any person authorized by law to perform the duties of such officer; (19) "persons" shall include corporations, except where otherwise specified, and officers, partnerships, and women, and when used with reference to the commission of acts which are herein forbidden shall include persons who are participants in the forbidden acts, and the agents, officers, and members of the board of directors or trustees, or other similar controlling bodies of corporations; (20) "petition" shall mean a paper filed

—"court."

—"courts of bankruptcy."

—"creditor."

—"date of bankruptcy;" "bankruptcy," etc.

—"debt."

—"discharge."

—"document."

—when deemed "insolvent."

—"judge."

—"oath."

—"officer."

—"persons."

—"petition."

in a court of bankruptcy or with a clerk or deputy clerk by a debtor praying for the benefits of this Act, or by creditors alleging the commission of an act of bankruptcy by a debtor therein named; (21) "referee" shall mean the referee who has jurisdiction of the case or to whom the case has been referred, or any one acting in his stead; (22) "conceal" shall include secret, falsify, and mutilate; (23) "secured creditor" shall include a creditor who has security for his debt upon the property of the bankrupt of a nature to be assignable under this Act, or who owns such a debt for which some indorser, surety, or other persons secondarily liable for the bankrupt has such security upon the bankrupt's assets; (24) "States" shall include the Territories, the Indian Territory, Alaska, and the District of Columbia; (25) "transfer" shall include the sale and every other and different mode of disposing of or parting with property, or the possession of property, absolutely or conditionally, as a payment, pledge, mortgage, gift, or security; (26) "trustee" shall include all of the trustees of an estate; (27) "wage-earner" shall mean an individual who works for wages, salary, or hire, at a rate of compensation not exceeding one thousand five hundred dollars per year; (28) words importing the masculine gender may be applied to and include corporations, partnerships, and women; (29) words importing the plural number may be applied to and mean only a single person or thing; (30) words importing the singular number may be applied to and mean several persons or things.

—"referee."

—"conceal."

—"secured creditor."

—"States."

—"transfer."

—"trustee."

—"wage-earner."

Words in masculine gender.

—importing, plural.

—importing, singular.

CHAPTER II.

CREATION OF COURTS OF BANKRUPTCY AND THEIR JURISDICTION.

Courts of bankruptcy.

Sec. 2. That the courts of bankruptcy as hereinbefore defined, viz., the district courts of the United States in the several States, the Supreme Court of the District of Columbia, the district courts of the several Territories, and the United States courts in the Indian Territory and the District of Alaska, are hereby made courts of bankruptcy, and are hereby invested, within their respective territorial limits as now established, or as they may be hereafter changed, with such jurisdiction at law and in equity as will enable them to exercise original jurisdiction in bankruptcy proceedings, in vacation in chambers and during their respective terms, as

—U. S. district courts.

—supreme court, D. C.

—territorial courts.

Jurisdiction.

they are now or may be hereafter held, to (1) adjudge persons bankrupt who have had their principal place of business, resided, or had their domicile within their respective territorial jurisdictions for the preceding six months, or the greater portion thereof, or who do not have their principal place of business, reside, or have their domicile within the United States, but have property within their jurisdictions, or who have been adjudged bankrupts by courts of competent jurisdiction without the United States, and have property within their jurisdictions; (2) allow claims, disallow claims, reconsider allowed or disallowed claims, and allow or disallow them against bankrupt estates; (3) appoint receivers or the marshals, upon application of parties in interest, in case the courts shall find it absolutely necessary, for the preservation of estates, to take charge of the property of bankrupts after the filing of the petition and until it is dismissed or the trustee is qualified; (4) arraign, try, and punish bankrupts, officers, and other persons, and the agents, officers, members of the board of directors or trustees, or other similar controlling bodies, or corporations for violations of this Act, in accordance with the laws of procedure of the United States now in force, or such as may be hereafter enacted, regulating trials for the alleged violation of laws of the United States; (5) authorize the business of bankrupts to be conducted for limited periods by receivers, the marshals, or trustees, if necessary in the best interests of the estates, and allow such officers additional compensation for such services, as provided in section forty-eight; (6) bring in and substitute additional persons or parties in proceedings in bankruptcy when necessary for the complete determination of a matter in controversy; (7) cause the estates of bankrupts to be collected, reduced to money and distributed, and determine controversies in relation thereto, except as herein otherwise provided; (8) close estates, whenever it appears that they have been fully administered, by approving the final accounts and discharging the trustees, and reopen them whenever it appears they were closed before being fully administered; (9) confirm or reject compositions between debtors and their creditors, and set aside compositions and reinstate the cases; (10) consider and confirm, modify or overrule, or return, with instructions for further proceedings, records and findings certified to them by referees; (11) determine all claims of bankrupts to their exemptions; (12) discharge or refuse to

—to adjudge bankrupt.

—allow and disallow claims, etc.

—appoint receivers, etc.

—try and punish bankrupts, etc.

—to permit temporary transaction of business.

—to sustitute additional persons in proceedings, etc.

—to collect and distribute assets.

—to close estates.

—to confirm or reject compositions.

—to modify, etc., referees' findings.

—determine exemptions.

—discharge bankrupts, etc.

discharge bankrupts and set aside discharges and reinstate the cases; (13) enforce obedience by bankrupts, officers, and other persons to all lawful orders, by fine or imprisonment or fine and imprisonment; (14) extradite bankrupts from their respective districts to other districts; (15) make such orders, issue such process, and enter such judgments in addition to those specifically provided for as may be necessary for the enforcement of the provisions of this Act; (16) punish persons for contempts committed before referees; (17) pursuant to the recommendation of creditors, or when they neglect to recommend the appointment of trustees, appoint trustees, and upon complaints of creditors, remove trustees for cause upon hearings and after notices to them; (18) tax costs, whenever they are allowed by law, and render judgments therefor against the unsuccessful party, or the successful party for cause, or in part against each of the parties, and against estates, in proceedings in bankruptcy; (19) transfer cases to other courts of bankruptcy; and (20) exercise ancillary jurisdiction over persons or property within their respective territorial limits in aid of a receiver or trustee appointed in any bankruptcy proceedings pending in any other court of bankruptcy.

—enforce orders.

—extradite bankrupts.

—make orders.

—punish for contempt.

—appoint trustees.

—tax costs.

—transfer cases.

Nothing in this section contained shall be construed to deprive a court of bankruptcy of any power it would possess were certain specific powers not herein enumerated.

Unspecified powers.

CHAPTER III.

BANKRUPTS.

Bankrupts.

Sec. 3. ACTS OF BANKRUPTCY.—a Acts of bankruptcy by a person shall consist of his having (1) conveyed, transferred, concealed, or removed, or permitted to be concealed or removed, any part of his property with intent to hinder, delay, or defraud his creditors, or any of them; or (2) transferred, while insolvent, any portion of his property to one or more of his creditors with intent to prefer such creditors over his other creditors; or (3) suffered or permitted, while insolvent, any creditor to obtain a preference through legal proceedings, and not having at least five days before a sale or final disposition of any property affected by such preference vacated or discharged such preference; or (4) made a general assignment for the benefit of his creditors, or, being insolvent, applied for a receiver or trustee for

Acts of bankruptcy.
—of what to consist.

his property or because of insolvency a receiver or trustee has been put in charge of his property under the laws of a State, of a Territory, or of the United States; or (5) admitted in writing his inability to pay his debts and his willingness to be adjudged a bankrupt on that ground.

Petition to be filed within four months.

—from when to date.

b A petition may be filed against a person who is insolvent and who has committed an act of bankruptcy within four months after the commission of such act. Such time shall not expire until four months after (1) the date of the recording or registering of the transfer or assignment when the act consists in having made a transfer of any of his property with intent to hinder, delay, or defraud his creditors or for the purpose of giving a preference as hereinbefore provided, or a general assignment for the benefit of his creditors, if by law such recording or registering is required or permitted, or, if it is not, from the date when the beneficiary takes notorious, exclusive, or continuous possession of the property unless the petitioning creditors have received actual notice of such transfer or assignment.

Defense of solvency.

—burden of proof.

c It shall be a complete defense to any proceedings in bankruptcy instituted under the first subdivision of this section to allege and prove that the party proceeded against was not insolvent as defined in this Act at the time of the filing the petition against him, and if insolvency at such date is proved by the alleged bankrupt the proceedings shall be dismissed, and under said subdivision one the burden of proving solvency shall be on the alleged bankrupt.

Person denying insolvency.

—to testify.

—burden of proof, etc.

d Whenever a person against whom a petition has been filed as hereinbefore provided under the second and third subdivisions of this section takes issue with and denies the allegation of his insolvency, it shall be his duty to appear in court on the hearing with his books, papers, and accounts, and submit to an examination, and give testimony as to all matters tending to establish solvency or insolvency, and in case of his failure to so attend and submit to examination the burden of proving his solvency shall rest upon him.

Petitioner to give bond.

e Whenever a petition is filed by any person for the purpose of having another adjudged a bankrupt, and an application is made to take charge of and hold the property of the alleged bankrupt, or any part of the same, prior to the adjudication and pending a hearing on the petition, the petitioner or applicant shall file in the same court a bond with at least two good and sufficient sureties who shall reside within the jurisdiction of said

court, to be approved by the court or a judge thereof, in such sum as the court shall direct, conditioned for the payment, in case such petition is dismissed, to the respondent, his or her personal representatives, all costs, expenses, and damages occasioned by such seizure, taking, and detention of the property of the alleged bankrupt.

—liability for costs, etc.

If such petition be dismissed by the court or withdrawn by the petitioner, the respondent or respondents shall be allowed all costs, counsel fees, expenses, and damages occasioned by such seizure, taking, or detention of such property. Counsel fees, costs, expenses, and damages shall be fixed and allowed by the court, and paid by the obligors in such bond.

—allowance of costs, etc.

Counsel fees, etc., to be fixed by court.

Sec. 4. WHO MAY BECOME BANKRUPTS.—a Any person, except a municipal, railroad, insurance, or banking corporation, shall be entitled to the benefits of this Act as a voluntary bankrupt.

Who may become bankrupts.

—voluntary.

Any natural person, except a wage-earner or a person engaged chiefly in farming or the tillage of the soil, any unincorporated company, and any moneyed, business, or commercial corporation, except a municipal, railroad, insurance, or banking corporation, owing debts to the amount of one thousand dollars or over, may be adjudged an involuntary bankrupt upon default or an impartial trial, and shall be subject to the provisions and entitled to the benefits of this Act.

—involuntary.

The bankruptcy of a corporation shall not release its officers, directors, or stockholders, as such, from any liability under the laws of a State or Territory or of the United States.

Sec. 5. PARTNERS.—a A partnership, during the continuation of the partnership business, or after its dissolution and before the final settlement thereof, may be adjudged a bankrupt.

Partnership.

b The creditors of the partnership shall appoint the trustee; in other respects so far as possible the estate shall be administered as herein provided for other estates.

— administration of estate.

c The court of bankruptcy which has jurisdiction of one of the partners may have jurisdiction of all the partners and of the administration of the partnership and individual property.

—jurisdiction over one partner sufficient.

d The trustee shall keep separate accounts of the partnership property and of the property belonging to the individual partners.

—trustee's duty.

e The expenses shall be paid from the partnership property and the individual property in such proportions as the court shall determine.

—expenses.

—payment of partnership debts.

—payment of individual debts.

—surplus of partnership property.

f The net proceeds of the partnership property shall be appropriated to the payment of the partnership debts, and the net proceeds of the individual estate of each partner to the payment of his individual debts. Should any surplus remain of the property of any partner after paying his individual debts, such surplus shall be added to the partnership assets and be applied to the payment of the partnership debts. Should any surplus of the partnership property remain after paying the partnership debts, such surplus shall be added to the assets of the individual partners in the proportion of their respective interests in the partnership.

Claims of partnership against individual estates, etc.

g The court may permit the proof of the claim of the partnership estate against the individual estates, and vice versa, and may marshall the assets of the partnership estate and individual estates so as to prevent preferences and secure the equitable distribution of the property of the several estates.

Administration of estate where all partners are not bankrupt.

h In the event of one or more but not all of the members of a partnership being adjudged bankrupt, the partnership property shall not be administered in bankruptcy, unless by consent of the partner or partners not adjudged bankrupt; but such partner or partners not adjudged bankrupt shall settle the partnership business as expeditiously as its nature will permit, and account for the interest of the partner or partners adjudged bankrupt.

Exemption of bankrupts.

Sec. 6. EXEMPTIONS OF BANKRUPTS.—a This Act shall not affect the allowance to bankrupts of the exemptions which are prescribed by the State laws in force at the time of the filing of the petition in the State wherein they have had their domicile for the six months or the greater portion thereof immediately preceding the filing of the petition.

Duties of bankrupts specified.

Sec. 7. DUTIES OF BANKRUPTS.—The bankrupt shall (1) attend the first meeting of his creditors, if directed by the court or a judge thereof to do so, and the hearing upon his application for a discharge, if filed; (2) comply with all lawful orders of the court; (3) examine the correctness of all proofs of claims filed against his estate; (4) execute and deliver such papers as shall be ordered by the court; (5) execute to his trustee transfers of all his property in foreign countries; (6) immediately inform his trustee of any attempt, by his creditors or other persons, to evade the provisions of this Act, coming to his knowledge; (7) in case of any person having to his knowledge proved a false claim against his estate, disclose that fact immediately to his trus-

tee; (8) prepare, make oath to, and file in court within ten days, unless further time is granted, after the adjudication, if an involuntary bankrupt, and with the petition if a voluntary bankrupt, a schedule of his property, showing the amount and kind of property, the location thereof, its money value in detail, and a list of his creditors, showing their residences, if known, if unknown, that fact to be stated, the amounts due each of them, the consideration thereof, the security held by them, if any, and a claim for such exemptions as he may be entitled to, all in triplicate, one copy of each for the clerk, one for the referee, and one for the trustee; and (9) when present at the first meeting of his creditors, and at such other times as the court shall order, submit to an examination concerning the conducting of his business, the cause of his bankruptcy, his dealings with his creditors and other persons, the amount, kind, and whereabouts of his property, and, in addition, all matters which may affect the administration and settlement of his estate; but no testimony given by him shall be offered in evidence against him in any criminal proceeding.

Bankrupt, when not compelled to attend meeting.

Provided, however, That he shall not be required to attend a meeting of his creditors, or at or for an examination at a place more than one hundred and fifty miles distant from his home or principal place of business, or to examine claims except when presented to him, unless ordered by the court, or a judge thereof, for cause shown; and the bankrupt shall be paid his actual expenses from the estate when examined or required to attend at any place other than the city, town, or village of his residence.

—examine claims.

Expenses for attending meetings.

Death or insanity of bankrupts.

Sec. 8. DEATH OR INSANITY OF BANKRUPTS.—a The death or insanity of a bankrupt shall not abate the proceedings, but the same shall be conducted and concluded in the same manner, so far as possible, as though he had not died or become insane: *Provided,* That in case of death the widow and children shall be entitled to all rights of dower and allowance fixed by the laws of the State of the bankrupt's residence.

—not to abate proceedings.

—widow entitled to dower, etc.

Protection and detention of bankrupts.

Sec. 9. PROTECTION AND DETENTION OF BANKRUPTS.—a A bankrupt shall be exempt from arrest upon civil process except in the following cases: (1) When issued from a court of bankruptcy for contempt or disobedience of its lawful orders; (2) when issued from a State court having jurisdiction, and served within such State, upon a debt or claim from which his discharge in bankruptcy would not be a release, and in such case he shall

Exemption from arrest.

be exempt from such arrest when in attendance upon a court of bankruptcy or engaged in the performance of a duty imposed by this Act.

Detention for purposes of examination.

b The judge may, at any time after the filing of a petition by or against a person, and before the expiration of one month after the qualification of the trustee, upon satisfactory proof by the affidavits of at least two persons that such bankrupt is about to leave the district in which he resides or has his principal place of business to avoid examination, and that his departure will defeat the proceedings in bankruptcy, issue a warrant to the marshal, directing him to bring such bankrupt forthwith before the court for examination. If upon hearing the evidence of the parties it shall appear to the court or judge thereof that the allegations are true and that it is necessary, he shall order such marshal to keep such bankrupt in custody not exceeding ten days, but not imprison him, until he shall be examined and released or give bail conditioned for his appearance for examination, from time to time, not exceeding in all ten days, as required by the court, and for his obedience to all lawful orders made in reference thereto.

May be kept in custody ten days, etc.

Extradition of bankrupts.

Sec. 10. EXTRADITION OF BANKRUPTS.—a Whenever a warrant for the apprehension of a bankrupt shall have been issued, and he shall have been found within the jurisdiction of a court other than the one issuing the warrant, he may be extradited in the same manner in which persons under indictment are now extradited from one district within which a district court has jurisdiction to another.

Suits by and against bankrupts.

Sec. 11. SUITS BY AND AGAINST BANKRUPTS.—a A suit which is founded upon a claim from which a discharge would be a release, and which is pending against a person at the time of the filing of a petition against him, shall be stayed until after an adjudication or the dismissal of the petition; if such person is adjudged a bankrupt, such action may be further stayed until twelve months after the date of such adjudication, or, if within that time such person applies for a discharge, then until the question of such discharge is determined.

—stay until adjudication.

—further stay.

—appearance of trustee.

b The court may order the trustee to enter his appearance and defend any pending suit against the bankrupt.

—commenced prior to adjudication.

c A trustee may, with the approval of the court, be permitted to prosecute as trustee any suit commenced by the bankrupt prior to the adjudication, with like force and effect as though it had been commenced by him.

d Suits shall not be brought by or against a trustee

of a bankrupt estate subsequent to two years after the estate has been closed. Time for bringing suits against trustees.

Sec. 12. COMPOSITIONS, WHEN CONFIRMED.—a A bankrupt may offer, either before or after adjudication, terms of composition to his creditors after, but not before, he has been examined in open court or at a meeting of his creditors, and has filed in court the schedule of his property and the list of his creditors required to be filed by bankrupts. In compositions before adjudication the bankrupt shall file the required schedules, and thereupon the court shall call a meeting of creditors for the allowance of claims, examination of the bankrupt, and preservation or conduct of estates, at which meeting the judge or referee shall preside; and action upon the petition for adjudication shall be delayed until it shall be determined whether such composition shall be confirmed. Compositions. —when may be offered.

b An application for the confirmation of a composition may be filed in the court of bankruptcy after, but not before, it has been accepted in writing by a majority in number of all creditors whose claims have been allowed, which number must represent a majority in amount of such claims, and the consideration to be paid by the bankrupt to his creditors, and the money necessary to pay all debts which have priority and the cost of the proceedings, have been deposited in such place as shall be designated by and subject to the order of the judge. —application for confirming.

c A date and place, with reference to the convenience of the parties in interest, shall be fixed for the hearing upon each application for the confirmation of a composition, and such objections as may be made to its confirmation. —date, etc., for hearing.

d The judge shall confirm a composition if satisfied that (1) it is for the best interests of the creditors; (2) the bankrupt has not been guilty of any of the acts or failed to perform any of the duties which would be a bar to his discharge; and (3) the offer and its acceptance are in good faith and have not been made or procured except as herein provided, or by any means, promises, or acts herein forbidden. —conditions of confirmance.

e Upon the confirmation of a composition, the consideration shall be distributed as the judge shall direct, and the case dismissed. Whenever a composition is not confirmed, the estate shall be administered in bankruptcy as herein provided. —distribution of consideration.

Sec. 13. COMPOSITIONS, WHEN SET ASIDE.—a The judge may, upon the application of parties in interest filed at any time within six months after a composition has been confirmed, set the same aside and reinstate —may be set aside.

the case if it shall be made to appear upon a trial that fraud was practiced in the procuring of such composition, and that the knowledge thereof has come to the petitioners since the confirmation of such composition.

—upon practice of fraud.

Discharges.

Sec. 14. DISCHARGES, WHEN GRANTED.—a Any person may, after the expiration of one month and within the next twelve months subsequent to being adjudged a bankrupt, file an application for a discharge in the court of bankruptcy in which the proceedings are pending; if it shall be made to appear to the judge that the bankrupt was unavoidably prevented from filing it within such time, it may be filed within but not after the expiration of the next six months.

—application for.

—hearing of application.

b The judge shall hear the application for a discharge, and such proofs and pleas as may be made in opposition thereto by the trustee or other parties in interest, at such time as will give the trustee or parties in interest a reasonable opportunity to be fully heard, and investigate the merits of the application and discharge the applicant unless he has (1) committed an offense punishable by imprisonment as herein provided; or (2) with intent to conceal his financial condition, destroyed, concealed, or failed to keep books of account or records from which such condition might be ascertained; or (3) obtained money or property on credit upon a materially false statement in writing, made by him to any person or his representative for the purpose of obtaining credit from such person; or (4) at any time subsequent to the first day of the four months immediately preceding the filing of the petition transferred, removed, destroyed, or concealed, or permitted to be removed, destroyed, or concealed, any of his property, with intent to hinder, delay, or defraud his creditors (5) in voluntary proceedings been granted a discharge in bankruptcy within six years; or (6) in the course of the proceedings in bankruptcy refused to obey any lawful order of, or to answer any material question approved by the court: *Provided*, That a trustee shall not interpose objections to a bankrupt's discharge until he shall be authorized so to do at a meeting of creditors called for that purpose.

Confirmation discharges from debt.

c The confirmation of a composition shall discharge the bankrupt from his debts, other than those agreed to be paid by the terms of the composition and those not affected by a discharge.

Discharges, when revoked.

Sec. 15. DISCHARGES, WHEN REVOKED.—a The judge may, upon the application of parties in interest who have not been guilty of undue laches, filed at any time within one year after a discharge shall have been granted, revoke it upon a trial if it shall be made to appear that

it was obtained through the fraud of the bankrupt, and that the knowledge of the fraud has come to the petitioners since the granting of the discharge, and that the actual facts did not warrant the discharge.

Co-debtors' liability not affected by bankrupt's discharge, etc.

Sec. 16. CO-DEBTORS OF BANKRUPTS.—a The liability of a person who is co-debtor with, or guarantor or in any manner a surety for, a bankrupt shall not be altered by the discharge of such bankrupt.

Debts not affected by a discharge.

Sec. 17. DEBTS NOT AFFECTED BY A DISCHARGE.—a A discharge in bankruptcy shall release a bankrupt from all of his provable debts, except such as (first) are due as a tax levied by the United States, the State, county, district, or municipality in which he resides; (second) are liabilities for obtaining property by false pretenses or false representations, or for willful and malicious injuries to the person or property of another, or for alimony due or to become due, or for maintenance or support of wife or child, or for seduction of an unmarried female, or for breach of promise of marriage accompanied by seduction, or for criminal conversation; (third) have not been duly scheduled in time for proof and allowance, with the name of the creditor, if known to the bankrupt, unless such creditor had notice or actual knowledge of the proceedings in bankruptcy; or (fourth) were created by his fraud, embezzlement, misappropriation, or defalcation while acting as an officer or in any fiduciary capacity; or (fifth) are for wages due to workmen, clerks, traveling or city salesmen, or servants, which have been earned within three months before the date of commencement of the proceedings in bankruptcy; or (sixth) are due for moneys of an employee received or retained by his employer to secure the faithful performance by such employee of the terms of a contract of employment. (As amended Jan. 7, 1922.)

—U. S. and State taxes.

—judgments in fraud actions, etc.

—claims not scheduled, etc.

—created by fraud actions, etc.

CHAPTER IV.

COURTS AND PROCEDURE THEREIN.

Courts and procedure.

Sec. 18. PROCESS, PLEADINGS AND ADJUDICATIONS.—a Upon the filing of a petition for involuntary bankruptcy, service thereof, with a writ of subpœna, shall be made upon the person therein named as defendant in the same manner that service of such process is now had upon the commencement of a suit in equity in the courts of the United States, except that it shall be returnable within fifteen days, unless the judge shall for cause fix a longer time; but in case personal service can not be made, then notice shall be given by publication in the same manner and for the same time as provided by law

Service of petition, involuntary bankruptcy.

—returnable in 15 days.

—by publication. for notice by publication in suits to enforce a legal or equitable lien in courts of the United States, except that, unless the judge shall otherwise direct, the order shall be published not more than once a week for two consecutive weeks, and the return day shall be ten days after the last publication unless the judge shall for cause fix a longer time.

Pleading within 10 days. b The bankrupt, or any creditor, may appear and plead to the petition within five days after the return day, or within such further time as the court may allow.

—verification. c All pleadings setting up matters of fact shall be verified under oath.

Court to determine issues when facts controverted. d If the bankrupt, or any of his creditors, shall appear, within the time limited, and controvert the facts alleged in the petition, the judge shall determine, as soon as may be, the issues presented by the pleadings, without the intervention of a jury, except in cases where a jury trial is given by this Act, and makes the adjudication or dismiss the petition.

Decision where pleadings not filed. e If on the last day within which pleadings may be filed none are filed by the bankrupt or any of his creditors, the judge shall on the next day, if present, or as soon thereafter as practicable, make the adjudication or dismiss the petition.

If judge absent, case to be referred to referee. f If the judge is absent from the district, or the division of the district in which the petition is pending, on the next day after the last day on which pleadings may be filed, and none have been filed by the bankrupt or any of his creditors, the clerk shall forthwith refer the case to the referee.

Hearing on filing voluntary petition. g Upon the filing of a voluntary petition the judge shall hear the petition and make the adjudication or dismiss the petition. If the judge is absent from the district, or the division of the district in which the petition is filed at the time of the filing, the clerk shall forthwith refer the case to the referee.

—absence of judge.

Jury trials. Sec. 19. JURY TRIALS.—a A person against whom an involuntary petition has been filed shall be entitled to have a trial by jury, in respect to the question of his insolvency, except as herein otherwise provided, and any act of bankruptcy alleged in such petition to have been committed, upon filing a written application therefor at or before the time within which an answer may be filed.

—person against whom involuntary petition filed, entitled.

—right waived. If such application is not filed within such time, a trial by jury shall be deemed to have been waived.

Attendance of jury, etc. b If a jury is not in attendance upon the court, one may be specially summoned for the trial, or the case may be postponed, or, if the case is pending in one of the district courts within the jurisdiction of a circuit

court of the United States, it may be certified for trial to the circuit court sitting at the same place, or by consent of parties when sitting at any other place in the same district, if such circuit court has or is to have a jury first in attendance.

Laws as to jury trials applicable.

c The right to submit matters in controversy, or an alleged offense under this Act, to a jury shall be determined and enjoyed, except as provided by this Act, according to the United States laws now in force or such as may be hereafter enacted in relation to trials by jury.

Oaths, by whom administered.

Sec. 20. OATHS, AFFIRMATIONS.—a Oaths required by this Act, except upon hearings in court, may be administered by (1) referees; (2) officers authorized to administer oaths in proceedings before the courts of the United States, or under the laws of the State where the same are to be taken; and (3) diplomatic or consular officers of the United States in any foreign country.

Affirmations.

b Any person conscientiously opposed to taking an oath may, in lieu thereof, affirm. Any person who shall affirm falsely shall be punished as for the making of a false oath.

Evidence.

Sec. 21. EVIDENCE.—a A court of bankruptcy may, upon application of any officer, bankrupt, or creditor, by order require any designated person, including the bankrupt and his wife, to appear in court or before a referee or the judge of any State court, to be examined concerning the acts, conduct, or property of a bankrupt whose estate is in process of administration under this Act: *Provided*, That the wife may be examined only touching business transacted by her or to which she is a party, and to determine the fact whether she has transacted or been a party to any business of the bankrupt.

Compulsory attendance of witnesses.

Depositions, laws governing.

b The right to take depositions in proceedings under this Act shall be determined and enjoyed according to the United States laws now in force, or such as may be hereafter enacted relating to the taking of depositions, except as herein provided.

—notice of taking.

c Notice of the taking of depositions shall be filed with the referee in every case. When depositions are to be taken in opposition to the allowance of a claim notice shall also be served upon the claimant, and when in opposition to a discharge notice shall also be served upon the bankrupt.

Certified copies of proceedings evidence.

d Certified copies of proceedings before a referee, or of papers, when issued by the clerk or referee, shall be admitted as evidence with like force and effect as certified copies of the records of district courts of the United States are now or may hereafter be admitted as evidence.

—of order approving trustees' bond.

e A certified copy of the order approving the bond of a trustee shall constitute conclusive evidence of the vesting in him of the title to the property of the bankrupt, and if recorded shall impart the same notice that a deed from the bankrupt to the trustee if recorded would have imparted had not bankruptcy proceedings intervened.

—of order confirming composition, etc.

f A certified copy of an order confirming or setting aside a composition, or granting or setting aside a discharge, not revoked, shall be evidence of the jurisdiction of the court, the regularity of the proceedings, and of the fact that the order was made.

—evidence of revesting title in bankrupt.

g A cerified copy of an order confirming a composition shall constitute evidence of the revesting of the title of his property in the bankrupt, and if recorded shall impart the same notice that a deed from the trustee to the bankrupt if recorded would impart.

Reference of cases after adjudication.

Sec. 22. REFERENCE OF CASES AFTER ADJUDICATION.—a After a person has been adjudged a bankrupt the judge may cause the trustee to proceed with the administration of the estate, or refer it (1) generally to the referee or specially with only limited authority to act in the premises or to consider and report upon specified issues; or (2) to any referee within the territorial jurisdiction of the court, if the convenience of parties in interest will be served thereby, or for cause, or if the bankrupt does not do business, reside, or have his domicile in the district.

Transfer of case to different referee.

b The judge may, at any time, for the convenience of parties or for cause, transfer a case from one referee to another.

Jurisdiction of United States and State courts. —circuit courts.

Sec. 23. JURISDICTION OF UNITED STATES AND STATE COURTS.—a The United States circuit courts shall have jurisdiction of all controversies at law and in equity, as distinguished from proceedings in bankruptcy, between trustees as such and adverse claimants concerning the property acquired or claimed by the trustees, in the same manner and to the same extent only as though bankruptcy proceedings had not been instituted and such controversies had been between the bankrupts and such adverse claimants.

Suits by trustees, where brought.

b Suits by the trustee shall only be brought or prosecuted in the courts where the bankrupt, whose estate is being administered by such trustee, might have brought or prosecuted them if proceedings in bankruptcy had not been instituted, unless by consent of the proposed defendant, except suits for the recovery of property under section sixty, subdivision b, section sixty-seven, subdivision e, and section seventy, subdivision e.

c The United States circuit courts shall have concurrent jurisdiction with the courts of bankruptcy, within their respective territorial limits, of the offenses enumerated in this Act. Concurrent jurisdiction in circuit courts and courts of bankruptcy.

Sec. 24. JURISDICTION OF APPELLATE COURTS.—a The Supreme Court of the United States, the circuit courts of appeals of the United States, and the supreme courts of the Territories, in vacation in chambers and during their respective terms, as now or as they may be hereafter held, are hereby invested with appellate jurisdiction of controversies arising in bankruptcy proceedings from the courts of bankruptcy from which they have appellate jurisdiction in other cases. The Supreme Court of the United States shall exercise a like jurisdiction from courts of bankruptcy not within any organized circuit of the United States and from the Supreme Court of the District of Columbia. Appellate courts, jurisdiction of. —appeals from courts not in organized circuits and in District of Columbia.

b The several circuit courts of appeal shall have jurisdiction in equity, either interlocutory or final, to superintend and revise in matter of law the proceedings of the several inferior courts of bankruptcy within their jurisdiction. Such power shall be exercised on due notice and petition by any party aggrieved. Jurisdiction of circuit court of appeals.

Sec. 25. APPEALS AND WRITS OF ERROR.—a That appeals, as in equity cases, may be taken in bankruptcy proceedings from the courts of bankruptcy to the circuit court of appeals of the United States, and to the supreme court of the Territories in the following cases, to-wit, (1) from a judgment adjudging or refusing to adjudge the defendant a bankrupt; (2) from a judgment granting or denying a discharge; and (3) from a judgment allowing or rejecting a debt or claim of five hundred dollars or over. Such appeal shall be taken within ten days after the judgment appealed from has been rendered, and may be heard and determined by the appellate court in term or vacation as the case may be. Appeals. —when taken. —to be within 10 days. —hearing.

b From any final decision of a court of appeals allowing or rejecting a claim under this Act, an appeal may be had under such rules and within such time as may be prescribed by the Supreme Court of the United States, in the following cases, and no other: Appeal to U. S. Supreme Court.

1. Where the amount in controversy exceeds the sum of two thousand dollars, and the question involved is one which might have been taken on appeal or writ of error from the highest court of a State to the Supreme Court of the United States; or —where amount exceeds $2,000, etc.

2. Where some Justice of the Supreme Court of the United States shall certify that in his opinion the de- —where question certified by Supreme Court Justice.

termination of the question or questions involved in the allowance or rejection of such claim is essential to a uniform construction of this Act throughout the United States.

—trustees not to give bond.

c Trustees shall not be required to give bond when they take appeals or sue out writs of error.

—certification to Supreme Court by courts.

d Controversies may be certified to the Supreme Court of the United States from other courts of the United States, and the former court may exercise jurisdiction thereof and issue writs of certiorari pursuant to the provisions of the United States laws now in force or such as may be hereafter enacted.

Arbitration of controversies.

Sec. 26. ARBITRATION OF CONTROVERSIES.—a The trustee may, pursuant to the direction of the court, submit to arbitration any controversy arising in the settlement of the estate.

—trustees may submit to.

Selection of arbitrators.

b Three arbitrators shall be chosen by mutual consent, or one by the trustee, one by the other party to the controversy, and the third by the two so chosen, or if they fail to agree in five days after their appointment the court shall appoint the third arbitrator.

Findings of arbitrators.

c The written finding of the arbitrators, or a majority of them, as to the issues presented, may be filed in court and shall have like force and effect as the verdict of a jury.

Compromise by trustee.

Sec. 27. COMPROMISES.—a The trustee may, with the approval of the court, compromise any controversy arising in the administration of the estate upon such terms as he may deem for the best interests of the estate.

Newspapers to publish notices.

Sec. 28. DESIGNATION OF NEWSPAPERS.—a Courts of bankruptcy shall by order designate a newspaper published within their respective territorial districts, and in the county in which the bankrupt resides or the major part of his property is situated, in which notices required to be published by this Act and orders which the court may direct to be published shall be inserted. Any court may in a particular case, for the convenience of parties in interest, designate some additional newspaper in which notices and orders in such case shall be published.

Penalty.

Sec. 29. OFFENSES.—a A person shall be punished, by imprisonment for a period not to exceed five years, upon conviction of the offense of having knowingly and fraudulently appropriated to his own use, embezzled, spent, or unlawfully transferred any property or secreted or destroyed any document belonging to a bankrupt estate which came into his charge as trustee.

—for misappropriating property.

—concealing property.

b A person shall be punished, by imprisonment for a period not to exceed two years, upon conviction of the

offense of having knowingly and fraudulently (1) concealed while a bankrupt, or after his discharge, from his trustee any of the property belonging to his estate in bankruptcy; or (2) made a false oath or account in, or in relation to, any proceeding in bankruptcy; (3) presented under oath any false claim for proof against the estate of a bankrupt, or used any such claim in composition personally or by agent, proxy, or attorney, or as agent, proxy, or attorney; or (4) received any material amount of property from a bankrupt after the filing of the petition, with intent to defeat this Act; or (5) extorted or attempted to extort any money or property from any person as a consideration for acting or forbearing to act in bankruptcy proceedings.

—false oath or account, etc.
—presenting false claim.
—receiving property from bankrupt.
—extorting money for forbearing to act, etc.

c A person shall be punished by fine, not to exceed five hundred dollars, and forfeit his office, and the same shall thereupon become vacant, upon conviction of the offense of having knowingly (1) acted as a referee in a case in which he is directly or indirectly interested; or (2) purchased, while a referee, directly or indirectly, any property of the estate in bankruptcy of which he is referee; or (3) refused, while a referee or trustee, to permit a reasonable opportunity for the inspection of the accounts relating to the affairs of, and the papers and records of, estates in his charge by parties in interest when directed by the court so to do.

—action as referee when interested.
—purchasing property, etc.
—refusing to permit inspection of accounts.

d A person shall not be prosecuted for any offense arising under this Act unless the indictment is found or the information is filed in court within one year after the commission of the offense.

Prosecutions to be in one year.

Sec. 30. RULES, FORMS, AND ORDERS.—a All necessary rules, forms, and orders as to procedure and for carrying this Act into force and effect shall be prescribed, and may be amended from time to time, by the Supreme Court of the United States.

United States Supreme Court to make rules, etc.

Sec. 31. COMPUTATION OF TIME.—a Whenever time is enumerated by days in this Act, or in any proceeding in bankruptcy, the number of days shall be computed by excluding the first and including the last, unless the last fall on a Sunday or holiday, in which event the day last included shall be the next day thereafter which is not a Sunday or a legal holiday.

Computation of time.

Sec. 32. TRANSFER OF CASES.—a In the event petitions are filed against the same person, or against different members of a partnership, in different courts of bankruptcy each of which has jurisdiction, the cases shall be transferred, by order of the courts relinquishing jurisdiction, to and be consolidated by the one of such courts

Transfer of cases commenced in different courts.

which can proceed with the same for the greatest convenience of parties in interest.

Officers.

CHAPTER V.

OFFICERS, THEIR DUTIES AND COMPENSATION.

Offices of referee and trustees created.

Sec. 33. CREATION OF TWO OFFICES.—a The offices of referee and trustee are hereby created.

Referees, appointment, etc.

Sec. 34.—APPOINTMENT, REMOVAL, AND DISTRICTS OF REFEREES.—a Courts of bankruptcy shall, within the territorial limits of which they respectively have jurisdiction, (1) appoint referees, each for a term of two years, and may, in their discretion, remove them because their services are not needed or for other cause; and (2) designate, and from time to time change, the limits of the districts of referees, so that each county, where the services of a referee are needed, may constitute at least one district.

—designation of districts.

—qualifications.

Sec. 35. QUALIFICATIONS OF REFEREES.—a Individuals shall not be eligible to appointment as referees unless they are respectively (1) competent to perform the duties of that office; (2) not holding any office of profit or emolument under the laws of the United States or of any State other than commissioners of deeds, justices of the peace, masters in chancery, or notaries public; (3) not related by consanguinity or affinity, within the third degree as determined by the common law, to any of the judges of the courts of bankruptcy, or circuit courts of the United States, or of the justices or judges of the appellate courts of the districts wherein they may be appointed; and (4) residents of, or have their offices in, the territorial districts for which they are to be appointed.

—to take oath.

Sec. 36. OATHS OF OFFICE OF REFEREES.—a Referees shall take the same oath of office as that prescribed for judges of United States courts.

—number of.

Sec. 37. NUMBER OF REFEREES.—a Such number of referees shall be appointed as may be necessary to assist in expeditiously transacting the bankruptcy business pending in the various courts of bankruptcy.

Jurisdiction of referees.

Sec. 38. JURISDICTION OF REFEREES.—a Referees respectively are hereby invested, subject always to a review by the judge, within the limits of their districts as established from time to time, with jurisdiction to (1) consider all petitions referred to them by the clerks and make the adjudications or dismiss the petitions; (2) exercise the powers vested in courts of bankruptcy

—to consider petitions.

for the administering of oaths to and the examination of persons as witnesses and for requiring the production of documents in proceedings before them, except the power of commitment; (3) exercise the powers of the judge for the taking possession and releasing of the property of the bankrupt in the event of the issuance by the clerk of a certificate showing the absence of a judge from the judicial district, or the division of the district, or his sickness or inability to act; (4) perform such part of the duties, except as to questions arising out of the applications of bankrupts for compositions or discharges, as are by this Act conferred on courts of bankruptcy and as shall be prescribed by rules or orders of the courts of bankruptcy of their respective districts, except as herein otherwise provided; and (5) upon the application of the trustee during the examination of the bankrupts, or other proceedings, authorize the employment of stenographers at the expense of the estates at a compensation not to exceed ten cents per folio for reporting and transcribing the proceedings.

—administer oaths, examine witnesses, etc.

—take possession and release property, etc.

—perform certain duties of bankruptcy courts.

—authorize employment of stenographers.

Sec. 39. DUTIES OF REFEREES.—a Referees shall (1) declare dividends and prepare and deliver to trustees dividend sheets showing the dividends declared and to whom payable; (2) examine all schedules of property and lists of creditors filed by bankrupts and cause such as are incomplete or defective to be amended; (3) furnish such information concerning the estates in process of administration before them as may be requested by the parties in interest; (4) give notices to creditors as herein provided; (5) make up records embodying the evidence, or the substance thereof, as agreed upon by the parties in all contested matters arising before them, whenever requested to do so by either of the parties thereto, together with their findings therein, and transmit them to the judges; (6) prepare and file the schedules of property and lists of creditors required to be filed by the bankrupts, or cause the same to be done, when the bankrupts fail, refuse, or neglect to do so; (7) safely keep perfect, and transmit to the clerk the records, herein required to be kept by them, when the cases are concluded; (8) transmit to the clerks such papers as may be on file before them whenever the same are needed in any proceedings in courts, and in like manner secure the return of such papers after they have been used, or, if it be impracticable to transmit the original papers, transmit certified copies thereof by mail; (9) upon application of any party in interest, preserve the evidence taken or the substance thereof as

Referees' duties.

—declare dividends.

—examine schedules, etc.

—furnish information, etc.

—give notices.

—prepare records, etc.

—prepare schedules, etc.

—preserve records, etc.

—transmit papers to clerks, etc.

—preserve evidence, etc.

agreed upon by the parties before them when a stenographer is not in attendance; and (10) whenever their respective offices are in the same cities or towns where the courts of bankruptcy convene, call upon and receive from the clerks all papers filed in courts of bankruptcy which have been referred to them.

—obtain papers, etc.

b Referees shall not (1) act in cases in which they are directly or indirectly interested; (2) practice as attorneys and counselors at law in any bankruptcy proceedings; or (3) purchase, directly or indirectly, any property of an estate in bankruptcy.

—not to act if interested.

Sec. 40. COMPENSATION OF REFEREES.—a Referees shall receive as full compensation for their services, payable after they are rendered, a fee of fifteen dollars deposited with the clerk at the time the petition is filed in each case, except when a fee is not required from a voluntary bankrupt, and twenty-five cents for every proof of claim filed for allowance, to be paid from the estate, if any, as a part of the cost of administration, and from estates which have been administered before them one per centum commissions on all moneys disbursed to creditors by the trustee, or one-half of one per centum on the amount to be paid to creditors upon the confirmation of a composition.

Compensation of referees.

b Whenever a case is transferred from one referee to another the judge shall determine the proportion in which the fee and commissions therefor shall be divided between the referees.

—on transfer from one to another.

c In the event of the reference of a case being revoked before it is concluded, and when the case is specially referred, the judge shall determine what part of the fee and commissions shall be paid to the referee.

—where reference revoked.

Sec. 41. CONTEMPTS BEFORE REFEREES.—a A person shall not, in proceedings before a referee, (1) disobey or resist any lawful order, process, or writ; (2) misbehave during a hearing or so near the place thereof as to obstruct the same; (3) neglect to produce, after having been ordered to do so, any pertinent document; or (4) refuse to appear after having been subpœnaed, or, upon appearing, refuse to take the oath as a witness, or, after having taken the oath, refuse to be examined according to law: *Provided*, That no person shall be required to attend as a witness before a referee at a place outside of the State of his residence, and more than one hundred miles from such place of residence, and only in case his lawful mileage and fee for one day's attendance, shall be first paid or tendered to him.

Contempt before referees.

When witness not required to attend.

b The referee shall certify the facts to the judge, if

Contempt proceedings.

any person shall do any of the things forbidden in this section. The judge shall thereupon, in a summary manner, hear the evidence as to the acts complained of, and, if it is such as to warrant him in so doing, punish such person in the same manner and to the same extent as for a contempt committed before the court of bankruptcy, or commit such person upon the same conditions as if the doing of the forbidden act had occurred with reference to the process of, or in the presence of, the court. —penalty.

Sec. 42. RECORDS OF REFEREES.—a The records of all proceedings in each case before a referee shall be kept as nearly as may be in the same manner as records are kept in equity cases in district courts of the United States. Records of referees. —manner of keeping.

b A record of the proceedings in each case shall be kept in a separate book or books, and shall, together with the papers on file, constitute the records of the case.

c The book or books containing a record of the proceedings shall, when the case is concluded before the referee, be certified to by him, and, together with such papers as are on file before him, be transmitted to the court of bankruptcy and shall there remain as a part of the records of the court.

Sec. 43. REFEREE'S ABSENCE OR DISABILITY.—a Whenever the office of a referee is vacant, or its occupant is absent or disqualified to act, the judge may act, or may appoint another referee, or another referee holding an appointment under the same court may, by order of the judge, temporarily fill the vacancy. Referee's absence or disability. —filling vacancy.

Sec. 44. APPOINTMENT OF TRUSTEES.—a The creditors of a bankrupt estate shall, at their first meeting after the adjudication or after a vacancy has occurred in the office of trustee, or after an estate has been reopened, or after a composition has been set aside or a discharge revoked, or if there is a vacancy in the office of trustee, appoint one trustee or three trustees of such estate. If the creditors do not appoint a trustee or trustees as herein provided, the court shall do so. Trustees. —appointment.

Sec. 45. QUALIFICATIONS OF TRUSTEES.—a Trustees may be (1) individuals who are respectively competent to perform the duties of that office, and reside or have an office in the judicial district within which they are appointed, or (2) corporations authorized by their charters or by law to act in such capacity and having an office in the judicial district within which they are appointed. —qualifications.

—death or removal.
—suits not to abate, etc.

Sec. 46. DEATH OR REMOVAL OF TRUSTEES.—a The death or removal of a trustee shall not abate any suit or proceeding which he is prosecuting or defending at the time of his death or removal, but the same may be proceeded with or defended by his joint trustee or successor in the same manner as though the same had been commenced or was being defended by such joint trustee alone or by such successor.

—duties specified.

Sec. 47. DUTIES OF TRUSTEES.—a Trustees shall respectively (1) account for and pay over to the estates under their control all interest received by them on property of such estates; (2) collect and reduce to money the property of the estates for which they are trustees, under the direction of the court, and close up the estate as expeditiously as is compatible with the best interests of the parties in interest; and such trustees, as to all property in the custody or coming into the custody of the bankruptcy court, shall be deemed vested with all the rights, remedies, and powers of a creditor holding a lien by legal or equitable proceedings thereon; and also, as to all property not in the custody of the bankruptcy court, shall be deemed vested with all the rights, remedies, and powers of a judgment creditor holding an execution duly returned unsatisfied; (3) deposit all money received by them in one of the designated depositories; (4) disburse money only by check or draft on the depositories in which it has been deposited; (5) furnish such information concerning the estates of which they are trustees and their administration as may be requested by parties in interest; (6) keep regular accounts showing all amounts received and from what sources and all amounts expended and on what accounts; (7) lay before the final meeting of the creditors detailed statements of the administration of the estates; (8) make final reports and file final accounts with the courts fifteen days before the days fixed for the final meetings of the creditors; (9) pay dividends within ten days after they are declared by the referees; (10) report to the courts, in writing, the condition of the estates and the amounts of money on hand, and such other details as may be required by the courts, within the first month after their appointment and every two months thereafter, unless otherwise ordered by the court; and (11) set apart the bankrupt's exemptions and report the items and estimated value thereof to the court as soon as practicable after their appointment.

b Whenever three trustees have been appointed for an estate, the concurrence of at least two of them shall be necessary to the validity of their every act concerning the administration of the estate. —concurrence of two out of three necessary.

c The trustee shall, within thirty days after the adjudication, file a certified copy of the decree of adjudication in the office where conveyances of real estate are recorded in every county where the bankrupt owns real estate not exempt from execution, and pay the fee for such filing, and he shall receive a compensation of fifty cents for each copy so filed, which, together with the filing fee, shall be paid out of the estate of the bankrupt as a part of the cost and disbursements of the proceedings.

Sec. 48. COMPENSATION OF TRUSTEES, RECEIVERS AND MARSHALS: (a) Trustees shall receive for their services, payable after they are rendered, a fee of five dollars deposited with the clerk at the time the petition is filed in each case, except when a fee is not required from a voluntary bankrupt, and such commissions on all moneys disbursed or turned over to any person, including lien holders, by them, as may be allowed by the courts, not to exceed six per centum on the first five hundred dollars or less, four per centum on moneys in excess of five hundred dollars and less than fifteen hundred dollars, two per centum on moneys in excess of fifteen hundred dollars and less than ten thousand dollars, and one per centum on moneys in excess of ten thousand dollars. And in case of the confirmation of a composition after the trustee has qualified the court may allow him, as compensation, not to exceed one-half of one per centum of the amount to be paid the creditors on such composition. Trustees' compensation. —fee. —commissions.

(b) In the event of an estate being administered by three trustees instead of one trustee or by successive trustees, the court shall apportion the fees and commissions between them according to the services actually rendered, so that there shall not be paid to trustees for the administering of any estate a greater amount than one trustee would be entitled to. — apportionment where more than one.

(c) The court may, in its discretion, withhold all compensation from any trustee who has been removed for cause. —withholding of.

(d) Receivers or marshals appointed pursuant to section two, subdivision three, shall receive for their services, payable after they are rendered, compensation by way of commissions upon the moneys disbursed or turned over to any person, including lien holders, by

them, and also upon the moneys turned over by them or afterwards realized by the trustees from property turned over in kind by them to the trustees, as the court may allow, not to exceed six per centum on the first five hundred dollars or less, four per centum on moneys in excess of five hundred dollars and less than one thousand five hundred dollars, two per centum on moneys in excess of one thousand five hundred dollars and less than ten thousand dollars, and one per centum on moneys in excess of ten thousand dollars: *Provided*, That in case of the confirmation of a composition such commissions shall not exceed one-half of one per centum of the amount to be paid creditors on such compositions: *Provided further*, That when the receiver or marshal acts as a mere custodian and does not carry on the business of the bankrupt as provided in clause five of section two, he shall not receive nor be allowed in any form or guise more than two per centum on the first thousand dollars or less, and one-half of one per centum on all above one thousand dollars on moneys disbursed by him or turned over by him to the trustee and on moneys subsequently realized from property turned over by him in kind to the trustee: *Provided further*, That before the allowance of compensation notice of application therefor, specifying the amount asked, shall be given to creditors in the manner indicated in section fifty-eight.

(e) Where the business is conducted by trustees, marshals, or receivers, as provided in clause five of section two, the court may allow such officers additional compensation for such services by way of commissions upon the moneys disbursed or turned over to any person, including lien holders, by them, and, in cases of receivers or marshals, also upon the moneys turned over by them or afterwards realized by the trustees from property turned over in kind by them to the trustees; such commissions not to exceed six per centum on the first five hundred dollars or less, four per centum on moneys in excess of five hundred dollars and less than one thousand five hundred dollars, two per centum on moneys in excess of one thousand five hundred dollars and less than ten thousand dollars, and one per centum on moneys in excess of ten thousand dollars, *Provided*, That in case of the confirmation of a composition such commissions shall not exceed one-half of one per centum of the amount to be paid creditors on such composition: *Provided further*, That before the allowance of compensation notice of application therefor,

specifying the amount asked, shall be given to creditors in the manner indicated in section fifty-eight.

Trustees' accounts and papers.

Sec. 49. ACCOUNTS AND PAPERS OF TRUSTEES.—a The accounts and papers of trustees shall be open to the inspection of officers and all parties in interest.

Bonds of referees.

Sec. 50. BONDS OF REFEREES AND TRUSTEES.—a Referees, before assuming the duties of their offices, and within such time as the district courts of the United States having jurisdiction shall prescribe, shall respectively qualify by entering into bond to the United States in such sum as shall be fixed by such courts, not to exceed five thousand dollars, with such sureties as shall be approved by such courts, conditioned for the faithful performance of their official duties.

—of trustees.

b Trustees, before entering upon the performance of their official duties, and within ten days after their appointment, or within such further time, not to exceed five days, as the court may permit, shall respectively qualify by entering into bond to the United States, with such sureties as shall be approved by the courts, conditioned for the faithful performance of their official duties.

—of new trustee, etc.

c The creditors of a bankrupt estate, at their first meeting after the adjudication, or after a vacancy has occurred in the office of trustee, or after an estate has been reopened, or after a composition has been set aside or discharge revoked, if there is a vacancy in the office of trustee, shall fix the amount of the bond of the trustee; they may at any time increase the amount of the bond. If the creditors do not fix the amount of the bond of the trustee as herein provided the court shall do so.

—amount may be increased.

Surety's property, value.

d The court shall require evidence as to the actual value of the property of sureties.

—two necessary.

e There shall be at least two sureties upon each bond.

—excess of property.

f The actual value of the property of the sureties, over and above their liabilities and exemptions, on each bond shall equal at least the amount of such bond.

—corporations may be.

g Corporations organized for the purpose of becoming sureties upon bonds, or authorized by law to do so, may be accepted as sureties upon the bonds of referees and trustees whenever the courts are satisfied that the rights of all parties in interest will be thereby amply protected.

Filing of bonds.

h Bonds of referees, trustees, and designated depositories shall be filed of record in the office of the clerk of the court and may be sued upon in the name of the United States for the use of any person injured by a breach of their conditions.

Bond, trustee's liability.

i Trustees shall not be liable, personally or on their

bonds, to the United States, for any penalties or forfeitures incurred by the bankrupts under this Act, of whose estates they are respectively trustees.

—joint.

j Joint trustees may give joint or several bonds.

—failure to give creates vacancy.

k If any referee or trustee shall fail to give bond, as herein provided and within the time limited, he shall be deemed to have declined his appointment, and such failure shall create a vacancy in his office.

—suits upon referees'.

l Suits upon referees' bonds shall not be brought subsequent to two years after the alleged breach of the bond.

—suits upon trustees'.

m Suits upon trustees' bonds shall not be brought subsequent to two years after the estate has been closed.

Clerks' duties. —to account.

Sec. 51. DUTIES OF CLERKS.—a Clerks shall respectively (1) account for, as for other fees received by them, the clerk's fee paid in each case and such other fees as may be received for certified copies of records which may be prepared for persons other than officers: (2) collect the fees of the clerk, referee, and trustee in each case instituted before filing the petition, except the petition of a proposed voluntary bankrupt which is accompanied by an affidavit stating that the petitioner is without, and can not obtain, the money with which to pay such fees; (3) deliver to the referees upon application all papers which may be referred to them, or, if the offices of such referees are not in the same cities or towns as the offices of such clerks, transmit such papers by mail, and in like manner return papers which were received from such referees after they have been used; (4) and within ten days after each case has been closed pay to the referee, if the case was referred, the fee collected for him, and to the trustee the fee collected for him at the time of filing the petition.

—collect fees, etc.

—deliver papers to referee, etc.

Compensation of clerks.

Sec. 52. COMPENSATION OF CLERKS AND MARSHALS.—a Clerks shall respectively receive as full compensation for their service to each estate, a filing fee of ten dollars, except when a fee is not required from a voluntary bankrupt.

—of marshals.

b Marshals shall respectively receive from the estate where an adjudication in bankruptcy is made, except as herein otherwise provided, for the performance of their services in proceedings in bankruptcy, the same fees, and account for them in the same way, as they are entitled to receive for the performance of the same or similar services in other cases in accordance with laws in force, or such as may be hereafter enacted, fixing the compensation of marshals.

Attorney-General to report annually.

Sec. 53. DUTIES OF ATTORNEY-GENERAL.—a The Attorney-General shall annually lay before Congress statistical tables showing for the whole country, and by States, the number of cases during the year of voluntary and involuntary bankruptcy; the amount of the property of the estates; the dividends paid and the expenses of administering such estates; and such other like information as he may deem important.

—statistical information for.

Sec. 54. STATISTICS OF BANKRUPTCY PROCEEDINGS.—a Officers shall furnish in writing and transmit by mail such information as is within their knowledge, and as may be shown by the records and papers in their possession, to the Attorney-General, for statistical purposes, within ten days after being requested by him to do so.

CHAPTER VI.

CREDITORS.

Creditors.

—place and time of meeting.

Sec. 55. MEETINGS OF CREDITORS.—a The court shall cause the first meeting of the creditors of a bankrupt, to be held, not less than ten nor more than thirty days after the adjudication, at the county seat of the county in which the bankrupt has had his principal place of business, resided, or had his domicile; or if that place would be manifestly inconvenient as a place of meeting for the parties in interest, or if the bankrupt is one who does not do business, reside, or have his domicile within the United States, the court shall fix a place for the meeting which is the most convenient for parties in interest. If such meeting should by any mischance not be held within such time, the court shall fix the date, as soon as may be thereafter, when it shall be held.

—presiding officer. duties.

b At the first meeting of creditors the judge or referee shall preside, and, before proceeding with the other business, may allow or disallow the claims of creditors there presented, and may publicly examine the bankrupt or cause him to be examined at the instance of any creditor.

Creditors' duty.

c The creditors shall at each meeting take such steps as may be pertinent and necessary for the promotion of the best interests of the estate and the enforcement of this Act.

—subsequent meetings of.

d A meeting of creditors, subsequent to the first one, may be held at any time and place when all of the creditors who have secured the allowance of their claims sign a written consent to hold a meeting at such time and place.

—call of meeting by court.

e The court shall call a meeting of creditors whenever

one-fourth or more in number of those who have proven their claims shall file a written request to that effect; if such request is signed by a majority of such creditors, which number represents a majority in amount of such claims, and contains a request for such meeting to be held at a designated place, the court shall call such meeting at such place within thirty days after the date of the filing of the request.

—final meeting.

f Whenever the affairs of the estate are ready to be closed a final meeting of creditors shall be ordered.

Voting at creditors' meetings.

Sec. 56. VOTERS AT MEETINGS OF CREDITORS.—a Creditors shall pass upon matters submitted to them at their meetings by a majority vote in number and amount of claims of all creditors whose claims have been allowed and are present, except as herein otherwise provided.

—holders of secured claims, not entitled, etc.

b Creditors holding claims which are secured or have priority shall not, in respect to such claims, be entitled to vote at creditors' meetings, nor shall such claims be counted in computing either the number of creditors or the amount of their claims, unless the amounts of such claims exceed the values of such securities or priorities, and then only for such excess.

Proof of claims. —of what to consist.

Sec. 57. PROOF AND ALLOWANCE OF CLAIMS.—a Proof of claims shall consist of a statement under oath, in writing, signed by a creditor setting forth the claim, the consideration therefor, and whether any, and, if so what, securities are held therefor, and whether any, and, if so what, payments have been made thereon, and that the sum claimed is justly owing from the bankrupt to the creditor.

—when founded upon a writing.

b Whenever a claim is founded upon an instrument of writing, such instrument, unless lost or destroyed, shall be filed with the proof of claim. If such instrument is lost or destroyed, a statement of such fact and of the circumstances of such loss or destruction shall be filed under oath with the claim. After the claim is allowed or disallowed, such instrument may be withdrawn by permission of the court, upon leaving a copy thereof on file with the claim.

—after proved, may be filed.

c Claims after being proved may, for the purpose of allowance, be filed by the claimants in the court where the proceedings are pending or before the referee if the case has been referred.

—allowance of claims, etc.

d Claims which have been duly proved shall be allowed, upon receipt by or upon presentation to the court, unless objection to their allowance shall be made by parties in interest, or their consideration be continued for cause by the court upon its own motion.

Claims of secured creditors, etc.

e Claims of secured creditors and those who have priority may be allowed to enable such creditors to participate in the proceedings at creditors' meetings held prior to the determination of the value of their securities or priorities, but shall be allowed for such sums only as to the courts seem to be owing over and above the value of their securities or priorities.

Claims, hearing objections.

f Objections to claims shall be heard and determined as soon as the convenience of the court and the best interests of the estates and the claimants will permit.

Preferred claims.

g The claims of creditors who have received preferences, voidable under section sixty, subdivision b, or to whom conveyances, transfers, assignments, or incumbrances, void or voidable under section sixty-seven, subdivision e, have been made or given, shall not be allowed unless such creditors shall surrender such preferences, conveyances, transfers, assignments, or incumbrances.

Value of securities held by secured creditors, etc.

h The value of securities held by secured creditors shall be determined by converting the same into money according to the terms of the agreement pursuant to which such securities were delivered to such creditors or by such creditors and the trustee, by agreement, arbitration, compromise, or litigation, as the court may direct, and the amount of such value shall be credited upon such claims, and a dividend shall be paid only on the unpaid balance.

Claims secured by individual undertaking.

i Whenever a creditor, whose claim against a bankrupt estate is secured by the individual undertaking of any person, fails to prove such claim, such person may do so in the creditor's name, and if he discharge such undertaking in whole or in part he shall be subrogated to that extent to the rights of the creditor.

Debts due the United States, allowance of.

j Debts owing to the United States, a State, a county, a district, or a municipality as a penalty or forfeiture shall not be allowed, except for the amount of the pecuniary loss sustained by the act, transaction, or proceeding out of which the penalty or forfeiture arose, with reasonable and actual costs occasioned thereby and such interest as may have accrued thereon according to law.

Reconsideration of claims.

k Claims which have been allowed may be reconsidered for cause and reallowed or rejected in whole or in part, according to the equities of the case, before but not after the estate has been closed.

—recovery of dividend.

l Whenever a claim shall have been reconsidered and rejected, in whole or in part, upon which a dividend has been paid, the trustee may recover from the creditor the amount of the dividend received upon the claim

if rejected in whole, or the proportional part thereof if rejected only in part.

Claims of one bankrupt against another.

m The claim of any estate which is being administered in bankruptcy against any like estate may be proved by the trustee and allowed by the court in the same manner and upon like terms as the claims of other creditors.

Time for proving claims.

n Claims shall not be proved against a bankrupt estate subsequent to one year after the adjudication; or if they are liquidated by litigation and the final judgment therein is rendered within thirty days before or after the expiration of such time, then within sixty days after the rendition of such judgment: *Provided*,

—of infants, etc.

That the right of infants and insane persons without guardians, without notice of the proceedings, may continue six months longer.

Notice to creditors.

Sec. 58. NOTICES TO CREDITORS.—a Creditors shall have at least ten days' notice by mail, to their respective addresses as they appear in the list of creditors of the bankrupt, or as afterwards filed with the papers

—unless waived, etc.

in the case by the creditors, unless they waive notice in writing, of (1) all examinations of the bankrupt; (2) all hearings upon applications for the confirmation of compositions; (3) all meetings of creditors; (4)

—of first meeting.

all proposed sales of property; (5) the declaration and time of payment of dividends; (6) the filing of the final accounts of the trustee, and the time when and the place where they will be examined and passed upon; (7) the proposed compromise of any controversy; (8)

—other notices.

the proposed dismissal of the proceedings; and (9) there

—to referee.

shall be thirty days' notice of all applications for the discharge of bankrupts. b Notice to creditors of the first meeting shall be published at least once and may be published such number of additional times as the court may direct; the last publication shall be at least one week prior to the date fixed for the meeting. Other notices may be published as the court shall direct. c All notices shall be given by the referee unless otherwise ordered by the judge.

Petition, who may file.

Sec. 59. WHO MAY FILE AND DISMISS PETITIONS.—a Any qualified person may file a petition to be adjudged a voluntary bankrupt.

—as voluntary bankrupt.

—involuntary.

b Three or more creditors who have provable claims against any person which amount in the aggregate, in excess of the value of securities held by them, if any, to five hundred dollars or over; or if all of the creditors of such person are less than twelve in number, then

one of such creditors whose claim equals such amount may file a petition to have him adjudged a bankrupt.

—to be in duplicate.

c Petitions shall be filed in duplicate, one copy for the clerk and one for service on the bankrupt.

Notice to creditors not joined in petition.

d If it be averred in the petition that the creditors of the bankrupt are less than twelve in number, and less than three creditors have joined as petitioners therein, and the answer avers the existence of a large number of creditors, there shall be filed with the answer a list under oath of all the creditors, with their addresses, and thereupon the court shall cause all such creditors to be notified of the pendency of such petition and shall delay the hearing upon such petition for a reasonable time, to the end that parties in interest shall have an opportunity to be heard; if upon such hearing it shall appear that a sufficient number have joined in such petition, or if prior to or during such hearing a sufficient number shall join therein, the case may be proceeded with, but otherwise it shall be dismissed.

—hearing of case, etc.

—when dismissed.

Creditors, computing number of.

e In computing the number of creditors of a bankrupt for the purpose of determining how many creditors must join in the petition, such creditors as were employed by him at the time of the filing of the petition or are related to him by consanguinity or affinity within the third degree, as determined by the common law, and have not joined in the petition, shall not be counted.

—appearance of.

f Creditors other than original petitioners may, at any time enter their appearance and join in the petition, or file an answer and be heard in opposition to the prayer of the petition.

Notice of dismissal.

g A voluntary or involuntary petition shall not be dismissed by the petitioner or petitioners or for want of prosecution or by consent of parties until after notice to the creditors; and to that end the court shall, before entertaining an application for dismissal, require the bankrupt to file a list, under oath, of all his creditors, with their addresses, and shall cause notice to be sent to all such creditors of the pendency of such application, and shall delay the hearing thereon for a reasonable time to allow all creditors and parties in interest opportunity to be heard.

Preferred creditors.

Sec. 60. PREFERRED CREDITORS.—a A person shall be deemed to have given a preference if, being insolvent, he has, within four months before the filing of the petition, or after the filing of the petition and before the adjudication, procured or suffered a judgment to be entered against himself in favor of any person, or made

a transfer of any of his property, and the effect of the enforcement of such judgment or transfer will be to enable any one of his creditors to obtain a greater percentage of his debt than any other of such creditors of the same class. Where the preference consists in a transfer, such period of four months shall not expire until four months after the date of the recording or registering of the transfer, if by law such recording or registering is required.

Preference, when given.

b If a bankrupt shall have procured or suffered a judgment to be entered against him in favor of any person or have made a transfer of any of his property, and if, at the time of the transfer, or of the entry of the judgment, or of the recording or registering of the transfer if by law recording or registering thereof is required, and being within four months before the filing of the petition in bankruptcy or after the filing thereof and before the adjudication, the bankrupt be insolvent and the judgment or transfer then operate as a preference, and the person receiving it or to be benefited thereby, or his agent acting therein, shall then have reasonable cause to believe that the enforcement of such judgment or transfer would effect a preference, it shall be voidable by the trustee and he may recover the property or its value from such person. And for the purpose of such recovery any court of bankruptcy, as hereinbefore defined, and any State court which would have had jurisdiction if bankruptcy had not intervened, shall have concurrent jurisdiction.

—avoidable.

Preferred creditor giving further credit, etc.

c If a creditor has been preferred, and afterwards in good faith gives the debtor further credit without security of any kind for property which becomes a part of the debtor's estates, the amount of such new credit remaining unpaid at the time of the adjudication in bankruptcy may be set off against the amount which would otherwise be recoverable from him.

—set off of new credit.

Payments to attorneys, etc.

d If a debtor shall, directly or indirectly, in contemplation of the filing of a petition by or against him, pay money or transfer property to an attorney and counselor at law, solicitor in equity, or proctor in admiralty for services to be rendered, the transaction shall be reexamined by the court on petition of the trustee or any creditor and shall only be held valid to the extent of a reasonable amount to be determined by the court, and the excess may be recovered by the trustee for the benefit of the estate.

—re-examination of.

CHAPTER VII.

ESTATES.

Estates.

Depositories for money.

Sec. 61. DEPOSITORIES FOR MONEY.—a Courts of bankruptcy shall designate, by order, banking institutions as depositories for the money of bankrupt estates, as convenient as may be to the residences of trustees, and shall require bonds to the United States, subject to their approval, to be given by such banking institutions, and may from time to time as occasion may require, by like order increase the number of depositories or the amount of any bond or change such depositories.

—bond.

Expenses of administering estates.

Sec. 62. EXPENSES OF ADMINISTERING ESTATES.—a The actual and necessary expenses incurred by officers in the administration of estates shall, except where other provisions are made for their payment, be reported in detail, under oath, and examined and approved or disapproved, by the court. If approved, they shall be paid or allowed out of the estates in which they were incurred.

—report and approval.

Debts proved.

Sec. 63. DEBTS WHICH MAY BE PROVED.—a Debts of the bankrupt which may be proved and allowed against his estate which are (1) a fixed liability, as evidenced by a judgment or an instrument in writing, absolutely owing at the time of the filing of the petition against him, whether then payable or not, with any interest thereon which would have been recoverable at that date or with a rebate of interest upon such as were not then payable and did not bear interest; (2) due as costs taxable against an involuntary bankrupt who was at the time of the filing of the petition against him plaintiff in a cause of action which would pass to the trustee and which the trustee declines to prosecute after notice; (3) founded upon a claim for taxable costs incurred in good faith by a creditor before the filing of a petition in an action to recover a provable debt; (4) founded upon an open account, or upon a contract express or implied; and (5) founded upon provable debts reduced to judgments after the filing of the petition and before the consideration of the bankrupt's application for a discharge, less costs incurred and interest accrued after the filing of the petition and up to the time of the entry of such judgments.

—fixed liability.

—costs of suit due, etc.

—costs incurred before filing petition.

—on open account.

—judgments, etc.

Allowance of unliquidated claims.

b Unliquidated claims against the bankrupt may, pursuant to application to the court, be liquidated in such manner as it shall direct, and may thereafter be proved and allowed against his estate.

Debts having priority. —taxes.

Sec. 64. DEBTS WHICH HAVE PRIORITY.—a The court shall order the trustee to pay all taxes legally due and owing by the bankrupt to the United States, State, county, district, or municipality in advance of the payment of dividends to creditors, and upon filing the receipts of the proper public officers for such payment he shall be credited with the amount thereof, and in case any question arises as to the amount or legality of any such tax the same shall be heard and determined by the court.

—order of payment.

—cost of preserving estate. —filing fees.

—cost of administration, etc.

—wages of workmen, etc.

—owing to person entitled to priority, etc.

b The debts to have priority, except as herein provided, and to be paid in full out of bankrupt estates, and the order of payment shall be (1) the actual and necessary cost of preserving the estate subsequent to filing the petition; (2) the filing fees paid by creditors in involuntary cases, and, where property of the bankrupt, transferred or concealed by him either before or after the filing of the petition, shall have been recovered for the benefit of the estate of the bankrupt, by the efforts and at the expense of one or more creditors, the reasonable expenses of such recovery; (3) the cost of administration, including the fees and mileage payable to witnesses as now or hereafter provided by the laws of the United States, and one reasonable attorney's fee, for the professional services actually rendered, irrespective of the number of attorneys employed, to the petitioning creditors in involuntary cases, to the bankrupt in involuntary cases while performing the duties herein prescribed, and to the bankrupt in voluntary cases, as the court may allow; (4) wages due to workmen, clerks, traveling or city salesmen, or servants which have been earned within three months before the date of commencement of proceedings, not to exceed three hundred dollars to each claimant; and (5) debts owing to any person who by the laws of the States or the United States is entitled to priority.

Payment of claims accruing after composition, when discharge revoked, etc.

c In the event of the confirmation of a composition being set aside, or a discharge revoked, the property acquired by the bankrupt in addition to his estate at the time the composition was confirmed or the adjudication was made shall be applied to the payment in full of the claims of creditors for property sold to him on credit, in good faith, while such composition or discharge was in force, and the residue, if any, shall be applied to the payment of the debts which were owing at the time of the adjudication.

Dividends.

Sec. 65. DECLARATION AND PAYMENT OF DIVIDENDS.—a Dividends of an equal per centum shall be declared

and paid on all allowed claims, except such as have priority or are secured. —on allowed claims.

b The first dividend shall be declared within thirty days after the adjudication, if the money of the estate in excess of the amount necessary to pay the debts which have priority and such claims as have not been, but probably will be, allowed equals five per centum or more of such allowed claims. Dividends subsequent to the first shall be declared upon like terms as the first and as often as the amount shall equal ten per centum or more and upon closing the estate. Dividends may be declared oftener and in smaller proportions if the judge shall so order: *Provided,* That the first dividend shall not include more than fifty per centum of the money of the estate in excess of the amount necessary to pay the debts which have priority and such claims as probably will be allowed: And provided further, That the final dividend shall not be declared within three months after the first dividend shall be declared. —declaration of first. —subsequent.

c The rights of creditors who have received dividends, or in whose favor final dividends have been declared, shall not be affected by the proof and allowance of claims subsequent to the date of such payment or declarations of dividends; but the creditors proving and securing the allowance of such claims shall be paid dividends equal in amount to those already received by the other creditors if the estate equals so much before such other creditors are paid any further dividends. —creditors receiving, not affected by proof of subsequent claims, etc.

d Whenever a person shall have been adjudged a bankrupt by a court without the United States and also by a court of bankruptcy, creditors residing within the United States shall first be paid a dividend equal to that received in the court without the United States by other creditors before creditors who have received a dividend in such courts shall be paid any amounts. —preference of certain creditors.

e A claimant shall not be entitled to collect from a bankrupt estate any greater amount than shall accrue pursuant to the provisions of this Act. Limit to claimant's right to collect.

Sec. 66. UNCLAIMED DIVIDENDS.—a Dividends which remain unclaimed for six months after the final dividend has been declared shall be paid by the trustee into court. Unclaimed dividends. —after 6 months paid into court.

b Dividends remaining unclaimed for one year shall, under the direction of the court, be distributed to the creditors whose claims have been allowed but not paid in full, and after such claims have been paid in full the balance shall be paid to the bankrupt: *Provided,* That in case unclaimed dividends belong to minors such —after 1 year. distributed. —of minors.

minors may have one year after arriving at majority to claim such dividends.

Liens. —unrecorded claims not.

Sec. 67. LIENS.—a Claims which for want of record or for other reasons would not have been valid liens as against the claims of the creditors of the bankrupt shall not be liens against his estate.

—trustee subrogated to right of creditor.

b Whenever a creditor is prevented from enforcing his rights as against a lien created, or attempted to be created, by his debtor, who afterwards becomes a bankrupt, the trustee of the estate of such bankrupt shall be subrogated to and may enforce such rights of such creditor for the benefit of the estate.

Lien. judgment, etc., created within 4 months, to be dissolved.

c A lien created by or obtained in or pursuant to any suit or proceeding at law or in equity, including an attachment upon mesne process or a judgment by confession, which was begun against a person within four months before the filing of a petition in bankrupcty by or against such person shall be dissolved by the adjudication of such person to be a bankrupt if (1) it appears that said lien was obtained and permitted while the defendant was insolvent and that its existence and enforcement will work a preference or (2) the party or parties to be benefited thereby had reasonable cause to believe the defendant was insolvent and in contemplation of bankruptcy, or (3) that such lien was sought and permitted in fraud of the provisions of this Act; or if the dissolution of such lien would militate against the best interests of the estate of such person the same shall not be dissolved, but the trustee of the estate of such person, for the benefit of the estate, shall be subrogated to the rights of the holder of such lien and empowered to perfect and enforce the same in his name as trustee with like force and effect as such holder might have done had not bankruptcy proceedings intervened.

—if defendant were insolvent.

—knowledge of.

—through fraud.

—trustee subrogated, etc.

Liens given in good faith, etc.

d Liens given or accepted in good faith and not in contemplation of or in fraud upon this Act, and for a present consideration, which have been recorded according to law, if record thereof was necessary in order to impart notice, shall, to the extent of such present consideration only, not be affected by this Act.

Conveyances, etc., subsequent to act and within four months of petition.

e All conveyances, transfers, assignments, or incumbrances of his property, or any part thereof, made or given by a person adjudged a bankrupt under the provisions of this Act subsequent to the passage of this Act and within four months prior to the filing of the petition, with the intent and purpose on his part to hinder, delay, or defraud his creditors, or any of them, shall be null and void as against the creditors of such

—to defraud, etc., void.

—property remains part of assets.

debtor, except as to purchasers in good faith and for a present fair consideration; and all property of the debtor conveyed, transferred, assigned, or encumbered as aforesaid shall, if he be adjudged a bankrupt, and the same is not exempt from execution and liability for debts by the law of his domicile, be and remain a part of the assets and estate of the bankrupt and shall pass to his said trustee, whose duty it shall be to recover and reclaim the same by legal proceedings or otherwise for the benefit of the creditors. And all conveyances, transfers, or incumbrances of his property made by a debtor at any time within four months prior to the filing of the petition against him, and while insolvent, which are held null and void as against the creditors of such debtor by the laws of the State, Territory, or District in which such property is situate, shall be deemed null and void under this Act against the creditors of such debtor if he be adjudged a bankrupt, and such property shall pass to the assignee and be by him reclaimed and recovered for the benefit of the creditors of the bankrupt. For the purpose of such recovery any court of bankruptcy as hereinbefore defined, and any State court which would have had jurisdiction if bankruptcy had not intervened, shall have concurrent jurisdiction.

Conveyances, etc., within four months of petition.

—void under State law.

—void under this act.

f That all levies, judgments, attachments, or other liens, obtained through legal proceedings against a person who is insolvent, at any time within four months prior to the filing of a petition in bankruptcy against him, shall be deemed null and void in case he is adjudged a bankrupt, and the property affected by the levy, judgment, attachment, or other lien shall be and shall pass to the trustee as a part of the estate of the bankrupt, unless the court shall, on due notice, order that the right under such levy, judgment, attachment, or other lien shall be preserved for the benefit of the estate; and thereupon the same may pass to and shall be preserved by the trustee for the benefit of the estate as aforesaid. And the court may order such conveyance as shall be necessary to carry the purposes of this section into effect: *Provided*, That nothing herein contained shall have the effect to destroy or impair the title obtained by such levy, judgment, attachment, or other lien, of a bona fide purchaser for value who shall have acquired the same without notice or reasonable cause for inquiry.

Liens, etc., created through legal proceedings.

—void, etc.

—property passes to trustee.

Court may order conveyances.

Purchaser for value.

Sec. 68. SET-OFFS AND COUNTERCLAIMS.—a In all cases of mutual debts or mutual credits between the estate of a bankrupt and a creditor the account shall be stated

Set-offs and counterclaims.

—allowed.
—not allowed.

and one debt shall be set off against the other, and the balance only shall be allowed or paid.

b A set-off or counterclaim shall not be allowed in favor of any debtor of the bankrupt which (1) is not provable against the estate; or (2) was purchased by or transferred to him after the filing of the petition, or within four months before such filing, with a view to such use and with knowledge or notice that such bankrupt was insolvent, or had committed an act of bankruptcy.

Possession of property.

Sec. 69. POSSESSION OF PROPERTY.—a A judge may, upon satisfactory proof, by affidavit, that a bankrupt against whom an involuntary petition has been filed and is pending has committed an act of bankruptcy, or has neglected or is neglecting, or is about to so neglect his

—when bankrupts may be seized.

property that it has thereby deteriorated or is thereby deteriorating or is about thereby to deteriorate in value, issue a warrant to the marshal to seize and hold it subject to further orders. Before such warrant is issued

—bond to indemnify.

the petitioners applying therefor shall enter into a bond in such an amount as the judge shall fix, with such sureties as he shall approve, conditioned to indemnify such bankrupt for such damages as he shall sustain in the event such seizure shall prove to have been wrong-

—released on giving bond.

fully obtained. Such property shall be released, if such bankrupt shall give bond in a sum which shall be fixed by the judge, with such sureties as he shall approve, conditioned to turn over such property, or pay the value thereof in money to the trustee, in the event he is adjudged a bankrupt pursuant to such petition.

Title to property.

Sec. 70. TITLE TO PROPERTY.—a The trustee of the estate of a bankrupt, upon his appointment and qualification, and his successor or successors, if he shall have one or more, upon his or their appointment and qualification, shall in turn be vested by operation of law with

—vested in trustee.

the title of the bankrupt, as of the date he was adjudged a bankrupt, except in so far as it is to property which is exempt, to all (1) documents relating to his

—documents.
—patents, etc.

property; (2) interests in patents, patent rights, copyrights, and trade-marks; (3) powers which he might

—certain powers.

have exercised for his own benefit, but not those which he might have exercised for some other person; (4)

—transferred in fraud.

property transferred by him in fraud of his creditors; (5) property which prior to the filing of the petition

—which might have been transferred, etc.

he could by any means have transferred or which might have been levied upon and sold under judicial process

—policy of insurance.

against him: *Provided*, That when any bankrupt shall have any insurance policy which has a cash surrender

value payable to himself, his estate, or personal representatives, he may, within thirty days after the cash surrender value has been ascertained and stated to the trustee by the company issuing the same, pay or secure to the trustee the sum so ascertained and stated, and continue to hold, own, and carry such policy free from the claims of the creditors participating in the distribution of his estate under the bankruptcy proceedings, otherwise the policy shall pass to the trustee as assets; and (6) rights of action arising upon contracts or from the unlawful taking or detention of, or injury to, his property.

—rights of action upon contracts.

b All real and personal property belonging to bankrupt estates shall be appraised by three disinterested appraisers; they shall be appointed by, and report to, the court. Real and personal property shall, when practicable, be sold subject to the approval of the court; it shall not be sold otherwise than subject to the approval of the court for less than seventy-five per centum of its appraised value.

Appraisal of property.

—sale.

c The title to property of a bankrupt estate which has been sold, as herein provided, shall be conveyed to the purchaser by the trustee.

Trustee to convey title.

d Whenever a composition shall be set aside, or discharge revoked, the trustee shall, upon his appointment and qualification, be vested as herein provided with the title to all of the property of the bankrupt as of the date of the final decree setting aside the composition or revoking the discharge.

—vesting title on.

—setting composition aside.

e The trustee may avoid any transfer by the bankrupt of his property which any creditor of such bankrupt might have avoided, and may recover the property so transferred, or its value, from the person to whom it was transferred, unless he was a bona fide holder for value prior to the date of the adjudication. Such property may be recovered or its value collected from whoever may have received it, except a bona fide holder for value. For the purpose of such recovery any court of bankruptcy as hereinbefore defined, and any State court which would have had jurisdiction if bankruptcy had not intervened, shall have concurrent jurisdiction.

—may avoid certain, transfers, etc.

—recovery of property.

f Upon the confirmation of a composition offered by a bankrupt, the title to his property shall thereupon revest in him.

Title revested on confirming composition.

Sec. 71. That the clerks of the several district courts of the United States shall prepare and keep in their respective offices complete and convenient indexes of all petitions and discharges in bankruptcy heretofore or

Indexes to be kept.

Certificates of search to be issued.

hereafter filed in the said courts, and shall, when requested so to do, issue certificates of search certifying as to whether or not any such petitions or discharges have been filed; and said clerks shall be entitled to receive for such certificates the same fees as now allowed by law for certificates as to judgments in said courts: *Provided*, That said bankruptcy indexes and dockets shall at all times be open to inspection and examination by all persons or corporations without any fee or charge therefor.

Referee and trustee not to be allowed further compensation.

Sec. 72. That neither the referee, receiver, marshal, nor trustee shall in any form or guise receive, nor shall the court allow him, any other or further compensation for his services than that expressly authorized and prescribed in this Act.

THE TIME WHEN THIS ACT SHALL GO INTO EFFECT.

Force and effect.

—petition for voluntary bankruptcy.

—involuntary.

a This Act shall go into full force and effect upon its passage: *Provided, however*, That no petition for voluntary bankruptcy shall be filed within one month of the passage thereof, and no petition for involuntary bankruptcy shall be filed within four months of the passage thereof.

Cases pending under State laws.

b Proceedings commenced under State insolvency laws before the passage of this Act shall not be affected by it.

VII

GENERAL ORDERS AND FORMS IN BANKRUPTCY

ADOPTED AND ESTABLISHED BY THE SUPREME COURT OF THE UNITED STATES NOVEMBER 28, 1898.

OCTOBER TERM, 1898.
172 U. S. 653 as amended Dec. 11, 1905.

In pursuance of the powers conferred by the Constitution and laws upon the Supreme Court of the United States, and particularly by the act of Congress approved July 1, 1898, entitled "An act to establish a uniform system of bankruptcy throughout the United States," it is ordered, on this 28th day of November, 1898, that the following rules be adopted and established as general orders in bankruptcy, to take effect on the first Monday, being the second day, of January, 1899. And it is further ordered that all proceedings in bankruptcy had before that day, in accordance with the act last aforesaid, and being in substantial conformity either with the provisions of these general orders, or else with the general orders established by this court under the bankrupt act of 1867 and with any general rules or special orders of the courts in bankruptcy, stand good, subject, however, to such further regulation by rule or order of those courts as may be necessary or proper to carry into force and effect the bankrupt act of 1898 and the general orders of this court.

I.

DOCKET.

The clerk shall keep a docket, in which the cases shall be entered and numbered in the order in which they are commenced. It shall contain a memorandum of the filing of the petition and of the action of the court thereon, of the reference of the case to the referee, and of the transmission by him to the clerk on his certified record of the proceedings, with the dates thereof, and a memorandum of all proceedings in the case except those duly entered on the referee's certified record aforesaid. The docket shall be arranged in a manner convenient for reference, and shall at all times be open to public inspection.

II.

FILING OF PAPERS.

The clerk or the referee shall indorse on each paper filed with him the day and hour of filing, and a brief statement of its character.

III.

PROCESS.

All process, summons and subpœnas shall issue out of the court, under the seal thereof, and be tested by the clerk; and blanks, with the signature of the clerk and seal of the court, may, upon application, be furnished to the referees.

IV.

CONDUCT OF PROCEEDINGS.

Proceedings in bankruptcy may be conducted by the bankrupt in person in his own behalf, or by a petitioning or opposing creditor; but a creditor will only be allowed to manage before the court his individual interest. Every party may appear and conduct the proceedings by attorney, who shall be an attorney or counselor authorized to practice in the circuit or district court. The name of the attorney or counsellor, with his place of business, shall be entered upon the docket, with the date of the entry. All papers or proceedings offered by an attorney to be filed shall be indorsed as above required, and orders granted on motion shall contain the name of the party or attorney making the motion. Notices and orders which are not, by the act or by these general orders, required to be served on the party personally may be served upon his attorney.

V.

FRAME OF PETITIONS.

All petitions and the schedules filed therewith shall be printed or written out plainly, without abbreviation or interlineation, except where such abbreviation and interlineation may be for the purpose of reference.

VI.

PETITIONS IN DIFFERENT DISTRICTS.

In case two or more petitions shall be filed against the same individual in different districts, the first hearing shall be had in the district in which the debtor has his domicil, and the petition may be amended by inserting an allegation of an act of bankruptcy committed at an earlier date than that first alleged, if such earlier act is charged in either of the other petitions; and in case of two or more petitions against the same partnership in different courts, each having jurisdiction over the case, the petition first filed shall be first heard, and may be amended by the insertion of an allegation of an earlier act of bankruptcy than that first alleged, if such earlier act is charged in either of the other petitions; and, in either case,

the proceedings upon the other petitions may be stayed until an adjudication is made upon the petition first heard; and the court which makes the first adjudication of bankruptcy shall retain jurisdiction over all proceedings therein until the same shall be closed. In case two or more petitions shall be filed in different districts by different members of the same partnership, for an adjudication of the bankruptcy of said partnership, the court in which the petition is first filed, having jurisdiction, shall take and retain jurisdiction over all proceedings in such bankruptcy until the same shall be closed; and if such petitions shall be filed in the same district, action shall be first had upon the one first filed. But the court so retaining jurisdiction shall, if satisfied that it is for the greatest convenience of parties in interest that another of said courts should proceed with the cases, order them to be transferred to that court.

VII.

PRIORITY OF PETITIONS.

Whenever two or more petitions shall be filed by creditors against a common debtor, alleging separate acts of bankruptcy committed by said debtor on different days within four months prior to the filing of said petitions, and the debtor shall appear and show cause against an adjudication of bankruptcy against him on the petitions, that petition shall be first heard and tried which alleges the commission of the earliest act of bankruptcy; and in case the several acts of bankruptcy are alleged in the different petitions to have been committed on the same day, the court before which the same are pending may order them to be consolidated, and proceed to a hearing as upon one petition; and if an adjudication of bankruptcy be made upon either petition, or for the commission of a single act of bankruptcy, it shall not be necessary to proceed to a hearing upon the remaining petitions, unless proceedings be taken by the debtor for the purpose of causing such adjudication to be annulled or vacated.

VIII.

PROCEEDINGS IN PARTNERSHIP CASES.

Any member of a partnership, who refuses to join in a petition to have the partnership declared bankrupt, shall be entitled to resist the prayer of the petition in the same manner as if the petition had been filed by a creditor of the partnership, and notice of the filing of the petition shall be given to him in the same manner as provided by law and by these rules in the case of a debtor petitioned against; and he shall have the right to appear at the time fixed by the court for the hearing of the petition, and to make proof, if he can, that the partnership is not insolvent or has not committed an act of bankruptcy, and to make all defences which any debtor proceeded against is entitled to take by the provisions of the act; and in case an adjudication of bankruptcy is made upon the petition,

such partner shall be required to file a schedule of his debts and an inventory of his property in the same manner as is required by the act in cases of debtors against whom adjudication of bankruptcy shall be made.

IX.

SCHEDULE IN INVOLUNTARY BANKRUPTCY.

In all cases of involuntary bankruptcy in which the bankrupt is absent or can not be found, it shall be the duty of the petitioning creditor to file, within five days after the date of the adjudication, a schedule giving the names and places of residence of all the creditors of the bankrupt, according to the best information of the petitioning creditor. If the debtor is found, and is served with notice to furnish a schedule of his creditors and fails to do so, the petitioning creditor may apply for an attachment against the debtor, or may himself furnish such schedule as aforesaid.

X.

INDEMNITY FOR EXPENSES.

Before incurring any expense in publishing or mailing notices, or in traveling, or in procuring the attendance of witnesses, or in perpetuating testimony, the clerk, marshal or referee may require, from the bankrupt or other person in whose behalf the duty is to be performed, indemnity for such expense. Money advanced for this purpose by the bankrupt or other person shall be repaid him out of the estate as part of the cost of administering the same.

XI.

AMENDMENTS.

The court may allow amendments to the petition and schedules on application to the petitioner. Amendments shall be printed or written, signed and verified, like original petitions and schedules. If amendments are made to separate schedules, the same must be made separately, with proper references. In the application for leave to amend, the petitioner shall state the cause of the error in the paper originally filed.

XII.

DUTIES OF REFEREE.

1. The order referring a case to a referee shall name a day upon which the bankrupt shall attend before the referee; and from that day the bankrupt shall be subject to the orders of the court in all matters relating to his bankruptcy, and may receive from the referee a protection against

arrest, to continue until the final adjudication on his application for a discharge, unless suspended or vacated by order of the court. A copy of the order shall forthwith be sent by mail to the referee, or be delivered to him personally by the clerk or other officer of the court. And thereafter all the proceedings, except such as are required by the act or by these general orders to be had before the judge, shall be had before the referee.

2. The time when and the place where the referees shall act upon the matters arising under the several cases referred to them shall be fixed by special order of the judge, or by the referee; and at such times and places the referees may perform the duties which they are empowered by the act to perform.

3. Applications for a discharge, or for the approval of a composition, or for an injunction to stay proceedings of a court or officer of the United States or of a State, shall be heard and decided by the judge. But he may refer such an application, or any specified issue arising thereon, to the referee to ascertain and report the facts.

XIII.

APPOINTMENT AND REMOVAL OF TRUSTEE.

The appointment of a trustee by the creditors shall be subject to be approved or disapproved by the referee or by the judge; and he shall be removable by the judge only.

XIV.

NO OFFICIAL OR GENERAL TRUSTEE.

No official trustee shall be appointed by the court, nor any general trustee to act in classes of cases.

XV.

TRUSTEE NOT APPOINTED IN CERTAIN CASES.

If the schedule of a voluntary bankrupt discloses no assets, and if no creditor appears at the first meeting, the court may, by order setting out the facts, direct that no trustee be appointed; but at any time thereafter a trustee may be appointed, if the court shall deem it desirable. If no trustee is appointed as aforesaid, the court may order that no meeting of the creditors other than the first meeting shall be called.

XVI.

NOTICE TO TRUSTEE OF HIS APPOINTMENT.

It shall be the duty of the referee, immediately upon the appointment and approval of the trustee, to notify him in person or by mail of his ap-

pointment; and the notice shall require the trustee forthwith to notify the referee of his acceptance or rejection of the trust, and shall contain a statement of the penal sum of the trustee's bond.

XVII.

DUTIES OF TRUSTEE.

The trustee shall, immediately upon entering upon his duties, prepare a complete inventory of all the property of the bankrupt that comes into his possession. The trustee shall make report to the court, within twenty days after receiving the notice of his appointment, of the articles set off to the bankrupt by him, according to the provisions of the forty-seventh section of the act, with the estimated value of each article, and any creditor may take exceptions to the determination of the trustee within twenty days after the filing of the report. The referee may require the exceptions to be argued before him, and shall certify them to the court for final determination at the request of either party. In case the trustee shall neglect to file any report or statement which it is made his duty to file or make by the act, or by any general order in bankruptcy, within five days after the same shall be due, it shall be the duty of the referee to make an order requiring the trustee to show cause before the judge, at a time specified in the order, why he should not be removed from office. The referee shall cause a copy of the order to be served upon the trustee at least seven days before the time fixed for the hearing, and proof of the service thereof to be delivered to the clerk. All accounts of trustees shall be referred as of course to the referee for audit, unless otherwise specially ordered by the court.

XVIII.

SALE OF PROPERTY.

1. All sales shall be by public auction unless otherwise ordered by the court.

2. Upon application to the court, and for good cause shown, the trustee may be authorized to sell any specified portion of the bankrupt's estate at private sale; in which case he shall keep an accurate account of each article sold, and the price received therefor, and to whom sold; which account he shall file at once with the referee.

3. Upon petition by a bankrupt, creditor, receiver or trustee, setting forth that a part or the whole of the bankrupt's estate is perishable, the nature and location of such perishable estate, and that there will be loss if the same is not sold immediately, the court, if satisfied of the facts stated and that the sale is required in the interest of the estate, may order the same to be sold, with or without notice to the creditors, and the proceeds to be deposited in court.

XIX.

ACCOUNTS OF MARSHAL.

The marshal shall make return, under oath, of his actual and necessary expenses in the service of every warrant addressed to him, and for custody of property, and other services, and other actual and necessary expenses paid by him, with vouchers therefor whenever practicable, and also with a statement that the amounts charged by him are just and reasonable.

XX.

PAPERS FILED AFTER REFERENCE.

Proofs of claims and other papers filed subsequently to the reference, except such as call for action by the judge, may be filed either with the referee or with the clerk.

XXI.

As amended, November 1, 1915, 239 U. S. 623.

PROOF OF DEBTS.

1. Depositions to prove claims against a bankrupt's estate shall be correctly entitled in the court and in the cause. When made to prove a debt due to a partnership, it must appear on oath that the deponent is a member of the partnership; when made by an agent, the reason the deposition is not made by the claimant in person must be stated; and when made to prove a debt due to a corporation, the deposition shall be made by the treasurer, or, if the corporation has no treasurer, by the officer whose duties most nearly correspond to those of treasurer; if the treasurer or corresponding officer is not within the district wherein the bankruptcy proceedings are pending, the deposition may be made by some officer or agent of the corporation having knowledge of the facts. Depositions to prove debts existing in open accounts shall state when the debt became or will become due; and if it consists of items maturing at different dates the average due date shall be stated, in default of which it shall not be necessary to compute interest upon it. All such depositions shall contain an averment that no note has been received for such account, nor any judgment rendered thereon. Proofs of debt received by any trustee shall be delivered to the referee to whom the cause is referred.

2. Any creditor may file with the referee a request that all notices to which he may be entitled shall be addressed to him at any place, to be designated by the post-office box or street number, as he may appoint; and thereafter, and until some other designation shall be made by such creditor, all notices shall be so addressed; and in other cases notices shall be addressed as specified in the proof of debt.

3. Claims which have been assigned before proof shall be supported by a deposition of the owner at the time of the commencement of proceedings, setting forth the true consideration of the debt and that it is entirely unsecured, or if secured, the security, as is required in proving secured claims. Upon the filing of satisfactory proof of the assignment of a claim proved and entered on the referee's docket, the referee shall immediately give notice by mail to the original claimant of the filing of such proof of assignment; and, if no objection be entered within ten days, or within further time allowed by the referee, he shall make an order subrogating the assignee to the original claimant. If objection be made, he shall proceed to hear and determine the matter.

4. The claims of persons contingently liable for the bankrupt may be proved in the name of the creditor when known by the party contingently liable. When the name of the creditor is unknown, such claim may be proved in the name of the party contingently liable; but no dividend shall be paid upon such claim, except upon satisfactory proof that it will diminish *pro tanto* the original debt.

5. The execution of any letter of attorney to represent a creditor, or of an assignment of claim after proof, may be proved or acknowledged before a referee, or a United States commissioner, or a notary public. When executed on behalf of a partnership or of a corporation, the person executing the instrument shall make oath that he is a member of the partnership, or a duly authorized officer of the corporation on whose behalf he acts. When the person executing is not personally known to the officer taking the proof or acknowledgment, his identity shall be established by satisfactory proof.

6. When the trustee or any creditor shall desire the re-examination of any claim filed against the bankrupt's estate, he may apply by petition to the referee to whom the case is referred for an order for such re-examination, and thereupon the referee shall make an order fixing a time for hearing the petition, of which due notice shall be given by mail addressed to the creditor. At the time appointed the referee shall take the examination of the creditor, and of any witnesses that may be called by either party, and if it shall appear from such examination that the claim ought to be expunged or diminished, the referee may order accordingly.

XXII.

TAKING OF TESTIMONY.

The examination of witnesses before the referee may be conducted by the party in person or by his counsel or attorney, and the witnesses shall be subject to examination and cross-examination, which shall be had in conformity with the mode now adopted in courts of law. A deposition taken upon an examination before a referee shall be taken down in writing by him, or under his direction, in the form of narrative, unless he determines that the examination shall be by question and answer. When completed it shall be read over to the witness and signed by him in the presence of

the referee. The referee shall note upon the deposition any question objected to, with his decision thereon; and the court shall have power to deal with the costs of incompetent, immaterial, or irrelevant depositions, or parts of them, as may be just.

XXIII.

ORDERS OF REFEREE.

In all orders made by the referee, it shall be recited, according as the fact may be, that notice was given and the manner thereof; or that the order was made by consent; or that no adverse interest was represented at the hearing; or that the order was made after hearing adverse interests.

XXIV.

TRANSMISSION OF PROVED CLAIMS TO CLERK.

The referee shall forthwith transmit to the clerk a list of the claims proved against an estate, with the names and addresses of the proving creditors.

XXV.

SPECIAL MEETING OF CREDITORS.

Whenever, by reason of a vacancy in the office of trustee, or for any other cause, it becomes necessary to call a special meeting of the creditors in order to carry out the purposes of the act, the court may call such a meeting, specifying in the notice the purpose for which it is called.

XXVI.

ACCOUNTS OF REFEREE.

Every referee shall keep an accurate account of his traveling and incidental expenses, and of those of any clerk or other officer attending him in the performance of his duties in any case which may be referred to him; and shall make return of the same under oath to the judge, with proper vouchers when vouchers can be procured, on the first Tuesday in each month.

XXVII.

REVIEW BY JUDGE.

When a bankrupt, creditor, trustee, or other person shall desire a review by the judge of any order made by the referee, he shall file with the

referee his petition therefor, setting out the error complained of; and the referee shall forthwith certify to the judge the question presented, a summary of the evidence relating thereto, and the finding and order of the referee thereon.

XXVIII.

REDEMPTION OF PROPERTY AND COMPOUNDING OF CLAIMS.

Whenever it may be deemed for the benefit of the estate of a bankrupt to redeem and discharge any mortgage or other pledge, or deposit or lien, upon any property, real or personal, or to relieve said property from any conditional contract, and to tender performance of the conditions thereof, or to compound and settle any debts or other claims due or belonging to the estate of the bankrupt, the trustee, or the bankrupt, or any creditor who has proved his debt, may file his petition therefor; and thereupon the court shall appoint a suitable time and place for the hearing thereof, notice of which shall be given as the court shall direct, so that all creditors and other persons interested may appear and show cause, if any they have, why an order should not be passed by the court upon the petition authorizing such act on the part of the trustee.

XXIX.

PAYMENT OF MONEYS DEPOSITED.

No moneys deposited as required by the act shall be drawn from the depository unless by check or warrant, signed by the clerk of the court, or by a trustee, and countersigned by the judge of the court, or by a referee designated for that purpose, or by the clerk or his assistant under an order made by the judge, stating the date, the sum, and the account for which it is drawn; and an entry of the substance of such check or warrant, with the date thereof, the sum drawn for, and the account for which it is drawn, shall be forthwith made in a book kept for that purpose by the trustee or his clerk; and all checks and drafts shall be entered in the order of time in which they are drawn, and shall be numbered in the case of each estate. A copy of this general order shall be furnished to the depository, and also the name of any referee or clerk authorized to countersign said checks.

XXX.

IMPRISONED DEBTOR.

If, at the time of preferring his petition, the debtor shall be imprisoned, the court, upon application, may order him to be produced upon *habeas corpus*, by the jailor or any officer in whose custody he may be, before the referee, for the purpose of testifying in any matter relating to his

bankruptcy; and, if committed after the filing of his petition upon process in any civil action founded upon a claim provable in bankruptcy, the court may, upon like application, discharge him from such imprisonment. If the petitioner, during the pendency of the proceedings in bankruptcy, be arrested or imprisoned upon process in any civil action, the district court, upon his application, may issue a writ of *habeas corpus* to bring him before the court to ascertain whether such process has been issued for the collection of any claim provable in bankruptcy, and if so provable he shall be discharged; if not, he shall be remanded to the custody in which he may lawfully be. Before granting the order for discharge the court shall cause notice to be served upon the creditor or his attorney, so as to give him an opportunity of appearing and being heard before the granting of the order.

XXXI.

PETITION FOR DISCHARGE.

The petition of a bankrupt for a discharge shall state concisely, in accordance with the provisions of the act and the orders of the court, the proceedings in the case and the acts of the bankrupt.

XXXII.

As amended June 4, 1917 (244 U. S. 64).

OPPOSITION TO DISCHARGE OR COMPOSITION.

A creditor opposing the application of a bankrupt for his discharge, or for the confirmation of a composition, shall enter his appearance in opposition thereto on the day when the creditors are required to show cause, and shall file a specification in writing of the grounds of his opposition within ten days thereafter, unless the time shall be shortened or enlarged by special order of the judge.

XXXIII.

ARBITRATION.

Whenever a trustee shall make application to the court for authority to submit a controversy arising in the settlement of a demand against a bankrupt's estate, or for a debt due to it, to the determination of arbitrators, or for authority to compound and settle such controversy by agreement with the other party, the application shall clearly and distinctly set forth the subject-matter of the controversy, and the reasons why the trustee thinks it proper and most for the interest of the estate that the controversy should be settled by arbitration or otherwise.

XXXIV.

COSTS IN CONTESTED ADJUDICATIONS.

In cases of involuntary bankruptcy, when the debtor resists an adjudication, and the court, after hearing, adjudges the debtor a bankrupt, the petitioning creditor shall recover, and be paid out of the estate, the same costs that are allowed to a party recovering in a suit in equity; and if the petition is dismissed, the debtor shall recover like costs against the petitioner.

XXXV.

As amended December 11, 1905 (199 U. S. 618).

COMPENSATION OF CLERKS, REFEREES AND TRUSTEES.

1. The fees allowed by the act to clerks shall be in full compensation for all services performed by them in regard to filing petitions or other papers required by the act to be filed with them, or in certifying or delivering papers or copies of records to referees or other officers, or in receiving or paying out money; but shall not include copies furnished to other persons, or expenses necessarily incurred in publishing or mailing notices or other papers.

2. The compensation of referees, prescribed by the act, shall be in full compensation for all services performed by them under the act, or under these general orders; but shall not include expenses necessarily incurred by them in publishing or mailing notices, in traveling, or in perpetuating testimony, or other expenses necessarily incurred in the performance of their duties under the act and allowed by special order of the judge.

3. The compensation allowed to trustees by the act shall be in full compensation for the services performed by them; but shall not include expenses necessarily incurred in the performance of their duties and allowed upon the settlement of their accounts.

4. In any case in which the fees of the clerk, referee and trustee are not required by the act to be paid by a debtor before filing his petition to be adjudged a bankrupt, the judge, at any time during the pendency of the proceedings in bankruptcy, may order those fees to be paid out of the estate; or may, after notice to the bankrupt, and satisfactory proof that he then has or can obtain the money with which to pay those fees, order him to pay them within a time specified, and, if he fails to do so, may order his petition to be dismissed. He may also, pending such proceedings, both in voluntary and involuntary cases, order the commissions of referees and trustees to be paid immediately after such commissions accrue and are earned.

XXXVI.

APPEALS.

1. Appeals from a court of bankruptcy to a circuit court of appeals, or to the supreme court of a Territory, shall be allowed by a judge of the

court appealed from or of the court appealed to, and shall be regulated, except as otherwise provided in the act, by the rules governing appeals in equity in the courts of the United States.

2. Appeals under the act to the Supreme Court of the United States from a circuit court of appeals, or from the supreme court of a Territory, or from the supreme court of the District of Columbia, or from any court of bankruptcy whatever, shall be taken within thrty days after the judgment or decree, and shall be allowed by a judge of the court appealed from, or by a justice of the Supreme Court of the United States.

3. In every case in which either party is entitled by the act to take an appeal to the Supreme Court of the United States, the court from which the appeal lies shall, at or before the time of entering its judgment or decree, make and file a finding of the facts, and its conclusions of law thereon, stated separately; and the record transmitted to the Supreme Court of the United States on such an appeal shall consist only of the pleadings, the judgment or decree, the finding of facts, and the conclusions of law.

XXXVII.

GENERAL PROVISIONS.

In proceedings in equity, instituted for the purpose of carrying into effect the provisions of the act, or for enforcing the rights and remedies given by it, the rules of equity practice established by the Supreme Court of the United States shall be followed as nearly as may be. In proceedings at law, instituted for the same purpose, the practice and procedure in cases at law shall be followed as nearly as may be. But the judge may, by special order in any case, vary the time allowed for return of process, for appearance and pleading, and for taking testimony and publication, and may otherwise modify the rules for the preparation of any particular case so as to facilitate a speedy hearing.

XXXVIII.

FORMS.

The several forms annexed to these general orders shall be observed and used, with such alterations as may be necessary to suit the circumstances of any particular case.

FORMS IN BANKRUPTCY

[172 U. S. 666.]

[N. B.—Oaths required by the act, except upon hearings in court, may be administered by referees and by officers authorized to administer oaths in proceedings before the courts of the United States, or under the laws of the State where the same are to be taken. Bankrupt Act of 1898, c. 4, § 20.]

[FORM NO. 1.]

DEBTOR'S PETITION.

To the Honorable ——— ———,
Judge of the District Court of the United States
for the ——— District of ———:

The petition of ——— ———, of ———, in the county of ———, and district and State of ———, ——— [*state occupation*], respectfully represents:

That he has had his principal place of business [*or* has resided, *or* has had his domicile] for the greater portion of six months next immediately preceding the filing of this petition at ———, within said judicial district; that he owes debts which he is unable to pay in full; that he is willing to surrender all his property for the benefit of his creditors except such as is exempt by law, and desires to obtain the benefit of the acts of Congress relating to bankruptcy.

That the schedule hereto annexed, marked A, and verified by your petitioner's oath, contains a full and true statement of all his debts, and (so far as it is possible to ascertain) the names and places of residence of his creditors, and such further statements concerning said debts as are required by the provisions of said acts:

That the schedule hereto annexed, marked B, and verified by your petitioner's oath, contains an accurate inventory of all his property, both real and personal, and such further statements concerning said property as are required by the provisions of said acts:

Wherefore your petitioner prays that he may be adjudged by the court to be a bankrupt within the purview of said acts.

——— ———.

——— ———, *Attorney.*

United States of America, District of ———, ss:

I, ——— ———, the petitioning debtor mentioned and described in the foregoing petition, do hereby make solemn oath that the statements con-

tained therein are true according to the best of my knowledge, information, and belief.

——— ———, *Petitioner.*

Subscribed and sworn to before me this ——— day of ———, A. D. 18—.

———— ————,
———— ————.
[*Official character.*]

SCHEDULE A.—STATEMENT OF ALL DEBTS OF BANKRUPT.

SCHEDULE A. (1)

Statement of all creditors who are to be paid in full, or to whom priority is secured by law.

Claims which have priority.	Reference to ledger or voucher.	Names of creditors.	Residence (if unknown, that fact must be stated).	Where and when contracted.	Nature and consideration of the debt, and whether contracted as partner or joint contractor; and if so, with whom.	Amount $	Amount c.
(1.) Taxes and debts due and owing to the United States.							
(2.) Taxes due and owing to the State of ———, or to any county, district, or municipality thereof.							
(3.) Wages due workmen, clerks, or servants, to an amount not exceeding $300 each, earned within three months before filing the petition.							
(4.) Other debts having priority by law.							
					Total.....		

——— ———, *Petitioner.*

SCHEDULE A. (2)

Creditors holding securities.

[N. B.—Particulars of securities held, with dates of same, and when they were given, to be stated under the names of the several creditors, and also particulars concerning each debt, as required by acts of Congress relating to bankruptcy, and whether contracted as partner or joint contractor with any other person; and if so, with whom.]

Reference to ledger or voucher.	Names of creditors.	Residences (if unknown, that fact must be stated).	Description of securities.	When and where debts were contracted.	Value of securities.		Amount of debts.	
					$	c.	$	c.
				Total.....				

——— ———, *Petitioner.*

SCHEDULE A. (3)

Creditors whose claims are unsecured.

[N. B.—When the name and residence (or either) of any drawer, maker, indorser, or holder of any bill or note, etc., are unknown, the fact must be stated, and also the name and residence of the last holder known to the debtor. The debt due to each creditor must be stated in full, and any claim by way of set-off stated in the schedule of property.]

Reference to ledger or voucher.	Names of creditors.	Residence (if unknown, that fact must be stated).	When and where contracted.	Nature and consideration of the debt, and whether any judgment, bond, bill of exchange, promissory note, etc., and whether contracted as partner or joint contractor with any other person; and, if so, with whom.	Amount	
					$	c.
				Total		

——— ———, *Petitioner.*

SCHEDULE A. (4)

Liabilities on notes or bills discounted which ought to be paid by the drawers, makers, acceptors, or indorsers.

[N. B.—The dates of the notes or bills, and when due, with the names, residences, and the business or occupation of the drawers, makers, or acceptors thereof, are to be set forth under the names of the holders. If the names of the holders are not known, the names of the last holder known to the debtor shall be stated, and his business and place of residence. The same particulars as to notes or bills on which the debtor is liable as indorser.]

Reference to ledger or voucher.	Names of holders as far as known.	Residence (if unknown, that fact must be stated).	Place where contracted.	Nature of liability, whether same was contracted as partner or joint contractor, or with any other person; and, if so, with whom.	Amount
					$
				Total	

——— ———, *Petitioner.*

SCHEDULE A. (5)

Accommodation paper.

[N. B.—The dates of the notes or bills, and when due, with the names and residences of the drawers, makers, and acceptors thereof, are to be set forth under the names of the holders; if the bankrupt be liable as drawer, maker, acceptor, or indorser thereof, it is to be stated accordingly. If the names of the holders are not known, the name of the last holder known to the debtor should be stated, with his residence. Same particulars as to other commercial paper.]

Reference to ledger or voucher.	Names of holders.	Residences (if unknown, that fact must be stated).	Names and residence of persons accommodated.	Place where contracted.	Whether liability was contracted as partner or joint contractor, or with any other person; and, if so, with whom.	Amount	
						$	c.
					Total		

———— ————, *Petitioner.*

OATH TO SCHEDULE A.

United States of America, District of ———— ss:

On this ——— day of ———, A. D. 18—, before me personally came ———— ————, the person mentioned in and who subscribed to the foregoing schedule, and who, being by me first duly sworn, did declare the said schedule to be a statement of all his debts, in accordance with the acts of Congress relating to bankruptcy.

Subscribed and sworn to before me this ——— day of ———, A. D. 18—.

———— ————,

[*Official character.*]

SCHEDULE B.—STATEMENT OF ALL PROPERTY OF BANKRUPT

SCHEDULE B. (1)

Real estate.

Location and description of all real estate owned by debtor, or held by him.	Incumbrances thereon, if any, and dates thereof.	Statement of particulars relating thereto.	Estimated value.	
			$	c.
		Total		

——— ———, *Petitioner.*

SCHEDULE B. (2)

Personal property.

		$	c.
a.—Cash on hand			
b.—Bills of exchange, promissory notes, or securities of any description (each to be set out separately)			
c.—Stock in trade, in — business of ——— ———, at ———, of the value of ———			
d.—Household goods and furniture, household stores, wearing apparel and ornaments of the person, viz			
e.—Books, prints and pictures, viz			
f.—Horses, cows, sheep, and other animals (with number of each), viz.			
g.—Carriages and other vehicles, viz			
h.—Farming stock and implements of husbandry, viz			
i.—Shipping, and shares in vessels, viz			
k.—Machinery, fixtures, apparatus, and tools used in business, with the place where each is situated, viz			
l.—Patents, copyrights, and trade-marks, viz			
m.—Goods or personal property of any other description, with the place where each is situated, viz			
	Total		

——— ———, *Petitioner.*

SCHEDULE B. (3)

Choses in action.

		Dollars.	Cents.
a.—Debts due petitioner on open account.....			
b.—Stocks in incorporated companies, interest in joint stock companies, and negotiable bonds.			
c.—Policies of insurance.....			
d.—Unliquidated claims of every nature, with their estimated value			
e.—Deposits of money in banking institutions and elsewhere			
	Total		

——— ———, *Petitioner.*

SCHEDULE B. (4)

Property in reversion, remainder, or expectancy, including property held in trust for the debtor or subject to any power or right to dispose of or to charge.

[N. B.—A particular description of each interest must be entered. If all or any of the debtor's property has been conveyed by deed of assignment, or otherwise, for the benefit of creditors, the date of such deed should be stated, the name and address of the person to whom the property was conveyed, the amount realized from the proceeds thereof, and the disposal of the same, as far as known to the debtor.]

General interest.	Particular description.	Supposed value of my interest.	
Interest in land		$	c.
Personal property			
Property in money, stock, shares, bonds, annuities, etc.	Total		
Rights and powers, legacies and bequests.....		Amount realized from proceeds of property conveyed.	
Property heretofore conveyed for benefit of creditors.			
What portion of debtor's property has been conveyed by deed of assignment, or otherwise, for benefit of creditors; date of such deed, name and address of party to whom conveyed; amount realized therefrom, and disposal of same, so far as known to debtor		$	c.
What sum or sums have been paid to counsel, and to whom, for services rendered or to be rendered in this bankruptcy			

——— ———, *Petitioner.*

SCHEDULE B. (5)

A particular statement of the property claimed as exempted from the operation of the acts of Congress relating to bankruptcy, giving each item of property and its valuation; and, if any portion of it is real estate, its location, description, and present use.

		Valuation.	
		$	c.
Military uniform, arms and equipments.....			
Property claimed to be exempted by state laws; its valuation; whether real or personal; its description and present use; and reference given to the statute of the State creating the exemption			
	Total.....		

——— ———, *Petitioner.*

SCHEDULE B. (6)

BOOKS, PAPERS, DEEDS AND WRITINGS RELATING TO BANKRUPT'S BUSINESS AND ESTATE.

The following is a true list of all books, papers, deeds, and writings relating to my trade, business, dealings, estate and effects, or any part thereof, which, at the date of this petition, are in my possession or under my custody and control, or which are in the possession or custody of any person in trust for me, or for my use, benefit, or advantage; and also of all others which have been heretofore, at any time, in my possession, or under my custody or control, and which are now held by the parties whose names are hereinafter set forth, with the reason for their custody of the same.

Books.	
Deeds.	
Papers.	

———— ————, *Petitioner.*

OATH TO SCHEDULE B.

United States of America, District of ———, ss:

On this —— day of ———, A. D. 18—, before me personally came ———— ————, the person mentioned in and who subscribed to the foregoing schedule, and who, being by me first duly sworn, did declare the said schedule to be a statement of all his estate, both real and personal, in accordance with the acts of Congress relating to bankruptcy.

———— ————,

———— ————,

[*Official character.*]

SUMMARY OF DEBTS AND ASSETS.

[From the statements of the bankrupt in Schedules A and B.]

Schedule A..	1 (1)	Taxes and debts due United States....			
" " ..	1 (2)	Taxes due States, counties, districts, and municipalities.			
" " ..	1 (3)	Wages			
" " ..	1 (4)	Other debts preferred by law.....			
Schedule A..	2	Secured claims			
Schedule A..	3	Unsecured claims			
Schedule A..	4	Notes and bills which ought to be paid by other parties thereto.			
Schedule A..	5	Accommodation paper			
		Schedule A. total			
Schedule B..	1	Real estate			
Schedule B..	2-a	Cash on hand			
" " ..	2-b	Bills, promissory notes, and securities..			
" " ..	2-c	Stock in trade			
" " ..	2-d	Household goods, etc.....			
" " ..	2-e	Books, prints, and pictures.....			
" " ..	2-f	Horses, cows, and other animals.....			
" " ..	2-g	Carriages and other vehicles.....			
" " ..	2-h	Farming stock and implements.....			
" " ..	2-i	Shipping and shares in vessels.....			
" " ..	2-k	Machinery, tools, etc.			
" " ..	2-l	Patents, copyrights, and trade-marks..			
" " ..	2-m	Other personal property			
Schedule B..	3-a	Debts due on open accounts.....			
" " ..	3-b	Stocks, negotiable bonds, etc.....			
" " ..	3-c	Policies of insurance.....			
" " ..	3-d	Unliquidated claims			
" " ..	3-e	Deposits of money in banks and elsewhere.			
Schedule B..	4	Property in reversion, remainder, trust, etc.			
Schedule B..	5	Property claimed to be excepted.....			
Schedule B..	6	Books, deeds, and papers.....			
		Schedule B. total			

[FORM NO. 2.]

PARTNERSHIP PETITION.

To the Honorable ——— ———,

Judge of the District Court of the United States
for the —— District of ———:

The petition of ——— ——— respectfully represents:

That your petitioners and ——— ——— have been partners under the firm name of ——— ———, having their principal place of business at ———, in the county of ———, and district and State of ———, for the greater portion of the six months next immediately preceding the filing of this petition; that the said partners owe debts which they are unable to pay in full; that your petitioners are willing to surrender all their

property for the benefit of their creditors, except such as is exempt by law, and desire to obtain the benefit of the acts of Congress relating to bankruptcy.

That the schedule hereto annexed, marked A, and verified by —— oath , contains a full and true statement of all the debts of said partners, and, as far as possible, the names and places of residence of their creditors, and such further statements concerning said debts as are required by the provisions of said acts.

That the schedule hereto annexed, marked B, verified by —— oath , contains an accurate inventory of all the property, real and personal, of said partners, and such further statements concerning said property as are required by the provisions of said acts.

And said ——— ——— further states that the schedule hereto annexed, marked C, verified by his oath, contains a full and true statement of all his individual debts, and, as far as possible, the names and places of residence of his creditors, and such further statements concerning said debts as are required by the provisions of said acts; and that the schedule hereto annexed, marked D, verified by his oath, contains an accurate inventory of all his individual property, real and personal, and such further statements concerning said property as are required by the provisions of said acts.

And said ——— ——— further states that the schedule hereto annexed, marked E, verified by his oath, contains a full and true statement of all his individual debts, and, as far as possible, the names and places of residence of his creditors, and such further statements concerning said debts as are required by the provisions of said acts; and that the schedule hereto annexed, marked F, verified by his oath, contains an accurate inventory of all his individual property, real and personal, and such further statements concerning said property as are required by the provisions of said acts.

And said ——— ——— further states that the schedule hereto annexed, marked G, verified by his oath, contains a full and true statement of all his individual debts, and, as far as possible, the names and places of residence of his creditors, and such further statements concerning said debts as are required by the provisions of said acts; and that the schedule hereto annexed, marked H, verified by his oath, contains an accurate inventory of all his individual property, real and personal, and such further statements concerning said property as are required by the provisions of said acts.

And said ——— ——— further states that the schedule hereto annexed, marked J, verified by his oath, contains a full and true statement of all his individual debts, and, as far as possible, the names and places of residence of his creditors, and such further statements concerning said debts as are required by the provisions of said acts, and that the schedule hereto annexed, marked K, verified by his oath, contains an accurate inventory of all his individual property, real and personal, and such further statements concerning said property as are required by the provisions of said acts.

Wherefore your petitioners pray that the said firm may be adjudged by a decree of the court to be bankrupts within the purview of said acts.

——— ———,
——— ———,
——— ———,
Petitioners.

——— ———, *Attorney.*

——— ———, the petitioning debtors mentioned and described in the foregoing petition, do hereby make solemn oath that the statements contained therein are true according to the best of their knowledge, information, and belief.

——— ———,
——— ———,
——— ———,
Petitioners.

Subscribed and sworn to before me this —— day of ———, A. D. 18—.

——— ———,
[*Official Character.*]
——— ———,

[Schedules to be annexed corresponding with schedules under Form No. 1.]

[FORM NO. 3.]

CREDITORS' PETITION.

To the Honorable ——— ———, judge of the District Court of the United States for the —— district of ———:

The petition of ——— ———, of ———, and ——— ———, of ———, and ——— ———, of ———, respectfully shows:

That ——— ———, of ———, has for the greater portion of six months next preceding the date of filing this petition, had his principal place of business, [*or* resided, *or* had his domicile] at ———, in the county of ——— and State and district aforesaid, and owes debts to the amount of $1,000.

That your petitioners are creditors of said ——— ———, having provable claims amounting in the aggregate, in excess of securities held by them, to the sum of $500. That the nature and amount of your petitioners' claims are as follows:

_____

_____

And your petitioners further represent that said ——— ——— is insolvent, and that within four months next preceding the date of this petition the said ——— ——— committed an act of bankruptcy, in that he did heretofore, to wit, on the —— day of _____

_____

_____

Wherefore your petitioners pray that service of this petition, with a subpœna, may be made upon ——— ———, as provided in the acts of Congress relating to bankruptcy, and that he may be adjudged by the court to be a bankrupt within the purview of said acts.

——— ———,
——— ———,
——— ———,
Petitioners.

——— ———, *Attorney.*

United States of America, District of ———, ss:

——— ———, ——— ———, ——— ———, being three of the petitioners above named, do hereby make solemn oath that the statements contained in the foregoing petition, subscribed by them, are true.

Before me, ——— ———, this —— day of ———, 189—.

——— ———,
———,
[*Official Character.*]

[Schedules to be annexed corresponding with schedules under Form No. 1.]

[FORM NO. 4.]

ORDER TO SHOW CAUSE UPON CREDITORS' PETITION.

In the District Court of the United States for the —— District of ——.

In the matter of ——— ———	In Bankruptcy.

Upon consideration of the petition of ——— ——— that ——— ——— be declared a bankrupt, it is ordered that the said ——— ——— do appear at this court, as a court of bankruptcy, to be holden at ———, in the district aforesaid, on the —— day of ———, at — o'clock in the ——— noon, and show cause, if any there be, why the prayer of said petition should not be granted; and

It is further ordered that a copy of said petition, together with a writ of subpœna, be served on said ——— ———, by delivering the same to him personally or by leaving the same at his last usual place of abode in said district, at least five days before the day aforesaid.

Witness the Honorable ——— ———, judge of the said court, and the seal thereof, at ———, in said district, on the —— day of ———, A. D. 18—.

——— ———,
Clerk.

{ Seal of the court. }

[FORM NO. 5.]

SUBPŒNA TO ALLEGED BANKRUPT.

United States of America, —— District of ———.

To ——— ———, in said district, greeting:

For certain causes offered before the District Court of the United States of America within and for the —— district of ———, as a court of bankruptcy, we command and strictly enjoin you, laying all other matters aside and notwithstanding any excuse, that you personally appear before our said District Court to be holden at ———, in said district, on the —— day of ———, A. D. 189—, ——— ——— to answer to a petition filed by ——— ——— in our said court, praying that you may be adjudged a bankrupt; and to do further and receive that which our said District Court shall consider in this behalf. And this you are in no wise to omit, under the pains and penalties of what may befall thereon.

Witness the Honorable ——— ———, judge of said court, and the seal thereof, at ———, this —— day of ———, A. D. 189—.

——— ———,
Clerk.

{ Seal of the court. }

[FORM NO. 6.]

DENIAL OF BANKRUPTCY.

In the District Court of the United States for the —— District of ——.

In the matter of _____ _____	In Bankruptcy.

At ———, in said district, on the —— day of ——, A. D. 18—.

And now the said ——— ——— appears, and denies that he has committed the act of bankruptcy set forth in the said petition, or that he is insolvent, and avers that he should not be declared bankrupt for any cause in said petition alleged; and this he prays may be inquired of by the court [*or*, he demands that the same may be inquired of by a jury].

——— ———.

Subscribed and sworn to before me this —— day of ———, A. D. 18—.

——— ———,
[*Official Character.*]

[FORM NO. 7.]

ORDER FOR JURY TRIAL.

In the District Court of the United States for the —— District of ——.

In the matter of _____ _____	In Bankruptcy.

At ———, in said district, on the —— day of ——— 18—.

Upon the demand in writing filed by ——— ———, alleged to be a bankrupt, that the fact of the commission by him of an act of bankruptcy, and the fact of his insolvency may be inquired of by a jury, it is ordered, that said issue be submitted to a jury.

——— ———,
Clerk.

{ Seal of the court }

[FORM NO. 8.]

SPECIAL WARRANT TO MARSHAL.

In the District Court of the United States for the —— District of ——.

In the matter of _____ _____	In Bankruptcy.

To the marshal of said district or to either of his deputies, greeting:

Whereas a petition for adjudication of bankruptcy was, on the ——— day of ——, A. D. 18—, filed against ——— ———, of the county of ——— and State of ———, in said district, and said petition is still pending; and whereas it satisfactorily appears that said ——— has committed an act of bankruptcy [*or* has neglected *or* is neglecting, *or* is about to so neglect his property that it has thereby deteriorated *or* is thereby deteriorating *or* is about thereby to deteriorate in value], you are therefore authorized and required to seize and take possession of all the estate, real and personal, of said ——— ———, and of all his deeds, books of account, and papers, and to hold and keep the same safely subject to the further order of the court.

Witness the Honorable ——— ———, judge of the said court, and the seal thereof, at ———, in said district, on the —— of ———, A. D. 189—.

———— ————,
Clerk.

{ Seal of the court. }

RETURN BY MARSHAL THEREON.

By virtue of the within warrant, I have taken possession of the estate of the within-named ——— ———, and of all his deeds, books of account, and papers which have come to my knowledge.

———— ————,
Marshal [or Deputy Marshal].

Fees and expenses.

1. Service of warrant	
2. Necessary travel, at the rate of six cents a mile each way	
3. Actual expenses in custody of property and other services as follows	
[Here state the particulars.]	

———— ————,
Marshal [or Deputy Marshal].

District of ———, A. D. 18—.

Personally appeared before me the said ——— ———, and made oath that the above expenses returned by him have been actually incurred and paid by him, and are just and reasonable.

———— ————.
Referee in Bankruptcy.

[FORM NO. 9.]

BOND OF PETITIONING CREDITOR.

Know all men by these presents: That we, ——— ———, as principal, and ——— ———, as sureties, are held and firmly bound unto ——— ———, in the full and just sum of ——— dollars, to be paid to the said ——— ———, executors, administrators, or assigns, to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally by these presents.

Signed and sealed this ——— day of ———, A. D. 189—.

The condition of this obligation is such that whereas a petition in bankruptcy has been filed in the district court of the United States for the —— district of ——— against the said ———, and the said ——— has

applied to that court for a warrant to the marshal of said district directing him to seize and hold the property of said ——— ———, subject to the further orders of said District court.

Now, therefore, if such a warrant shall issue for the seizure of said property, and if the said ——— ——— shall indemnify the said ——— ——— for such damages as he shall sustain in the event of such seizure shall prove to have been wrongfully obtained, then the above obligation to be void; otherwise to remain in full force and virtue.

Sealed and delivered in
presence of— ——— ——— [SEAL.]
——— ——— ——— ——— [SEAL.]
——— ——— ——— ——— [SEAL.]

Approved this —— day of ———, A. D. 189—.

———,
District Judge.

[FORM NO. 10.]

BOND TO MARSHAL.

Know all men by these presents: That we, ——— ———, as principal, and ——— ———, as sureties, are held and firmly bound unto ——— ———, marshal of the United States for the ——— district of ———, in the full and just sum of ——— dollars, to be paid to the said ——— ———, his executors, administrators, or assigns, to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Signed and sealed this —— day of ———, A. D. 189—.

The condition of this obligation is such that whereas a petition in bankruptcy has been filed in the district court of the United States for the ——— district of ———, against the said ——— ———, and the said court has issued a warrant to the marshal of the United States for said district, directing him to seize and hold the property of the said ——— ———, subject to the further order of the court, and the said property has been seized by said marshal as directed, and the said district court upon a petition of said ——— ——— has ordered the said property to be released to him.

Now, therefore, if the said property shall be released accordingly to the said ——— ———, and the said ——— ———, being adjudged a bankrupt, shall turn over said property or pay the value thereof in money to the trustee, then the above obligation to be void; otherwise to remain in full force and virtue.

Sealed and delivered in the
presence of — ——— ——— [SEAL.]
——— ——— ——— ——— [SEAL.]
——— ——— ——— ——— [SEAL.]

Approved this ——— day of ———, A. D. 189—.

———,
District Judge.

[FORM NO. 11.]

ADJUDICATION THAT DEBTOR IS NOT BANKRUPT.

In the District Court of the United States for the —— District of ——.

In the matter of ———	In Bankruptcy.

At ———, in said district, on —— day of ———, A. D. 18—, before the Honorable ——— ———, judge of the ——— district of ———.

This cause came on to be heard at ———, in said court, upon the petition of ——— that ——— be adjudged a bankrupt within the true intent and meaning of the acts of Congress relating to bankruptcy, and [*Here state the proceedings, whether there was no opposition, or, if opposed, state what proceedings were had.*]

And thereupon, and upon consideration of the proofs in said cause [*and the arguments of counsel thereon, if any*], it was found that the facts set forth in said petition were not proved; and it is therefore adjudged that said ——— was not a bankrupt, and that said petition be dismissed, with costs.

Witness the Honorable ——— ———, judge of said court, and the seal thereof, at ———, in said district, on the —— day of ———, A. D. 18—.

——— ———,
Clerk.

{ Seal of the court. }

[FORM NO. 12.]

ADJUDICATION OF BANKRUPTCY.

In the District Court of the United States for the ——— District of ———.

In the matter of ——— *Bankrupt*	In Bankruptcy.

At ———, in said district, on the —— day of ——— A. D. 18—, before the Honorable ——— ———, judge of said court in bankruptcy, the

petition of ——— ——— that ——— ——— be adjudged a bankrupt, within the true intent and meaning of the acts of Congress relating to bankruptcy, having been heard and duly considered, the said ——— ——— is hereby declared and adjudged bankrupt accordingly.

Witness the Honorable ——— ———, judge of said court, and the seal thereof, at ———, in said district, on the —— day of ———, A. D. 18—.

——— ———,
Clerk.

{ Seal of the court. }

[FORM NO. 13.]

APPOINTMENT, OATH, AND REPORT OF APPRAISERS.

In the District Court of the United States for the ——— District of ———.

In the matter of *Bankrupt*	In Bankruptcy.

It is ordered that ——— ———, of ———, ——— ——— of ———, and ——— ———, of ———, three disinterested persons, be, and they are hereby, appointed appraisers to appraise the real and personal property belonging to the estate of the said bankrupt set out in the schedules now on file in this court, and report their appraisal to the court, said appraisal to be made as soon as may be, and the appraisers to be duly sworn.

Witness my hand this —— day of ———, A. D. 18—.

——— ———,
Referee in Bankruptcy.

—— District of ———, ss:

Personally appeared the within-named ——— ——— and severally made oath that they will fully and fairly appraise the aforesaid real and personal property according to their best skill and judgment.

——— ———.
——— ———.
——— ———.

Subscribed and sworn to before me this —— day of ———, A. D. 189—.

——— ———,
[*Official Character.*]

We, the undersigned, having been notified that we were appointed to estimate and appraise the real and personal property aforesaid, have at-

tended to the duties assigned us, and after a strict examination and careful inquiry, we do estimate and appraise the same as follows:

	Dollars	Cents

In witness whereof we hereunto set our hands, at ———, this ——— day of ———, A. D. 18—.

———— ————.
———— ————.
———— ————.

[FORM NO. 14.]

ORDER OF REFERENCE.

In the District Court of the United States for the ——— District of ———.

In the matter of ——————— *Bankrupt*	In Bankruptcy.

Whereas ——— ———, of ———, in the county of ——— and district aforesaid, on the ——— day of ———, A. D. 18—, was duly adjudged a bankrupt upon a petition filed in this court by [*or* against] him on the ——— day of ———, A. D. 189—, according to the provisions of the acts of Congress relating to bankruptcy,

It is thereupon ordered, that said matter be referred to ——— ———, one of the referees in bankruptcy of this court, to take such further proceedings therein as are required by said acts; and that the said ——— ——— shall attend before said referee on the ——— day of ——— at ———, and thenceforth shall submit to such orders as may be made by said referee or by this court relating to said ——— bankruptcy.

Witness the Honorable ——— ———, judge of the said court, and the seal thereof, at ———, in said district, on the ——— day of ———, A. D. 18—.

———— ————,
Clerk.

{ Seal of the court. }

[FORM NO. 15.]

ORDER OF REFERENCE IN JUDGE'S ABSENCE.

In the District Court of the United States for the ——— District of ———.

In the matter of ————	In Bankruptcy.

Whereas on the ——— day of ———, A. D. 18—, a petition was filed to have ——— ———, of ———, in the county of ——— and district aforesaid, adjudged a bankrupt according to the provisions of the acts of Congress relating to bankruptcy; and whereas the judge of said court was absent from said district at the time of filing said petition [*or, in case of involuntary bankruptcy,* on the next day after the last day on which pleadings might have been filed, and none have been filed by the bankrupt or any of his creditors], it is thereupon ordered that the said matter be referred to ——— ———, one of the referees in bankruptcy of this court, to consider said petition and take such proceedings therein as are required by said acts; and that the said ——— ——— shall attend before said referee on the ——— day of ———, A. D. 189—, at ———.

Witness my hand and seal of the said court, at ———, in said district, on the ——— day of ———, A. D. 189—.

——— ———,
Clerk.

{ Seal of the court. }

[FORM NO. 16.]

REFEREE'S OATH OF OFFICE.

I, ——— ———, do solemnly swear that I will administer justice without respect to persons, and do equal right to the poor and to the rich, and that I will faithfully and impartially discharge and perform all the duties incumbent on me as referee in bankruptcy, according to the best of my abilities and understanding, agreeably to the Constitution and laws of the United States. So help me God.

——— ———.

Subscribed and sworn to before me this —— day of ———, A. D. 18—.

——— ———,
District Judge.

[FORM NO. 17.]

BOND OF REFEREE.

Know all men by these presents: That we ——— ——— of ——— ——— as principal, and ——— ——— of ——— ——— and ——— ——— of ——— ———, as sureties are held and firmly bound to the United States of America in the sum of ——— dollars, lawful money of the United States to be paid to the said United States, for the payment of which, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Signed and sealed this ——— day of ———, A. D. 189—.

The condition of this obligation is such that whereas the said ——— ———, has been on the ——— day of ———, A. D. 18—, appointed by the Honorable ——— ———, judge of the district court of the United States for the ——— district of ———, a referee in bankruptcy, in and for the county of ———, in said district, under the acts of Congress relating to bankruptcy.

Now, therefore, if the said ——— ——— shall well and faithfully discharge and perform all the duties pertaining to the said office of referee in bankruptcy, then this obligation to be void; otherwise to remain in full force and virtue.

Signed and sealed
in the presence of ——— ———, [L. S.]
——— ———, [L. S.]
——— ———, [L. S.]

Approved this ——— day of ———, A. D. 189—.

———,
District Judge.

[FORM NO. 18.]

NOTICE OF FIRST MEETING OF CREDITORS.

In the District Court of the United States for the ——— District of ———.
In Bankruptcy.

In the matter of ——— *Bankrupt*	In Bankruptcy.

To the creditors of ——— ———, of ———, in the county of ———, and district aforesaid, a bankrupt.

Notice is hereby given that on the ——— day of ———, A. D. 18—, the said ——— ——— was duly adjudicated bankrupt; and that the first meeting of his creditors will be held at ——— in ———, on the ——— day of ———, A. D. 18—, at ——— o'clock in the ——— noon, at which time the said creditors may attend, prove their claims, appoint a trustee,

examine the bankrupt, and transact such other business as may properly come before said meeting.

——— ———.
Referee in Bankruptcy.

——— ———, 18—.

[FORM NO. 19.]

LIST OF DEBTS PROVED AT FIRST MEETING.

In the District Court of the United States for the ——— District of ———.

In the matter of ——— *Bankrupt*	In Bankruptcy.

At ———, in said district, on the ——— day of ———, A. D. 18—, before ——— ———, referee in bankruptcy.

The following is a list of creditors who have this day proved their debts:

Names of creditors.	Residence.	Debts proved.	
		Dolls.	Cts.

——— ———.
Referee in Bankruptcy.

[FORM NO. 20.]

GENERAL LETTER OF ATTORNEY IN FACT WHEN CREDITOR IS NOT REPRESENTED BY ATTORNEY AT LAW.

In the District Court of the United States for the ——— District of ———.

In the matter of ——— *Bankrupt*	In Bankruptcy.

To ——— ———:

——— ———.

I, ——— ———, of ———, in the county of ——— and State of ———, do hereby authorize you, or any one of you, to attend the meeting or meet-

ings of creditors of the bankrupt aforesaid at a court of bankruptcy, wherever advertised or directed to be holden, on the day and at the hour appointed and notified by said court in said matter, or at such other place and time as may be appointed by the court for holding such meeting or meetings, or at which such meeting or meetings, or any adjournment or adjournments thereof may be held, and then and there from time to time, and as often as there may be occasion, for me and in my name to vote for or against any proposal or resolution that may be then submitted under the acts of Congress relating to bankruptcy; and in the choice of trustee or trustees of the estate of the said bankrupt, and for me to assent to such appointment of trustee; and with like powers to attend and vote at any other meeting or meetings of creditors, or sitting or sittings of the court, which may be held therein for any of the purposes aforesaid; also to accept any composition proposed by said bankrupt in satisfaction of his debts, and to receive payment of dividends and of money due me under any composition, and for any other purpose in my interest whatsoever, with full power of substitution.

In witness whereof I have hereunto signed my name and affixed my seal the —— day of ———, A. D. 189—.

——— ———. [L. S.]

Signed, sealed and delivered in the presence of —

——— ———.

Acknowledged before me this ——— day of ———, A. D. 189—.

——— ———,

[*Official Character.*]

[FORM NO. 21.]

SPECIAL LETTER OF ATTORNEY IN FACT.

In the matter of *Bankrupt*	In Bankruptcy.

To ——— ———,

——— ———:

I hereby authorize you, or any one of you, to attend the meeting of creditors in this matter, advertised or directed to be holden at ———, on the ——— day of ———, before ———, or any adjournment thereof, and then and there ——— for ——— and in ——— name to vote for or against any proposal or resolution that may be lawfully made or passed at such meet-

ing or adjourned meeting, and in the choice of trustee or trustees of the estate of the said bankrupt.

——— ——— [L. S.]

In witness whereof I have hereunto signed my name and affixed my seal the ——— day of ———, A. D. 189—.

Signed, sealed, and delivered in presence of —

——— ———.

Acknowledged before me this ——— day of ———, A. D. 18—.

——— ———,

[*Official Character.*]

[FORM NO. 22.]

APPOINTMENT OF TRUSTEE BY CREDITORS.

In the District Court of the United States for the ——— District of ———.

In the matter of *Bankrupt*	In Bankruptcy.

At ———, in said district, on the ——— day of ———, A. D. 18—, before ——— ———, referee in bankruptcy.

This being the day appointed by the court for the first meeting of creditors in the above bankruptcy, and of which due notice has been given in the [*here insert the names of the newspapers in which notice was published*], we, whose names are hereunder written, being the majority in number and in amount of claims of the creditors of the said bankrupt, whose claims have been allowed, and who are present at this meeting, do hereby appoint ——— ———, of ———, in the county of ——— and State of ———, to be the trustee— of the said bankrupt's estate and effects.

Signature of creditors.	Residences of the same.	Amount of debt.	
		Dolls.	Cts.

Ordered that the above appointment of trustee— be, and the same is hereby, approved.

——— ———,

Referee in Bankruptcy.

[FORM NO. 23.]

APPOINTMENT OF TRUSTEE BY REFEREE.

In the District Court of the United States for the ——— District of ———.

In the matter of ——— *Bankrupt*	In Bankruptcy.

At ———, in said district, on the —— day of ———, A. D. 18—, before ——— ———, referee in bankruptcy.

This being the day appointed by the court for the first meeting of creditors under the said bankruptcy, and of which due notice has been given in the [*here insert the names of the newspapers in which notice was published*] I, the undersigned referee of the said court in bankruptcy, sat at the time and place above mentioned, pursuant to such notice, to take the proof of debts and for the choice of trustee under the said bankruptcy; and I do hereby certify that the creditors whose claims had been allowed and were present, or duly represented, failed to make choice of a trustee of said bankrupt's estate, and therefore I do hereby appoint ——— ———, of ———, in the county of ——— and State of ———, as trustee of the same.

———,
Referee in Bankruptcy.

[FORM NO. 24.]

NOTICE TO TRUSTEE OF HIS APPOINTMENT.

In the District Court of the United States for the ——— District of ———.

In the matter of ——— *Bankrupt.*	In Bankruptcy.

To ——— ———, of ———, in the county of ———, and district aforesaid:

I hereby notify you that you were duly appointed trustee [*or* one of the trustees] of the estate of the above-named bankrupt at the first meeting of the creditors, on the ——— day of ———, A. D. 18—, and I have approved said appointment. The penal sum of your bond as such trustee has been fixed at ——— dollars. You are required to notify me forthwith of your acceptance or rejection of the trust.

Dated at ———, the ——— day of ———, A. D. 18—.

———,
Referee in Bankruptcy.

[FORM NO. 25.]

BOND OF TRUSTEE.

Know all men by these presents: That we, ——— ———, of ———, as principal, and ——— ———, of ———, and ——— ———, of ———, as sureties, are held and firmly bound unto the United States of America in the sum of ——— dollars, in lawful money of the United States, to be paid to the said United States, for which payment, well and truly to be made, we bind ourselves and our heirs, executors, and administrators, jointly and severally, by these presents.

Signed and sealed this —— day of ———, A. D. 189—.

The condition of this obligation is such, that whereas the above-named ——— ——— was, on the ——— day of ———, A. D. 189—, appointed trustee in the case pending in bankruptcy in said court, wherein ——— ——— is the bankrupt, and he, the said ——— ———, has accepted said trust with all the duties and obligations pertaining thereunto:

Now, therefore, if the said ——— ———, trustee as aforesaid, shall obey such orders as said court may make in relation to said trust, and shall faithfully and truly account for all the moneys, assets, and effects of the estate of said bankrupt which shall come into his hands and possession, and shall in all respects faithfully perform all his official duties as said trustee, then this obligation to be void; otherwise, to remain in full force and virtue.

Signed and sealed in presence of—

——— ———
——— ———

——— ———, [SEAL.]
——— ———, [SEAL.]
——— ———, [SEAL.]

[FORM NO. 26.]

ORDER APPROVING TRUSTEE'S BOND.

At a court of bankruptcy, held in and for the ——— District of ———, at ———, ———, this —— day of ———, 189—.

Before ——— ———, referee in bankruptcy, in the District Court of the United States for the District of ———.

In the matter of	In Bankruptcy.
Bankrupt	

It appearing to the Court ——— ———, of ———, and in said district, has been duly appointed trustee of the estate of the above-named bankrupt, and has given a bond with sureties for the faithful performance of his

official duties, in the amount fixed by the creditors [*or* by order of the court], to wit, in the sum of ——— dollars, it is ordered that the said bond be, and the same is hereby, approved.

——— ———,
Referee in Bankruptcy.

[FORM NO. 27.]

ORDER THAT NO TRUSTEE BE APPOINTED.

In the District Court of the United States for the ——— District of ———.

In the matter of *Bankrupt*	In Bankruptcy.

It appearing that the schedule of the bankrupt discloses no assets, and that no creditor has appeared at the first meeting, and that the appointment of a trustee of the bankrupt's estate is not now desirable, it is hereby ordered that, until further order of the court, no trustee be appointed and no other meeting of the creditors be called.

——— ———,
Referee in Bankruptcy.

[FORM NO. 28.]

ORDER FOR EXAMINATION OF BANKRUPT.

In the District Court of the United States for the ——— District of ———.

In the matter of *Bankrupt*	In Bankruptcy.

At ———, on the ——— day of ———, A. D. 18—.

Upon the application of ——— ———, trustee of said bankrupt [*or* creditor of said bankrupt], it is ordered that said bankrupt attend before ——— ———, one of the referees in bankruptcy of this court, at ——— on the ——— day of ———, at —— o'clock in the ——— noon, to submit to examination under the acts of Congress relating to bankruptcy, and that a copy of this order be delivered to him, the said bankrupt, forthwith.

——— ———, *Referee in Bankruptcy.*

[FORM NO. 29.]

EXAMINATION OF BANKRUPT OR WITNESS.

In the District Court of the United States for the ——— District of ———.

In the matter of ——— *Bankrupt*	In Bankruptcy.

At ———, in said district, on the —— day of ———, A. D. 18—, before ——— ———, one of the referees in bankruptcy of said court.

——— ———, of ———, in the county of ———, and State of ———, being duly sworn and examined at the time and place above mentioned, upon his oath says. [*Here insert substance of examination of party.*]

——— ———, *Referee in Bankruptcy.*

[FORM NO. 30.]

SUMMONS TO WITNESS.

To ——— ———:

Whereas ——— ———, of ———, in the county of ———, and State of ———, has been duly adjudged bankrupt, and the proceeding in bankruptcy is pending in the District Court of the United States for the ——— District of ———,

These are to require you, to whom this summons is directed, personally to be and appear before ——— ———, one of the referees in bankruptcy of the said court, at ———, on the —— day of ———, at — o'clock in the ——— noon, then and there to be examined in relation to said bankruptcy.

Witness the Honorable ——— Judge of said court, and the seal thereof at ———, this ——— day of ———, A. D. 189—.

——— ———, *Clerk.*

RETURN OF SUMMONS TO WITNESS.

In the District Court of the United States for the ——— District of ———.

In the matter of ——— *Bankrupt*	In Bankruptcy.

On this ——— day of ———, A. D. 18—, before me came ——— ———, of ———, in the county of ——— and State of ———, and makes oath,

and says that he did, on ———, the —— day of ———, A. D. 189—, personally serve ——— ———, of ———, in the county of ——— and State of ———, with a true copy of the summons hereto annexed, by delivering the same to him; and he further makes oath, and says that he is not interested in the proceeding in bankruptcy named in said summons.

——— ———.

Subscribed and sworn to before me this ——— day of ———, A. D. 18—.

——— ———.

[FORM NO. 31.]

PROOF OF UNSECURED DEBT.

In the District Court of the United States for the ——— District of ———.

In the matter of ——— *Bankrupt*	In Bankruptcy.

At ———, in said district of ———, on the —— day of ———, A. D. 189—, came ——— ———, of ———, in the county of ———, in said district of ———, and made oath, and says that ——— ———, the person by [*or* against] whom a petition for adjudication of bankruptcy has been filed, was at and before the filing of said petition, and still is, justly and truly indebted to said deponent in the sum of ——— dollars; that the consideration of said debt is as follows:———; that no part of said debt has been paid [except ———]; that there are no set-offs or counterclaims to the same [except ———]; and that deponent has not, nor has any person by his order, or to his knowledge or belief, for his use, had or received any manner of security for said debt whatever.

———,
Creditor.

Subscribed and sworn to before me this ——— day of ———, A. D. 18—.

———,
[*Official Character.*]

[FORM NO. 32.]

PROOF OF SECURED DEBT.

In the District Court of the United States for the ——— District of ———.

In the matter of ——————————— *Bankrupt*	In Bankruptcy.

At ———, in said district of ———, on the —— day of ———, A. D. 189—, same ——— ———, of ———, in the county of ———, in said district of ———, and made oath, and says that ——— ———, the person by [*or* against] whom a petition for adjudication of bankruptcy has been filed, was at and before the filing of said petition, and still is, justly and truly indebted to said deponent, in the sum of ——— dollars; that the consideration of said debt is as follows———————————; that no part of said debt has been paid [except ———————————]; that there are no set-offs or counterclaims to the same [except ———]; and that the only securities held by this deponent for said debt are the following:

———————————————————————————————;

——— ———,
Creditor.

Subscribed and sworn to before me this ——— day of ———, A. D. —.

——— ———,
[*Official Character.*]

[FORM NO. 33.]

PROOF OF DEBT DUE CORPORATION.

In the District Court of the United States for the ——— District of ———.

In the matter of ——————————— *Bankrupt*	In Bankruptcy.

At ———, in said district of ———, on the ——— day of ———, A. D. 189—, came ——— ———, of ——— in the county of ——— and State of ———, and made oath and says that he is ——— of the ———, a corporation incorporated by and under the laws of the State of ———, and carrying on business at ———, in the county of ——— and State of ———, and that he is duly authorized to make this proof, and says that the said ——— ———, the person by [*or* against] whom a petition for

adjudication of bankruptcy has been filed, was at and before the filing of the said petition, and still is justly and truly indebted to said corporation in the sum of ——— dollars; that the consideration of said debt is as follows:

———————————————————————————

———————————————————————————

that no part of said debt has been paid [except——————————————————————————]; that there are no set-offs or counterclaims to the same [except———————————]; and that said corporation has not, nor has any person by its order, or to the knowledge or belief of said deponent, for its use, had or received any manner of security for said debt whatever.

——— ———,
——— *of said Corporation.*

Subscribed and sworn to before me this ——— day of ———, A. D. 18—.

——— ———,
[*Official Character.*]

[FORM NO. 34.]

PROOF OF DEBT BY PARTNERSHIP.

In the District Court of the United States for the ——— District of ———.

In the matter of ——————————— *Bankrupt*	In Bankruptcy.

At ———, in said district of ———, on the ——— day of ———, A. D. 189—, came ——— ———, of ———, in the county of ———, in said district of ———, and made oath, and says that he is one of the firm of ——— ———, consisting of himself and ——— ———, of ———, in the county of ———, and State of ———; that the said ——— ———, the person by [*or* against] whom a petition for adjudication of bankruptcy has been filed, was at and before the filing of said petition, and still is, justly and truly indebted to this deponent's said firm in the sum of ——— dollars; that the consideration of said debt is as follows:——————————— ———————————————————————————; that no part of said debt has been paid [except ———————]; that there are no set-offs or counterclaims to the same [except ———]; and this deponent has not, nor has his said firm, nor has any person by their order, or to this deponent's knowledge or belief, for their use, had or received any manner of security for said debt whatever.

——— ———,
Creditor.

Subscribed and sworn to before me this ——— day of ———, A. D. 18—.

——— ———,
[*Official Character.*]

[FORM NO. 35.]

PROOF OF DEBT BY AGENT OR ATTORNEY.

In the District Court of the United States for the ——— District of ———.

In the matter of ——— *Bankrupt*	In Bankruptcy.

At ———, in said district of ———, on the —— day of ———, A. D. 189—, came ——— ———, of ———, in the county of ———, and State of ———, attorney [*or* authorized agent] of ———, in the county of ———, and State of ———, and made oath and says that ——— ———, the person by [*or* against] whom a petition for adjudication of bankruptcy has been filed, was at and before the filing of said petition, and still is, justly and truly indebted to the said ——— ———, in the sum of ——— dollars; that the consideration of said debt is as follows: ——— ———;

that no part of said debt has been paid [except ——— ———] ;

and that this deponent has not, nor has any person by his order, or to this deponent's knowledge or belief, for his use had or received any manner of security for said debt whatever. And this deponent further says, that this deposition cannot be made by the claimant in person because ——— ———,

and that he is duly authorized by his principal to make this affidavit, and that it is within his knowledge that the aforesaid debt was incurred as and for the consideration above stated, and that such debt, to the best of his knowledge and belief, still remains unpaid and unsatisfied.

Subscribed and sworn to before me this ——— day of ———, A. D. 18—.

———— ————,

[*Official Character.*]

[FORM NO. 36.]

PROOF OF SECURED DEBT BY AGENT.

In the District Court of the United States for the ——— District of ———.

In the matter of ——— *Bankrupt*	In Bankruptcy.

At ———, in said district of ———, on the —— day of ———, A. D. 189—, came ——— ———, of ———, in the county of ———, and State

of ———, attorney, [*or* authorized agent] of ———, in the county of ———, and State of ———, and made oath, and says that ——— ———, the person by [*or* against] whom a petition for adjudication of bankruptcy has been filed, was, at and before the filing of said petition, and still is, justly and truly indebted to the said ——— ——— in the sum of ——— dollars; that the consideration of said debt is as follows: ——— ———;

that no part of said debt has been paid [except ——— ———]; that there are no set-offs or counter claims to the same [except ——— ———]; and that the only securities held by said ——— for said debt are the following ——— ———;

and this deponent further says that this deposition can not be made by the claimant in person because ——— ———, ——— ———,

and that he is duly authorized by his principal to make this deposition, and that it is within his knowledge that the aforesaid debt was incurred as and for the consideration above stated.

——— ———.

Subscribed and sworn to before me this ——— day of ———, A. D. 18—.

——— ———,

[*Official Character.*]

[FORM NO. 37.]

AFFIDAVIT OF LOST BILL, OR NOTE.

In the District Court of the United States for the ——— District of ———.

In the matter of ——— *Bankrupt*	In Bankruptcy.

On this ——— day of ———, A. D. 18—, at ——— came ——— ———, of ———, in the county of ———, and State of ———, and makes oath and says that the bill of exchange [*or* note], the particulars whereof are underwritten, has been lost under the following circumstances, to wit, ———

———

———

and that he, this deponent, has not been able to find the same; and this deponent further says that he has not, nor has the said ——— ———, or any person or persons to their use, to this deponent's knowledge or belief, negotiated the said bill [*or* note], nor in any manner parted with or assigned the legal or beneficial interest therein, or any part thereof; and that

he, this deponent, is the person now legally and beneficially interested in the same.

Bill or note referred to.

Date.	Drawer or maker.	Acceptor.	Sum.

_____.

Subscribed and sworn to before me this _____ day of _____, A. D. 18—.

_____,

[*Official Character.*]

[FORM NO. 38.]

ORDER REDUCING CLAIM.

In the District Court of the United States for the _____ District of _____.

In the matter of _____ *Bankrupt*	In Bankruptcy.

At _____, in said district, on the _____ day of _____, A. D. 18—.

Upon the evidence submitted to this court upon the claim of _____ against said estate [and, *if the fact be so*, upon hearing counsel thereon], it is ordered, that the amount of said claim be reduced from the sum of _____, as set forth in the affidavit in proof of claim filed by said creditor in said case, to the sum of _____, and that the latter-named sum be entered upon the books of the trustee as the true sum upon which a dividend shall be computed [*if with interest*, with interest thereon from the _____ day of _____, A. D. 18—].

_____,

Referee in Bankruptcy,

[FORM NO. 39.]

ORDER EXPUNGING CLAIM.

In the District Court of the United States for the _____ District of _____.

In the matter of _____ *Bankrupt*	In Bankruptcy.

At _____, in said district, on the _____ day of _____, A. D. 18—.

Upon the evidence submitted to the court upon the claim of ——— against said estate [and, *if the fact be so*, upon hearing counsel thereon], it is ordered, that said claim be disallowed and expunged from the list of claims upon the trustee's record in said case.

———, ———,
Referee in Bankruptcy.

[FORM NO. 40.]

LIST OF CLAIMS AND DIVIDENDS TO BE RECORDED BY REFEREE AND BY HIM DELIVERED TO TRUSTEE.

In the District Court of the United States for the ——— District of ———.

In the matter of ——— *Bankrupt*	In Bankruptcy.

At ———, in said district, on the ——— day of ———, A. D. 18—.

———, ———,

A list of debts proved and claimed under the bankruptcy of ——— ———, with ——— dividend at the rate of —— per cent this day declared thereon by ——— ——— ———, a referee in bankruptcy.

No.	[To be placed alphabetically, and the names of all the parties to the proof to be carefully set forth.]	Sum proved.		Dividend.	
		Dollars.	Cents.	Dollars.	Cents.

———, ———,
Referee in Bankruptcy.

[FORM NO. 41.]

NOTICE OF DIVIDEND.

In the District Court of the United States for the ——— District of ———

In the matter of *Bankrupt*	In Bankruptcy.

At ———, on the ——— day of ———, A. D. 18—.

To ——— ———,

Creditor of ——— ———:

I hereby inform you that you may, on application at my office, ———, on the ——— day of ———, or any day thereafter, between the hours of ———, receive a warrant for the ——— dividend due to you out of the above estate. If you can not personally attend, the warrant will be delivered to your order on your filling up and signing the subjoined letter.

——— ———, *Trustee.*

CREDITOR'S LETTER TO TRUSTEE.

To ——— ———,

Trustee in bankruptcy of the estate of ——— ———, bankrupt:

Please deliver to ——— ——— the warrant for dividend payable out of the said estate to me.

——— ———, *Creditor.*

[FORM NO. 42.]

PETITION AND ORDER FOR SALE BY AUCTION OF REAL ESTATE.

In the District Court of the United States for the ——— District of ———.

In the matter of *Bankrupt*	In Bankruptcy.

Respectfully represents ———, trustee of the estate of said bankrupt, that it would be for the benefit of said estate that a certain portion of the real estate of said bankrupt, to wit [*here describe it and its estimated value*], should be sold by auction, in lots or parcels, and upon terms and conditions, as follows: ———

Wherefore he prays that he may be authorized to make sale by auction of said real estate as aforesaid.

Dated this ——— day of ———, A. D. 18—.

——— ———, *Trustee.*

The foregoing petition having been duly filed, and having come on for a hearing before me, of which hearing ten days' notice was given by mail to creditors of said bankrupt, now, after due hearing, no adverse interest being represented thereat [*or* after hearing ——— ——— in favor of said petition and ——— ——— in opposition thereto], it is ordered that the said trustee be authorized to sell the portion of the bankrupt's real estate specified in the foregoing petition, by auction, keeping an accurate account of each lot or parcel sold and the price received therefor and to whom sold; which said account he shall file at once with the referee.

Witness my hand this ——— day of ———, A. D. 189—.

———,
Referee in Bankruptcy.

[FORM NO. 43.]

PETITION AND ORDER FOR REDEMPTION OF PROPERTY FROM LIEN.

In the District Court of the United States for the ——— District of ———.

In the matter of ——— *Bankrupt*	In Bankruptcy.

Respectfully represents ——— ———, trustee of the estate of said bankrupt, that a certain portion of said bankrupt's estate, to wit: [*here describe the estate or property and its estimated value*] is subject to a mortgage [*describe the mortgage*], or to a conditional contract [*describing it*], or to a lien [*describe the origin and nature of the lien*], [*or, if the property be personal property*, has been pledged or deposited and is subject to a lien] for [*describe the nature of the lien*], and that it would be for the benefit of the estate that said property should be redeemed and discharged from the lien thereon. Wherefore he prays that he may be empowered to pay out of the assets of said estate in his hands the sum of ———, being the amount of said lien, in order to redeem said property therefrom.

Dated this ——— day of ———, A. D. 18—.

——— ———, *Trustee.*

The foregoing petition having been duly filed and having come on for a hearing before me, of which hearing ten days' notice was given by mail to creditors of said bankrupt, now, after due hearing, no adverse interest being represented thereat [*or* after hearing ——— ——— in favor of said petition and ——— ——— in opposition thereto], it is ordered that the said trustee be authorized to pay out of the assets of the bankrupt's estate specified in the foregoing petition the sum of ———, being the amount of the lien, in order to redeem the property therefrom.

Witness my hand this ——— day of ———, A. D. 189—.

———,
Referee in Bankruptcy.

[FORM NO. 44.]

PETITION AND ORDER FOR SALE SUBJECT TO LIEN.

In the District Court of the United States for the ——— District of ———.

In the matter of ——— *Bankrupt*	In Bankruptcy.

Respectfully represents ——— ———, trustee of the estate of said bankrupt, that a certain portion of said bankrupt's estate, to wit [*here describe the estate or property and its estimated value*], is subject to a mortgage [*describe mortgage*], or to a conditional contract [*describe it*], or to a lien [*describe the origin and nature of the lien*], or [*if the property be personal property*] has been pledged or deposited and is subject to a lien for [*describe the nature of the lien*], and that it would be for the benefit of the said estate that said property should be sold, subject to said mortgage, lien or other incumbrance. Wherefore he prays that he may be authorized to make sale of said property, subject to the incumbrance thereon.

Dated this ——— day of ———, A. D. 189—.

——— ———, *Trustee.*

The foregoing petition having been duly filed and having come on for a hearing before me, of which hearing ten days' notice was given by mail to creditors of said bankrupt, now, after due hearing, no adverse interest being represented thereat [*or* after hearing ——— ——— in favor of said petition and ——— ——— in opposition thereto], it is ordered that the said trustee be authorized to sell the portion of the bankrupt's estate specified in the foregoing petition, by auction [*or* at private sale], keeping an accurate account of the property sold and the price received therefor and to whom sold; which said account he shall file at once with the referee.

Witness my hand this ——— day of ———, A. D. 189—.

———,

Referee in Bankruptcy.

[FORM NO. 45.]

PETITION AND ORDER FOR PRIVATE SALE.

In the District Court of the United States for the ——— District of ———.

In the matter of ——— *Bankrupt*	In Bankruptcy.

Respectfully represents ——— ———, duly appointed trustee of the estate of the aforesaid bankrupt.

That for the following reasons, to wit, ———

it is desirable and for the best interest of the estate to sell at private sale a certain portion of the said estate, to wit, ———

Wherefore he prays that he may be authorized to sell the said property at private sale.

Dated this ——— day of ———, A. D. 189—.

——— ———, *Trustee.*

The foregoing petition having been duly filed and having come on for a hearing before me, of which hearing ten days' notice was given by mail to creditors of said bankrupt, now, after due hearing, no adverse interest being represented thereat [*or* after hearing ——— ——— in favor of said petition and ——— ——— in opposition thereto], it is ordered that the said trustee be authorized to sell the portion of the bankrupt's estate specified in the foregoing petition, at private sale, keeping an accurate account of each article sold and the price received therefor and to whom sold; which said account he shall file at once with the referee.

Witness my hand this ——— day of ———, A. D. 189—.

———,

Referee in Bankruptcy.

[FORM NO. 46.]

PETITION AND ORDER FOR SALE OF PERISHABLE PROPERTY.

In the District Court of the United States for the ——— District of ———.

In the matter of ——— *Bankrupt*	In Bankruptcy.

Respectfully represents ——— ——— the said bankrupt, [*or* a creditor, *or* the receiver, *or* the trustee of the said bankrupt's estate.]

That a part of the said estate, to wit, ——— now in ———, is perishable, and that there will be loss if the same is not sold immediately.

Wherefore, he prays the court to order that the same be sold immediately as aforesaid.

Dated this ——— day of ———, A. D. 189—. ——— ———.

The foregoing petition having been duly filed and having come on for a hearing before me, of which hearing ten days' notice was given by mail to the creditors of the said bankrupt, [*or* without notice to the creditors], now, after due hearing, no adverse interest being represented thereat [*or* after hearing ——— ——— in favor of said petition and ——— ——— in opposition thereto], I find that the facts are as above stated, and that the same is required in the interest of the estate, and it is therefore ordered that the same be sold forthwith and the proceeds thereof deposited in court.

Witness my hand this —— day of ———, A. D. 189—.

———,

Referee in Bankruptcy.

[FORM NO. 47.]

TRUSTEE'S REPORT OF EXEMPTED PROPERTY.

In the District Court of the United States for the ——— District of ———.

In the matter of *Bankrupt*	In Bankruptcy.

At ———, on the ——— day of ———, A. D. 18—.

The following is a schedule of property designated and set apart to be retained by the bankrupt aforesaid, as his own property, under the provisions of the acts of Congress relating to bankruptcy.

General head.	Particular description.	Value.	
		Dolls.	Cts.
Military uniform, arms and equipments			
Property exempted by State laws			

——— ———,
Trustee.

[FORM NO. 48.]

TRUSTEE'S RETURN OF NO ASSETS.

In the District Court of the United States for the ——— District of ———.

In the matter of *Bankrupt*	In Bankruptcy.

At ———, in said district, on the ——— day of ———, A. D. 18—.

On the day aforesaid, before me comes ——— ———, of ———, in the county of ——— and State of ———, and makes oath, and says that he, as trustee of the estate and effects of the above-named bankrupt , neither received nor paid any moneys on account of the estate.

Subscribed and sworn to before me at ———, this ——— day of ———, A. D. 18—.

——— ———,
Referee in Bankruptcy.

[FORM NO. 49.]

ACCOUNT OF TRUSTEE.

DR. *The estate of* ——— ———, *bankrupt* . *in account with* ——— ———, *trustee.* CR.

		Dolls.	Cts.	Dolls.	Cts.			Dolls.	Cts.	Dolls.	Cts.

[FORM NO. 50.]

OATH TO FINAL ACCOUNT OF TRUSTEE.

In the District Court of the United States for the ——— District of ———.

In the matter of ——— *Bankrupt*	In Bankruptcy.

On this ——— day of ———, A. D. 18—, before me comes ——— ———, of ———, in the county of ——— and State of ———, and makes oath, and says that he was, on the ——— day of ———, A. D. 18—, appointed trustee of the estate and effects of the above-named bankrupt, and that as such trustee he has conducted the settlement of the said estate. That the account hereto annexed containing ——— sheets of paper, the first sheet whereof is marked with the letter —— [*reference may here also be made to any prior account filed by said trustee*] is true, and such account contains entries of every sum of money received by said trustee on account of the estate and effects of the above-named bankrupt , and that the payments purporting in such account to have been made by said trustee have been so made by him. And he asks to be allowed for said payments and for commissions and expenses as charged in said accounts.

——— ———, *Trustee.*

Subscribed and sworn to before me at ———, in said ——— district of ———, this —— day of ———, A. D. 18—.

——— ———,
[*Official Character.*]

[FORM NO. 51.]

ORDER ALLOWING ACCOUNT AND DISCHARGING TRUSTEE.

In the District Court of the United States for the ——— District of ———.

In the matter of ——— *Bankrupt*	In Bankruptcy.

The foregoing account having been presented for allowance, and having been examined and found correct, it is ordered, that the same be allowed, and that the said trustee be discharged of his trust.

——— ———,
Referee in Bankruptcy.

[FORM NO. 52.]

PETITION FOR REMOVAL OF TRUSTEE.

In the District Court of the United States for the ——— District of ———.

In the matter of ——— *Bankrupt*	In Bankruptcy.

To the Honorable ——— ———,

Judge of the District Court for the ——— District of ———:

The petition of ——— ———, one of the creditors of said bankrupt, respectfully represents that it is for the interest of the estate of said bankrupt that ———, heretofore appointed trustee of said bankrupt's estate, should be removed from his trust, for the causes following to wit: [*here set forth the particular cause or causes for which such removal is requested.*]

Wherefore ——— ——— pray that notice may be served upon said ———, trustee as aforesaid, to show cause, at such time as may be fixed by the court, why an order should not be made removing him from said trust.

——— ———.

[FORM NO. 53.]

NOTICE OF PETITION FOR REMOVAL OF TRUSTEE.

In the District Court of the United States for the ——— District of ———.

In the matter of ——— *Bankrupt*	In Bankruptcy.

At ———, on the ——— day of ———, A. D. 18—.

To ——— ———,

Trustee of the estate of ——— ———, bankrupt:

You are hereby notified to appear before this court, at ———, on the ——— day of ———, A. D. 18—, at —— o'clock, —. m., to show cause (if any you have) why you should not be removed from your trust as trustee as aforesaid, according to the prayer of the petition of ——— ———, one of the creditors of said bankrupt, filed in this court on the ——— day of ———, A. D. 18—, in which it is alleged [*here insert the allegation of the petition*].

——— ———, *Clerk.*

[FORM NO. 54.]

ORDER FOR REMOVAL OF TRUSTEE.

In the District Court of the United States for the ——— District of ———.

In the matter of ——— *Bankrupt*	In Bankruptcy.

Whereas ——— ———, of ———, did, on the —— day of ———, A. D. 18—, present his petition to this court, praying that for the reasons therein set forth, ——— ———, the trustee of the estate of said ——— ———, bankrupt, might be removed:

Now, therefore, upon reading the said petition of the said ——— ——— and the evidence submitted therewith, and upon hearing counsel on behalf of said petitioner and counsel for trustee, and upon the evidence submitted on behalf of said trustee.

It is ordered that the said ——— ——— be removed from the trust as trustee of the estate of said bankrupt, and that the costs of the said petitioner incidental to said petition be paid by said ——— ———, trustee [*or* out of the estate of the said ——— ———, subject to prior charges.]

Witness the Honorable ——— ———, judge of the said court, and the seal thereof, at ———, in said district, on the —— day of ———, A. D. 18—.

——— ———,
Clerk.

{ Seal of the court. }

[FORM NO. 55.]

ORDER FOR CHOICE OF NEW TRUSTEE.

In the District Court of the United States for the ——— District of ———.

In the matter of ——— *Bankrupt*	In Bankruptcy.

At ———, on the —— day of ———, A. D. 18—.

Whereas by reason of the removal [*or* the death *or* resignation] of ——— ———, heretofore appointed trustee of the estate of said bankrupt, a vacancy exists in the office of said trustee.

It is ordered, that a meeting of the creditors of said bankrupt be held at ———, in ———, in said district, on the —— day of ———, A. D. 18—, for the choice of a new trustee of said estate.

And it is further ordered that notice be given to said creditors of the time, place, and purpose of said meeting, by letter to each, to be deposited in the mail at least ten days before that day.

——— ———, *Referee in Bankruptcy.*

[FORM NO. 56.]

CERTIFICATE BY REFEREE TO JUDGE.

In the District Court of the United States for the ——— District of ———.

In the matter of ——— *Bankrupt*	In Bankruptcy.

I, ——— ———, one of the referees of said court in bankruptcy, do hereby certify that in the course of the proceedings in said cause before me the following question arose pertinent to the said proceedings: [*Here state the question, a summary of the evidence relating thereto, and the finding and order of the referee thereon.*]

And the said question is certified to the judge for his opinion thereon.

Dated at ———, the ——— day of ———, A. D. 18—.

———,
Referee in Bankruptcy.

[FORM NO. 57.]

BANKRUPT'S PETITION FOR DISCHARGE.

In the matter of ——— *Bankrupt*	In Bankruptcy.

To the Honorable ——— ———.

Judge of the District Court of the United States for the District of ———.

——— ———, of ———, in the county of ———, and State of ———, in said district, respectfully represents that on the —— day of ———, last past, he was duly adjudged bankrupt under the acts of Congress

relating to bankruptcy; that he has duly surrendered all his property and rights of property, and has fully complied with all the requirements of said acts and of the orders of the court touching his bankruptcy.

Wherefore he prays that he may be decreed by the court to have a full discharge from all debts provable against his estate under said bankrupt acts, except such debts as are excepted by law from such discharge.

Dated this —— day of ———, A. D. 189—.

——— ———, *Bankrupt.*

ORDER OF NOTICE THEREON.

District of ———, ss:

On this —— day of ———, A. D. 189—, on reading the foregoing petition, it is—

Ordered by the court, that a hearing be had upon the same on the —— day of ———, A. D. 189—, before said court, at ———, in said district, at —— o'clock in the ——— noon; and that notice thereof be published in ——— ———, a newspaper printed in said district, and that all known creditors and other persons in interest may appear at the said time and place and show cause, if any they have, why the prayer of the said petitioner should not be granted.

And it is further ordered by the court, that the clerk shall send by mail to all known creditors copies of said petition and this order, addressed to them at their places of residence as stated.

Witness the Honorable ——— ———, judge of the said court, and the seal thereof, at ———, in said district, on the —— day of———, A. D. 189—.

——— ———,

{ Seal of } { the court } *Clerk.*

—— hereby depose, on oath, that the foregoing order was published in the ——— ——— on the following days, viz:

On the —— day of ——— and on the —— day of ———, in the year 189—.

——— ———.

District of ———.

——— ———, 189—.

Personally appeared ——— ———, and made oath that the foregoing statement by him subscribed is true.

Before me,

——— ———,

[*Official Character.*]

I hereby certify that I have on this —— day of ———, A. D. 189—, sent by mail copies of the above order, as therein directed.

——— ———,

Clerk.

[FORM NO. 58.]

SPECIFICATION OF GROUNDS OF OPPOSITION TO BANKRUPT'S DISCHARGE.

In the District Court of the United States for the ——— District of ———.

In the matter of ——— *Bankrupt*	In Bankruptcy.

——— ———, of ———, in the county of ——— and State of ———, a party interested in the estate of said ——— ———, bankrupt, do hereby oppose the granting to him of a discharge from his debts, and for the grounds of such opposition do file the following specifications: [*Here specify the grounds of opposition.*]

——— ———, *Creditor.*

[FORM NO. 59.]

DISCHARGE OF BANKRUPT.

District Court of the United States,

——— District of ———.

Whereas, ——— ——— of ——— in said district, has been duly adjudged a bankrupt, under the acts of Congress relating to bankruptcy, and appears to have conformed to all the requirements of law in that behalf, it is therefore ordered by this court that said ——— ——— be discharged from all debts and claims which are made provable by said acts against his estate, and which existed on the —— day of ———, A. D. 189—, on which day the petition for adjudication was filed ——— him; excepting such debts as are by law excepted from the operation of a discharge in bankruptcy.

Witness the Honorable ——— ———, judge of said district court, and the seal thereof this —— day of ———, A. D. 189—.

———,
Clerk.

{ Seal of the court }

[FORM NO. 60.]

PETITION FOR MEETING TO CONSIDER COMPOSITION.

District Court of the United States for the ——— District of ———.

	In Bankruptcy.
Bankrupt	

To the Honorable ——— ———, Judge of the District Court of the United States for the —— District of ———:

The above-named bankrupt respectfully represent that a composition of ——— per cent upon all unsecured debts, not entitled to a priority ——— ——— in satisfaction of —— debts has been proposed by —— to —— creditors, as provided by the acts of Congress relating to bankruptcy, and —— verily believe that the said composition will be accepted by a majority in number and in value of ——— creditors whose claims are allowed.

Wherefore, he pray that a meeting of —— creditors may be duly called to act upon said proposal for a composition, according to the provisions of said acts and the rules of court.

———— ————,
Bankrupt.

[FORM NO. 61.]

APPLICATION FOR CONFIRMATION OF COMPOSITION.

In the District Court of the United States, for the —— District of ———.

In the matter of	
	In Bankruptcy.
Bankrupt	

To the Honorable ——— ———, Judge of the District Court of the United States for the ——— District of ———:

At ———, in said district, on the —— day of ———, A. D. 189—, now comes ——— ———, the above-named bankrupt, and respectfully represents to the court that, after he had been examined in open court [*or* at a

meeting of his creditors] and had filed in court a schedule of his property and a list of his creditors, as required by law, he offered terms of composition to his creditors, which terms have been accepted in writing by a majority in number of all creditors whose claims have been allowed, which number represents a majority in amount of such claims; that the consideration to be paid by the bankrupt to his creditors, the money necessary to pay all debts which have priority, and the costs of the proceedings, amounting in all to the sum of ——— dollars, has been deposited, subject to the order of the judge, in the ——— National Bank, of ———, a designated depository of money in bankruptcy cases.

Wherefore the said ——— ——— respectfully asks that the said composition may be confirmed by the court.

——— ———, *Bankrupt.*

[FORM NO. 62.]

ORDER CONFIRMING COMPOSITION.

In the District Court of the United States for the ——— District of ———.

In the matter of ——— ———	In Bankruptcy.

An application for the confirmation of the composition offered by the bankrupt having been filed in court, and it appearing that the composition has been accepted by a majority in number of creditors whose claims have been allowed and of such allowed claims; and the consideration and the money required by law to be deposited, having been deposited as ordered, in such place as was designated by the judge of said court, and subject to his order; and it also appearing that it is for the best interests of the creditors; and that the bankrupt has not been guilty of any of the acts or failed to perform any of the duties which would be a bar to his discharge, and that the offer and its acceptance are in good faith and have not been made or procured by any means, promises, or acts contrary to the acts of Congress relating to bankruptcy: It is therefore hereby ordered that the said composition be, and it hereby is, confirmed.

Witness the Honorable ——— ———, judge of said court, and the seal thereof, this —— day of ———, A. D. 189—.

——— ———, *Clerk.*

{ Seal of the court }

[FORM NO. 63.]

ORDER OF DISTRIBUTION ON COMPOSITION.

UNITED STATES OF AMERICA:
In the District Court of the United States for the ——— District of ———.

In the matter of ——————————— *Bankrupt*	In Bankruptcy.

The composition offered by the above-named bankrupt in this case having been duly confirmed by the judge of said court, it is hereby ordered and decreed that the distribution of the deposit shall be made by the clerk of the court as follows, to wit: 1st, to pay the several claims which have priority; 2d, to pay the costs of proceedings; 3d, to pay, according to the terms of the composition, the several claims of general creditors which have been allowed, and appear upon a list of allowed claims, on the files in this case, which list is made a part of this order.

Witness the Honorable ——— ——, judge of said court, and the seal thereof, this —— day of ———, A. D. 189—.

——— ———, *Clerk.*

{ Seal of the court }

OCTOBER TERM, 1905.

[199 U. S. 618.]

ORDER.

It is ordered by the Court that General Order in Bankruptcy No. 35 be amended by adding the following sentence to subdivision 4:

He may also, pending such proceedings, both in voluntary and involuntary cases, order the commissions of referees and trustees to be paid immediately after such commissions accrue and are earned.

(Promulgated December 11, 1905.)

INDEX TO GENERAL ORDERS

	Order.	Section.	Page.
Abbreviations and interlineations in petitions and schedules forbidden	5	.....	4772
Accounts of marshal	19	.....	4777
referee	26	.....	4779
trustee	17	.....	4776
Amendments of petition and schedules	11	.....	4774
Appeals	36	1, 2, 3	4782
from circuit courts of appeals	36	2	4783
courts of bankruptcy	36	2	4783
supreme court of District of Columbia	36	2	4783
supreme court of Territory	36	2	4783
to circuit courts of appeals	36	1	4782
supreme court of Territory	36	1	4782
Supreme Court of the United States	36	2, 3	4783
Application for approval of composition	12	3	4775
discharge of bankrupt	12	3	4775
form of	31	.....	4781
Appointment and removal of trustee	13	.....	4775
Arbitration	33	.....	4781
Assignment of claims before proofs	21	3	4778
Attorney, conduct of proceedings by	4	.....	4772
execution of letter of	21	5	4778
Check for money deposited	29	.....	
Circuit courts of appeals, appeals from	36	2, 3	4783
to	36	1	4781
Claims, assignment of, before proof	21	3	4778
compounding of	28	.....	4780
of persons contingently liable	21	4	4778
proof of	21	.....	4777
re-examination of	21	6	4778
Clerk, compensation of	35	1	4782
indemnity for expenses of	10	.....	4774
indorsement of papers by	2	.....	4771
Compensation of clerks, referee, and trustee	35	1,2,3,4	4782
Composition, approval of	12	3	4775
opposition to	32	.....	4781
Compounding of claims	28	.....	4780
Conduct of proceedings	4	.....	4772
Consolidation of petitions	7	.....	4773
Costs in contested adjudications	34	.....	4782
Courts of bankruptcy, appeals from	36	1, 2, 3	4782

	Order.	Section.	Page.
Creditors, special meeting of	25	.....	4779
Debtor, imprisoned	30	.....	4780
Debts, proof of	21	1	4771
Deposition before referee	22	.....	4778
Discharge of bankrupt, application for	12	3	4775
opposition to	32	.....	4781
petition for	31	.....	4781
Districts, petitions in different	6	.....	4772
Docket	1	.....	4771
Duties of referee	12	1, 2, 3	4774
trustee	17	.....	4776
Examination of witnesses	22	.....	4778
Expenses of clerk, marshal, or referee, indemnity for	10	.....	4774
allowance of.	35	1,2,3,4	4782
Fees of clerk	35	1, 4	4782
referee	35	2, 4	4782
trustee	35	3, 4	4782
Filing of papers	2	.....	4771
after reference	20	.....	4777
Finding of facts by referee	12	3	4775
Forms	38	.....	4783
Frame of petitions	5	.....	4772
General provisions	37	.....	4783
Habeas corpus of imprisoned debtors	30	.....	4780
Imprisoned debtor	30	.....	4780
Indemnity for expenses of clerk, marshal, or referee.	10	.....	4774
Injunctions of proceedings of courts or officers	12	3	4775
Interlineation and abbreviation in petitions and schedules forbidden	5	.....	4772
Inventory by trustee	17	.....	4776
Involuntary bankruptcy, costs in	34	.....	4782
schedule in	9	.....	4774
Judge to hear application for approval of composition	12	3	4775
discharge of bankrupt.	12	3	4775
injunction	12	3	4775
removal of trustee	13	.....	4775
review by	27	.....	4779
Jurisdiction of two petitions in different districts	6	.....	4772
Marshal, accounts of	19	.....	4777
indemnity for expenses of	10	.....	4774
Meeting of creditors, first	12	1	4774
special	25	.....	4779
Moneys, deposited, payment of	29	.....	4780
Notices to creditors	21	2	4777
Opposition to discharge of composition	32	.....	4781
Order of reference	12	1	4774
Orders of referee	23	.....	4779
Papers, filing of	2	.....	4771
after reference	20	.....	4777
Partnership cases, proceedings in	8	.....	4773

	Order.	Section.	Page.
Payment of moneys deposited	29	.....	4780
Perishable property, sale of	18	3	4776
Petition and schedules, abbreviations and interlineations in, forbidden	5	.....	4772
amendments to	11	.....	4774
for discharge	31	.....	
Petitions, frame of	5	.....	4772
in different districts	6	.....	4772
two or more against common debtor	7	.....	4773
Poor bankrupts, payment of fees in cases of	35	4	4782
Practice and procedure	37	.....	4783
Priority of petitions	7	.....	4773
Proceedings, conduct of	4	.....	4772
Process	3	.....	4772
Proof of debts	21	1	4777
Property, redemption of	28	.....	4780
sale of	18	1, 2, 3	4776
Proved claims, transmission of, to clerk	24	.....	4779
Record of clerk	1	.....	4771
referee	1	.....	4771
on appeal to Supreme Court of United States	36	3	4783
Redemption of property and compounding of claims	28	.....	4780
Re-examination of claim	21	6	4778
Referee, accounts of	26	.....	4779
certificate of, to judge	27	.....	4779
compensation of	35	2	4782
duties of	12	1, 2, 3	4774
finding of facts by	12	3	4775
indemnity for expenses of	10	.....	4774
indorsement of papers by	2	.....	4771
orders of	23	.....	4779
proceedings before	12	1, 2	4774
records of	1	.....	4771
to notify trustee of his appointment	16	.....	4775
to transmit list of proved claims to clerk	24	.....	4779
Reference, order of	12	.....	4774
papers filed after	20	.....	4777
Removal of trustee	13	.....	4775
Review by judge	27	.....	
Sale of property	18	1, 2, 3	4776
Schedule, abbreviations and interlineations in, forbidden	5	.....	4772
amendments to	11	.....	4774
in involuntary bankruptcy	9	.....	4774
Special meeting of creditors	25	.....	4779
Subpœna	3	.....	4772
Summons	3	.....	4772
Supreme court of District of Columbia, appeals from	36	2, 3	4783
Territory, appeals to	36	1	4782
from	36	2, 3	4783
the United States, appeals to	36	2, 3	4783

	Order.	Section.	Page.
Testimony, taking of	22	.....	4778
Transmission of proved claims to clerk	24	.....	4779
Trustee, appointment of	13	.....	4775
compensation of	35	3	4782
duties of	17	.....	4776
no official or general, to be appointed	14	.....	4775
not appointed in certain cases	15	.....	4775
notice to, of appointment	16	.....	4775
removal of	13	.....	4775
Witnesses, examination of	22	.....	4778

TABLE OF CITATIONS

CITATIONS OF FEDERAL CONSTITUTION.

	Sec.
Article I	
§ 6 .....§§ 167, 327,	342
§ 8 ....§§ 483, 608, 612a,	654
§ 9	§ 465
Article II	
§ 2	§ 519
Article III	
.....	§§ 3, 5
§ 2..§§ 104, 105, 525, 527,	560
§ 3 ...§§ 483, 523n, 525,	527
Article IV	
§ 2 ..... §§ 104, 105,	491
Article XVI	
.....	§ 12
First Amendment .....§506d	
Second Amendment .....§506d	
Fourth Amendment §§ 339a,	
.....485, 487,	487b
Fifth Amendment ...§§ 483d,	
483e, 487b, 490c, 494,	
.....506q, 520,	523
Sixth Amendment ...§§ 483d,	
483e, 490c, 507, 515, 520b,	
522c, 523, 525, 525a, 525h,	526a
Seventh Amendment	§ 80
Eighth Amendment ...§§ 493,	534a
Fourteenth Amendment	
§§ 5, 339a, 487b, 506d,	
..... 506f,	534a
Eighteenth Amendment	
..... §§ 483b,	506q

CITATIONS OF REVISED STATUTES OF U. S.

Sec. of R.S.	Sec. of this work
1 ..... §§ 335,	354
49	§ 454
50	§ 454
103 ..... §§ 339,	339b
116	§ 343
123	§ 485
136	§ 380
161	§ 339
186	§ 468
216	§ 301
258	§ 485
281	§ 509
282	§ 509
286	§ 526
363	§ 427
369	§ 471
563	§ 605
566 ...§§ 473, 582a, 582b,	583
591	§ 370
592	§ 370
593	§ 370
594	§ 370
595	§ 370
596	§ 370
601	§ 371
604	§ 4
631	§ 397
636 ..... §§ 206,	455b
639	§ 549
641 ..... §§ 58, 461,	
537, 542, 543h, 544, 552,	553
642 ..... §§ 461,	552
643 ...§§ 58, 461, 537, 542,	
543h, 544, 545, 549, 551,	553
644	§ 551
648	§ 473
649 ..... §§ 473,	474
651 .....§§ 6, 25,	688
674	§ 699
687 ..... §§ 5,	456
688 .....§§ 5, 455, 456,	457a
692	§ 397
697	§ 688
700 ..... §§ 473, 474,	691
701 ..... §§ 711, 712,	712a
707 .....§§ 97, 686, 690,	696
708 ..... §§ 686,	698
709 ..... §§ 554, 557a,	
669, 687, 692, 696, 711,	712a
710 ..... §§ 469, 692,	707

Sec. of R.S.	Sec. of this work
714	§ 2
716	§§ 455, 456, 457c, 460, 471
718	§§ 153, 289, 291, 292, 293
719	§ 255
720	§§ 105, 157, 270, 308, 633
721	§§ 181, 447
722	§ 529
723	§§ 81, 284
724	§§ 349, 350
725	§§ 290, 335, 343, 428a, 431
726	§ 478
729	§ 525d
731	§ 525b
737	§ 117
738	§§ 60, 399, 402
741	§ 64
742	§ 64
747	§§ 169, 205, 526a, 527
750	§ 406
751	§ 461
752	§ 461
753	§§ 461e, 461f
754	§ 466
755	§ 466
756	§ 466
757	§ 466
758	§ 466
759	§ 466
760	§ 466
761	§§ 466, 467, 688
762	§§ 461f, 466
763	§§ 467, 688
764	§ 467
765	§ 467
766	§ 467
768	§ 467
771	§ 483f
783	§ 433
784	§ 433
785	§ 433
786	§§ 180d, 433
787	§§ 427a, 433, 455a
788	§§ 427a, 455a
795	§ 333
799	§ 699
800	§§ 453, 473, 508
802	§§ 508, 509
804	§ 509
805	§ 509
808	§ 511
809	§ 511
810	§ 509
819	§§ 508, 526, 606
824	§ 416
827	§ 416
828	§ 417c
829	§§ 340, 418
832	§ 418
837	§ 416
838	§ 416
839	§ 417
840	§ 417c
841	§ 417c
842	§ 417c
843	§ 417c
844	§ 417c
845	§ 417c
846	§ 417c
847	§ 418a
848	§§ 342, 419
849	§ 419
850	§ 419
858	§§ 174, 339, 523c
859	§ 339f
860	§§ 330, 339, 339a
861	§ 329
862	§ 329
863	§§ 79, 339b, 340, 346, 352, 354
864	§§ 79, 346, 354
865	§§ 79, 346, 354
866	§§ 79, 345, 356
867	§ 79
868	§§ 342, 345, 357, 639
869	§§ 342, 355, 357, 638b, 639
870	§ 342
871	§ 342
872	§ 342
873	§ 342
874	§ 342
875	§ 358
876	§§ 64, 340, 342, 419, 522d
877	§§ 340, 522d, 523
878	§§ 522e, 523
879	§§ 522d, 523
880	§§ 522d, 523
881	§§ 522d, 523
882	§§ 333, 333a, 333b, 333c, 453, 473
883	§§ 333, 333a
884	§§ 333, 333a, 523
885	§§ 333, 333a
886	§§ 333, 333a
887	§§ 333, 523b
888	§§ 333, 333a, 333e, 523
889	§§ 333, 333b, 523b
890	§§ 333, 333b
891	§§ 333, 333d
892	§§ 333, 333e
892	§§ 333, 333e
894	§§ 333, 333e
895	§§ 333, 333j
896	§ 333
897	§ 333
898	§§ 333, 333o
899	§§ 333, 333o

Sec. of R.S.	Sec. of this work
900	§§ 333, 333o, 471
901	§§ 333, 333o
902	§§ 333, 333o
903	§§ 333, 333o
904	§§ 333, 333o
905	§§ 333, 333m, 333n
906	§§ 333, 333m, 523b
907	§§ 333, 333d
908	§§ 333, 333d
909	§§ 333, 333k, 3331, 606
911	§§ 160, 295, 340, 432, 455, 466, 486, 699
912	§§ 295, 340, 455, 466, 699
913	§ 454a
914	§§ 84, 206, 208, 215, 417c, 453, 454m, 455, 471, 555
915	§ 470
916	§ 427
917	§ 84
918	§§ 84, 453, 455
919	§ 606
921	§ 472
922	§ 163
923	§§ 433, 606
924	§§ 433, 606
925	§ 470
926	§ 470
927	§ 470
928	§ 470
929	§ 470
930	§ 470
931	§ 470
932	§ 470
933	§ 470
934	§§ 79, 470, 566
935	§ 470
936	§ 470
937	§ 470
938	§ 606
939	§§ 586, 606
940	§ 606
941	§ 572, 585
943	§ 493
944	§ 493
945	§§ 335, 493
946	§ 493
947	§ 493
948	§§ 206, 455
949	§§ 373, 707
951	§ 95
953	§§ 70, 478, 479
954	§§ 155, 206, 208, 254, 453, 454f, 455b, 520c
955	§§ 220, 224
956	§ 216
957	§ 473a
958	§ 473a
959	§ 473a
960	§ 473a
961	§ 473a
966	§ 427e
967	§ 480a
968	§§ 407, 411
969	§ 407
970	§§ 427f, 606
974	§ 408a
975	§ 408a
976	§ 408a
980	§ 408a
982	§ 407
983	§§ 419a, 419b, 420, 423
984	§ 423
985	§ 427a
986	§ 427b
987	§§ 427b, 478
988	§ 427e
989	§ 427f
990	§§ 326, 567c
991	§ 471
992	§ 471
993	§ 427d
994	§ 427a
995	§§ 257, 586, 590
996	§§ 257, 589
997	§§ 699, 700a, 701, 704, 707
999	§§ 692, 692c, 699, 700a
1000	§§ 692, 692c, 702, 703
1001	§ 425
1003	§ 692
1004	§ 699
1005	§§ 699, 705
1007	§§ 427b, 703
1008	§ 669, 698
1009	§§ 605, 606, 698
1010	§ 712
1011	§§ 536a, 687, 711, 711b
1012	§§ 700, 702
1014	§§ 340, 408, 483g, 486, 488, 489, 493
1015	§ 493
1016	§ 493
1017	§§ 493, 692
1018	§ 493
1019	§ 493
1020	§ 493
1021	§§ 495, 511
1022	§ 493
1023	§§ 495, 506r
1024	§§ 495, 500. 501, 505
1025	§§ 495, 497
1026	§ 516
1027	§§ 486, 488a
1028	§§ 486, 488a
1029	§ 489
1030	§ 537
1031	§§ 508, 526

Sec. of R.S.	Sec. of this work
1032	§ 514
1033	§§ 499, 524
1034	§§ 522e, 523
1035	§ 527c
1036	§ 527c
1037	§ 704
1040	§ 534c
1041	§ 534d
1042	§ 534f
1043	§ 180n
1044	§§ 180n, 429a, 506t
1045	§ 180n
1046	§ 180m
1047	§ 180m
1049	§ 670
1050	§ 680
1053	§ 670
1054	§ 670
1056	§ 670
1057	§ 670
1058	§§ 670, 676
1059	§ 671
1061	§ 671
1062	§ 671
1063	§ 508
1064	§ 671
1065	§ 671
1066	§ 671
1067	§§ 671, 673
1068	§§ 671, 673
1069	§§ 72, 180
1071	§ 682
1072	§ 673b
1074	§ 682
1075	§ 682
1077	§ 682
1078	§ 682
1080	§ 682
1081	§ 682
1082	§ 682
1083	§ 682
1084	§ 682
1086	§ 684
1087	§ 683
1089	§ 684
1090	§ 684
1091	§§ 97, 684
1092	§ 684
1093	§ 684
1117	§ 464
1237	§ 471
1342	§ 483d
1610	§ 471
1750	§§ 192, 335
1778	§ 583
1786	§ 468a
1795	§ 468c
1796	§ 468c
1980	§ 506d
2126	§ 333d
2224	§ 333d
2225	§ 333d
2229	§ 333d
2324	§ 281a
2010	§ 468
2469	§§ 333, 333d
2470	§ 333
2597	§ 333d
2852	§ 333s
3059	§ 487
3066	§ 487
3169	§ 502
3199	§§ 333d, 333w
3217	§ 333u
3224	§§ 79, 271b, 284
3226	§ 180k
3227	§ 180k
3228	§ 649
3229	§ 522a
3239	§ 502
3242	§ 502
3258	§ 506q
3260	§ 506q
3279	§ 506q
3281	§ 506q
3282	§ 506q
3333	§§ 333t, 606
3373	§ 333t
3397	§ 501, 506k
3398	§ 506k
3450	§ 506q
3453	§ 606
3462	§ 487
3466	§ 649
3477	§ 673
3489	§ 180f
3494	§ 180m
3515	§ 506j
3625	§ 471
3626	§ 471
3627	§ 471
3628	§ 471
3629	§ 471
3630	§ 471
3631	§ 471
3636	§ 283a
3637	§ 283a
3737	§ 673a
3744	§§ 333, 333c
3752	§ 470
3753	§ 470
3754	§ 470
3838	§ 180d
3928	§ 333b
4041	§ 333b
4063	§§ 327, 470

Sec. of R.S.	Sec. of this work
4064	§§ 327, 470
4065	§§ 327, 470
4066	§§ 327, 470
4067	§ 462a
4068	§ 462a
4069	§ 462a
4070	§ 462a
4071	§ 358
4072	§ 358
4073	§ 358
4074	§ 358
4083	§§ 73, 74
4084	§ 74
4085	§ 74
4086	§ 74
4087	§ 74
4088	§ 74
4089	§ 74
4090	§ 74
4091	§ 74
4097	§ 74
4098	§ 74
4099	§ 74
4100	§ 74
4101	§ 74
4102	§ 74
4103	§ 74
4104	§ 74
4105	§ 74
4106	§ 74
4107	§ 74
4108	§ 74
4109	§ 74
4110	§ 74
4111	§ 74
4112	§ 74
4113	§ 74
4114	§ 74
4115	§ 74
4116	§ 74
4117	§ 74
4118	§ 74
4119	§ 74
4120	§ 74
4121	§ 74
4125	§ 74
4126	§ 74
4127	§ 74
4128	§ 74
4129	§ 74
4130	§§ 73, 74
4251	§ 566
4283	§ 593
4284	§ 593
4285	§ 593
4286	§ 593
4289	§ 593
4300	§ 528
4301	§ 528
4302	§ 528
4303	§ 526
4304	§ 528
4305	§ 528
4536	§ 604
4537	§ 604
4546	§§ 572, 604
4547	§§ 572, 604
4550	§ 604
4555	§ 604
4565	§ 584
4610	§ 180m
4613	§ 605
4614	§ 605
4615	§ 605
4616	§ 605
4617	§ 605
4618	§ 605
4619	§ 605
4620	§ 605
4621	§ 605
4622	§ 605
4623	§ 605
4624	§ 605
4625	§ 605
4626	§§ 417, 605
4627	§ 605
4628	§ 605
4629	§§ 418, 605
4630	§ 605
4631	§ 605
4632	§ 605
4633	§ 605
4634	§ 605
4635	§ 605
4636	§ 605
4637	§ 605
4638	§ 605
4639	§ 605
4640	§ 605
4641	§ 605
4642	§ 605
4643	§ 605
4644	§ 605
4645	§ 605
4646	§§ 416, 605
4647	§§ 416, 605
4648	§ 605
4649	§ 605
4650	§ 605
4651	§ 605
4652	§ 606
4654	§ 605
4719	§ 333g
4799	§ 3
4825	§ 95
4886	§§ 277, 292

Sec. of R.S.	Sec. of this work
4887	§§ 277, 292, 454
4894	§§ 147, 180a
4898	§§ 112, 333, 333e
4900	§§ 146, 389a, 454m
4902	§ 332, 339, 339a
4906	§ 340
4912	§ 69
4913	§ 69
4914	§ 69
4915	§§ 69, 147, 410
4918	§§ 5, 69, 147, 404
4919	§§ 5, 112, 454m, 473
4920	§§ 188, 453, 454m
4921	§§ 5, 112, 266, 277, 389, 389a, 404
4922	§ 146
4965	§ 454n
4968	§ 180m
4969	§§ 149, 453, 454n
4970	§ 266
5013	§§ 192, 335
5141	§ 302
5187	§ 506
5189	§ 506
5191	§ 302
5195	§ 302
5198	§ 1801
5201	§ 302
5205	§ 302
5208	§ 506
5209	§§ 339, 506
5221	§ 302e
5226	§ 302e
5234	§§ 301, 302x
5235	§§ 301, 302c
5236	§§ 301, 302e
5237	§§ 283b, 301, 302e
5242	§§ 284, 470
5261	§ 671
5270	§ 490
5271	§ 490e
5272	§ 490
5273	§ 490
5274	§ 490
5275	§ 490d
5276	§ 490d
5277	§ 490d
5278	§§ 70, 491
5279	§ 491
5280	§ 490e
5298	§ 427a
5300	§ 427a
5331	§ 523n
5332	§§ 523n, 534b
5333	§ 523m
5334	§ 523n
5336	§ 506c
5339	§§ 525a, 534b
5343	§ 534b
5391	§ 483e
5392	§§ 339, 523, 606
5393	§ 523
5396	§ 506r
5397	§ 506r
5425	§ 339
5431	§ 501
5435	§ 506u
5438	§ 506u
5440	§§ 276c, 502, 506e
5480	§§ 502, 506a, 532
5481	§ 507
5508	§§ 180m, 506d
5510	§ 506d
5518	§ 506d
5539	§ 534c
5540	§ 534c
5541	§ 534
5542	§ 534c
5543	§ 534e
5544	§ 534e
5546	§§ 207, 455, 534c
5547	§ 534c
5548	§ 534c
5549	§ 534c
5550	§ 534c
5595	§§ 206, 455

CITATIONS OF STATUTES AT LARGE.

Volume 1

Page	Sec.
70	§ 537
91	§ 483g
334	§ 483g

Volume 3

Page	Sec.
350	§ 483g
781	§ 483e

Volume 4

Page	Sec.
115	§ 483c
281	§ 427
487	§ 428a
633	§ 537
634	§ 461e
659	§ 469
708	§ 66

Volume 5

Page	Sec.
539	§ 461f
716	§ 483g
727	§ 582a

Volume 8

Page	Sec.
352	§ 560j

Volume 9

Page	Sec.
72	§ 510
253	§ 458

Volume 11

Page	Sec.
383	§ 66

Volume 12

Page	Sec.
588	§ 339
755	§ 465
820	§ 671

Volume 14

Page	Sec.
13	§ 483
27	§ 537
46	§ 537
171	§ 537
306	§ 537
385	§ 537
482	§ 465
517	§ 645
558	§ 537
734	§ 465

Volume 15

Page	Sec.
227	§ 537

Volume 16

Page	Sec.
140	§ 506d
144	§ 537
438	§ 537

Volume 17

Page	Sec.
44	§ 537
197	§ 470
509	§ 457c
928	§ 560j

Volume 18

Page	Sec.
27	§ 687
113	§ 333k
157	§ 461
186	§§ 339, 339a, 523
189	§ 606
190	§ 180m
193	§ 180f
293	§ 333k
315	§§ 378, 379, 560, 582, 592, 688
318	§ 687
320	§§ 1801, 593
333	§§ 417c, 457c
336	§ 568
371	§§ 427f, 537, 551
401	§§ 58, 485f, 537, 542, 543, 543h, 544, 545, 551
470	§§ 170, 460, 549, 550, 553, 555
471	§ 537
472	§§ 363, 399, 402, 556
473	§ 697
479	§§ 522c, 523, 534e

Volume 19

Page	Sec.
2	§ 74
32	§ 506t
63	§§ 301, 302
88	§ 534
206	§§ 418a, 592
241	§ 358
248	§ 180k
251	§ 593
252	§ 606
253	§§ 68, 456
254	§ 68

Volume 20

Page	Sec.
30	§§ 339, 523e
89	§ 238
145	§ 427a
171	§ 671
277	§ 333
324	§ 671
332	§ 333d
348	§ 506k
341	§ 484
354	§§ 493, 702
415	§§ 318, 385

Volume 21

Page	Sec.
4	§ 506c
43	§ 509
252	§ 684
284	§ 671
308	§§ 333, 333k
784	§ 671

Volume 22

Page	Sec.
29	§ 180f
31	§ 526
49	§ 487
60	§ 333r
162	§ 506
215	§ 490c
284	§ 671
401	§ 180f
403	§ 500
469	§ 671
477	§ 180k

Page	Sec.
603	§ 417
631	§ 417

Volume 23

11	§ 506u
24	§ 67
57	§ 593
72	§ 66
75	§ 66
116	§ 333r
122	§ 180n
242	§ 671
257	§ 671
283	§ 180f
321	§ 81
350	§ 180f
362	§ 333g
372	§ 671
381	§ 671
437	§ 467
443	§ 691
975	§ 66

Volume 24

8	§§ 301, 302c
80	§ 593
210	§ 506l
212	§ 606
213	§ 66
253	§§ 333h, 339b, 417
373	§§ 537b, 537g
379	§§ 416, 506f, 593
380	§§ 276c, 283d, 593
382	§ 216
384	§ 180g
385	§ 329a
386	§ 457d
387	§§ 389, 389a, 389b, 389f, 404, 473
431	§ 92
505	§§ 92, 97, 671, 685, 671a
506	§§ 97, 682, 696
507	§ 97
508	§§ 97, 407
541	§ 417
552	§§ 5, 385, 529, 537, 537g, 549
554	§§ 47, 312, 314, 633
635	§§ 523c, 529
636	§ 333v

Volume 25

40	§ 454m
45	§ 550
94	§ 482
135	§ 180f
357	§§ 5, 480, 482
387	§ 180d
433	§§ 528, 83, 560, 541, 542, 543h, 544, 547, 548, 555
436	§§ 55, 312, 314, 634
437	§ 180f
476	§ 463
478	§ 497b
479	§§ 483g, 694
496	§ 506b
554	§ 318
655	§§ 688, 691
656	§§ 536, 688, 689, 698, 702, 703, 707
676	§ 4
728	§ 482
786	§ 66
855	§ 333h
859	§ 151
862	§§ 457c, 457d
873	§ 506a

Volume 26

36	§ 671a
50	§§ 333, 333b
131	§§ 77, 339
135	§ 180m
137	§ 457c
209	§§ 5, 61, 105, 131, 151a, 276b, 283, 333, 339, 416, 416a, 4541, 506c, 5061
210	§ 151a
217	§ 4
316	§ 482
424	§ 525a
466	§ 333b
505	§ 698
693	§ 693
826	§§ 417, 467, 592, 695, 696, 703, 707, 712, 712a
827	§§ 467, 536, 605, 669, 688, 691b, 693, 696, 712
828	§§ 450, 592, 608, 683, 695, 696, 698
829	§§ 536a, 592, 698, 711
830	§ 4
851	§§ 180f, 671, 683
1085	§ 333
1093	§ 180b
1106	§ 283d

Volume 27

7	§§ 335, 358
17	§ 353
25	§§ 333i, 463, 466
96	§ 70
252	§§ 413, 425
347	§ 419
423	§ 343
434	§ 69
436	§§ 69, 691
443	§§ 339, 339b
450	§ 3331

Page		Sec.
531	..... §§ 70,	454o
572	.....	§ 485
751	..§§ 394, 394c, 467, 586,	615
824	.....	§ 536a

Volume 28

7	.....	§ 463
36	.....§§ 468a, 537, 543h,	551
74	..... §§ 483h,	694
278	..... §§ 61, 180e,	2581
279	.....	§ 164
286	.....	§ 99
290	.....	§ 463
305	.....	§ 99
372	.....	§ 485
390	.....	§ 466
397	.....	§ 693
560	.....	§ 522f
570	..... §§ 151a,	283
601	..... §§ 333,	335
666	..... §§ 693,	711
698	.....	§ 691
764	..... §§ 333,	523
809	....t..... §§ 333,	523

Volume 29

57	.....	§ 333g
85	.....	§ 70
179	.....	§ 416d
180	.....	§ 417
181	.....	§ 417
184	..... §§ 418a, 471,	483g
186	.....	§ 416
458	.....	§ 180f
492	.....	§ 536a
536	.....	§ 417a
575	.....	§ 589
578	.....	§ 257
600	.....	§ 302c
692	.....§§ 147, 180a, 333, 3331, 389a, 404, 460,	691
693	..... §§ 333, 3331,	389a
694	.....	§ 180
695	.....	§ 277

Volume 30

44	.....	§ 643
253	..... §§ 67,	698
416	.....	§ 98
432	.....	§ 468a
440	.....	§ 655
444	.....	§ 642
454	.....	§ 644
494	.....	§ 96
505	.....	§ 642
544	.....§§ 5, 61, 166, 302, 417c, 506t, 523g, 608, 608a, 609, 610, 612a, 613, 614, 615, 616, 617, 617a, 618, 619, 620, 621, 622, 623, 626, 627, 629, 630, 631, 632, 633, 634, 637, 638, 638a, 638b, 639, 640, 641a, 642, 643, 654, 655, 656, 657, 658, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 659, 660, 661, 662, 663, 664, 665, 667, 669, 688, 689, 693, 696, 698, 701,	703
545	.....§§ 67, 506t, 608, 621, 622, 634, 640, 643,	645
546	..§§ 302, 608, 613, 620, 621, 622, 623, 643, 645,	659
547	..§§ 616, 617, 617a, 618, 620, 621, 625, 626, 637, 638a, 639, 640, 641, 643,	659
548	.....§§ 523g, 638a, 639,	650
549	..... §§ 616, 632, 638a, 643, 649, 651,	653
550	..... §§ 642, 653, 655, 656, 657,	658
551	...§§ 166, 627, 629, 630,	637
552	.....§§ 37, 609, 638,	639
553	.....§§ 643, 666, 667, 668, 669, 693, 696,	698
554	.....§§ 180n, 614, 629, 655, 656, 667, 669, 702,	703
555	..... §§ 638,	643
556	..... §§ 627, 638, 641,	662
557	..... §§ 627, 638, 640, 643, 650,	663
558	....§§ 180d, 642, 660, 661, 663,	664
559	..... §§ 417, 627, 638, 640, 650,	661
560	..... §§ 638, 640,	645
561	..... §§ 619, 627, 629, 638a, 645,	655
562	..§§ 619, 642, 644, 647,	659
563	..§§ 647, 649, 652, 659,	655
564	.....§§ 643, 644, 649,	664
565	.....§§ 642, 644, 648,	649
566	.....	§ 646
591	.....§§ 691,	693
717	.....	§ 483c
727	.....	§ 536a
756	.....	§ 604
822	.....§§ 216, 231, 459,	705
829	..... §§ 592,	667
1354	.....	§ 573

Volume 31

54	.....	§ 699
77	.....	§ 70
84	..... §§ 66, 70,	608
85	.....§§ 66, 70, 691b,	696
141	..... §§ 71,	691

Page	Sec.
158	§§ 66, 71, 608, 691, 691b, 696
249	§ 66
270	§§ 478, 479
321	§§ 66, 67
322	§ 66
323	§ 66
324	§ 66
325	§ 66
326	§ 66
329	§ 333b
414	§§ 4, 691, 691a
450	§ 534c
626	§§ 490, 693, 695
660	§§ 255, 698, 703
781	§ 66
794	§ 27
853	§ 687
864	§ 5
950	§§ 340, 343
953	§ 70
1093	§ 463
1189	§§ 68, 468c, 691
1227	§ 689b, 691
7780	§ 70

Volume 32

95	§ 454m
176	§ 463
194	§ 506l
279	§§ 615, 630, 633, 635
385	§ 66
388	§ 551
419	§ 417c
476	§ 417c
529	§ 468c
691	§§ 72, 696
695	§§ 72, 691, 696
726	§ 671a
797	§§ 5, 608, 610, 612, 616, 617, 620, 625, 629, 630, 638b, 639, 642, 644, 649, 652, 655, 657, 662, 663, 664, 665
800	§§ 643, 644
806	§ 489
823	§§ 688, 689, 689f, 698
825	§ 5
827	§§ 339, 343
828	§ 5
842	§ 644
847	§§ 339, 339b, 506f
996	§ 671a
1225	§ 454m

Volume 33

59	§ 4
185	§ 333d
188	§§ 483h, 694
249	§ 4
394	§ 463
452	§ 671
484	§ 671
485	§ 671
548	§ 4
689	§ 25
691	§ 25
698	§ 490f
724	§§ 61, 688a
728	§§ 333l, 389i
729	§ 389i
731	§ 688a
806	§ 671
811	§§ 5, 61, 180e, 258
992	§ 66
997	§ 66
1085	§ 691
1156	§ 416
1207	§ 416

Volume 34

116	§§ 693, 695
144	§ 5
168	§§ 279, 389
263	§ 606
267	§§ 608, 649
276	§ 608
584	§§ 61, 333h
585	§ 457c
588	§§ 61, 416a
590	§§ 180g, 416
593	§ 457d
595	§§ 454k, 593
596	§§ 5, 151b, 166b
601	§§ 151b, 166b, 333r
603	§ 180n
607	§§ 454o, 687
618	§ 339
768	§§ 411, 525g, 506m, 607, 691
769	§§ 483, 606
771	§ 606
798	§§ 5, 339
814	§§ 4, 73, 693
815	§ 73
816	§ 511
898	§ 463
931	§ 66
1218	§ 483h
1228	§ 333r
1246	§§ 536, 688, 698
1251	§§ 69, 148, 149, 429, 473
1416	§ 312

Volume 35

40	§ 700
65	§§ 24, 70, 186u, 593, 602, 711

Page	Sec.
66	§ 180j
403	§ 77
416	§ 506b
424	§ 671
448	§§ 333v, 339a
614	§ 522f
649	§ 457d
838	§§ 689c, 691b
1075	§ 61, 180, 278, 389, 416, 416b, 429, 473
1080	§§ 389g, 389h
1081	§§ 389g, 389h
1084	§§ 180n, 333f
1086	§ 333f
1088	§§ 483, 506c, 523n, 534b
1089	§§ 506c, 523n
1090	§ 606
1088	§§ 523n, 534b
1089	§§ 506c, 523n
1092	§ 506d
1095	§ 606u
1131	§ 506a
1137	§ 525f
1142	§§ 483c, 525a, 525d
1143	§ 534b
1144	§ 180n
1145	§ 483c
1149	§ 333v
1151	§ 534b
1152	§§ 525d, 527c, 534b
1906	§ 506c

Volume 36

Page	Sec.
11	§§ 77, 96
91	§§ 689a, 698
105	§§ 77, 689a, 698
117	§ 5
209	§ 151a
263	§ 463
264	§ 463
291	§§ 61, 180j, 377b
331	§ 606
350	§ 333h
352	§ 339f
539	§§ 258k, 333h
543	§ 258k
544	§ 610
554	§ 180g
555	§ 457d
557	§§ 66, 264a
565	§ 66
557	§ 66
576	§ 66
604	§ 560
825	§§ 500, 506g
826	§ 506g
830	§ 151b
838	§§ 6, 61, 608, 610, 612, 615, 616, 617, 617a, 629, 633, 634, 636, 638a, 642, 643, 644, 653, 655, 663, 664
839	§§ 653, 656
842	§ 644
851	§§ 655, 671b
854	§ 151a
866	§ 100
901	§§ 413, 417a
913	§ 333h
1008	§ 551
1075	§§ 150, 180b
1086	§§ 483h, 694
1087	§§ 457c, 468a, 483a, 525a, 525b, 525d, 537b, 670, 671, 672, 673, 673b, 676, 680, 682, 683, 684, 688, 688a, 689, 689f, 690, 691, 691a, 693, 694, 696, 698, 703, 711
1094	§ 694
1097	§§ 461e, 551
1101	§ 454b
1102	§ 110a
1103	§ 537a
1135	§ 693
1136	§ 671
1137	§ 671
1139	§ 671
1156	§ 711
1157	§§ 687, 691b
1158	§§ 691b, 710
1159	§§ 689b, 691
1162	§ 264a
1164	§ 473b
1165	§ 473b
1166	§ 473b

Volume 37

Page	Sec.
46	§ 5
51	§ 66
61	§ 682
118	§ 66
268	§ 576
242	§ 180p
489	§§ 389g, 389h
501	§ 522f
555	§ 691
565	§§ 691c, 693, 711
630	§ 525c
667	§ 151a
670	§§ 506h, 525c
683	§§ 332a, 523k
701	§ 457d
724	§ 333f
731	§ 151a
736	§ 329a
737	§ 151b
842	§ 644
1013	§ 264a

Volume 38

Page	Sec.
104	§ 694
107	§ 276a
189	§ 333s
220	§§ 688, 693
275	§§ 333s, 522f
278	§§ 454k, 537e
279	§ 180f
700	§ 694
701	§ 483h
703	§ 689a
722	§ 339b
717	§ 329a
719	§ 693
721	§ 457c
730	§§ 151a, 333h, 333p, 454l
731	§§ 151a, 181a, 333p
736	§§ 151a, 276b
737	§§ 151a, 276b
738	§§ 264a, 276a, 428c, 430b
739	§§ 430a, 430b
740	§§ 429a, 430b
785	§ 506p
790	§§ 669, 711
791	§ 673
803	§ 691b
804	§§ 669, 689c, 691b, 693, 696, 711
956	§§ 215a, 454c, 454g, 546, 687, 710, 712
996	§ 671
1077	§ 180f
1164	§§ 560j, 561j
1185	§ 560d

Volume 39

121	§ 302c
437	§ 333b
441	§ 457d
532	§§ 461e, 551
539	§ 333v
650	§ 483d
664	§ 483d
726	§§ 689d, 692, 710
727	§§ 536a, 669, 689c, 689e, 691b, 698
728	§ 566
729	§ 329a
735	§§ 688, 693
737	§§ 180i, 283c
782	§ 333t
889	§ 333r
966	§ 693
999	§ 657
1069	§ 506q
1126	§ 339b
1132	§§ 691b, 693
1193	§ 671

Volume 40

Page	Sec.
80	§§ 497e, 506r
157	§§ 562, 417b
183	§ 671
219	§ 523n
228	§ 487a
229	§ 487c
272	§ 276c
274	§ 333v
276	§ 276d
279	§ 671
282	§ 671
285	§ 671
353	§§ 523n, 671
389	§ 180f
395	§§ 560f, 560g
399	§ 416c
407	§ 180f
408	§ 180f
419	§ 180o
438	§ 671
439	§ 671
451	§ 566
454	§ 671
535	§ 671
537	§ 671
538	§ 671
551	§ 671
720	§ 671
826	§ 671
900	§ 566
904	§ 671
916	§ 671
1010	§ 671
1048	§ 671
1181	§§ 536a, 701, 711g, 711j

Volume 41

305	§§ 430c, 483b, 487a, 506q, 522b, 523l, 525f, 551, 606
315	§ 487c
456	§§ 333h, 566
462	§ 566
491	§ 333h
525	§§ 566a, 671
537	§ 560e
554	§ 555
733	§§ 483h, 693
787	§ 551
988	§ 560b
1000	§ 560b
1002	§ 560b
1003	§ 560b
1004	§ 560b
1005	§ 560b
1006	§ 560b
1007	§ 560b

CITATIONS OF JUDICIAL CODE.

(36 St. at L. 1087.)

Page	Sec.
1	§ 256
4	§ 257
5	§§ 71, 257
6	§ 257
7	§ 65
8	§ 65
10	§ 65
12	§ 65
13	§§ 65, 256, 370
14	§§ 256, 370
15	§§ 256, 370
16	§§ 256, 370
17	§§ 256, 370
18	§§ 256, 370
19	§§ 256, 370
20	§§ 356, 371
21	§ 372
22	§ 370
23	§ 370
24	§§ 5, 6, 45, 61, 63, 96, 98, 180f, 468, 560, 606
25	§§ 5, 693, 694
26	§§ 5, 694
27	§ 5
28	§§ 5, 61, 537j, 541, 547, 549, 551
29	§§ 543, 544, 545, 547, 548a, 549, 555
30	§§ 544, 550
31	§§ 5, 537, 553
32	§ 5
33	§§ 5, 257, 537, 551, 552, 553
34	§§ 5, 537f
35	§ 553
36	§§ 311, 556
37	§ 363
38	§ 163
39	§ 553
40	§ 525
41	§ 525
42	§ 525
45	§ 61
46	§ 61
47	§ 61
48	§ 61
49	§ 61
52	§§ 61, 163
53	§ 163
54	§§ 64, 163
55	§§ 61, 64, 163
56	§§ 64, 163, 304, 306
57	§§ 61, 166
62	§ 62
65	§ 312
66	§§ 55, 66, 314
69	§ 5
71	§ 66
77	§ 66
80	§ 66
81	§ 66
83	§§ 66, 71
84	§ 66
85	§ 66
89	§ 66
90	§ 66
91	§ 66
95	§ 66
96	§ 66
97	§ 66
102	§ 66
103	§ 66
104	§ 66
105	§ 66
106	§ 66
108	§ 66
111	§ 66
112	§ 66
114	§ 66
115	§ 66
116	§ 4
120	§§ 693, 711
126	§ 5
128	§§ 592, 688, 691b, 693, 696
129	§§ 390, 560, 693, 696, 698, 703
130	§ 671a
131	§§ 73, 693, 711
133	§ 4
134	§§ 693, 696, 711
135	§ 4
138	§ 680
140	§ 670
141	§ 670
142	670
144	676
145	671
146	671
147	671
150	671
151	671
152	685
153	671
155	671
156	672
158	671
159	672
161	677
162	§§ 691, 692
163	677
165	677
166	677

Page	Sec.
167	§ 677
168	§ 682
169	§§ 671, 677
170	§ 677
172	§ 684
174	§ 683
175	§ 683
176	§ 685
177	§ 684
179	§ 684
184	§ 673b
188	§ 682
198	§ 698
205	§§ 256, 370
207	§§ 75, 151, 457
208	§ 75
209	§ 75
211	§ 75
212	§ 75
215	§ 75
230	§ 3
234	§ 455
237	§§ 669, 689d, 692, 696, 717
238	§§ 592, 688, 691, 696, 698, 711
239	§§ 689, 689f, 691b
240	§ 460, 688, 689
241	§ 688
242	§§ 686, 690, 696
243	§§ 686, 698
244	§§ 687, 691, 696, 698, 711
246	§§ 689c, 691b, 698, 711
247	§§ 691, 696, 698, 711
248	§§ 691, 698, 711
249	§ 711
250	§§ 436, 467, 691, 696, 698, 711
251	§§ 457, 689, 691
253	§ 467
256	§§ 5, 483a, 560f
261	§ 329
262	§§ 3, 460, 469, 693
263	§§ 250, 291
264	§§ 255, 256, 289
265	§ 270
266	§§ 105, 266, 688
267	§ 81
268	§ 428
269	§§ 711g, 711j
271	§ 5
272	§ 5 6
274	§ 687
275	§ 508
276	§ 509
277	§ 509
278	§ 508
279	§ 510
282	§ 511
284	§ 509
285	§ 509
286	§ 526
288	§ 526
291	§ 474
297	§ 537
299	§§ 5, 6, 495
1288	§ 688a
4138	§ 607

CITATIONS OF EQUITY RULES.

No.	Sec.
1	§ 251
3	§§ 249, 257
4	§§ 251, 255, 257, 428d
5	§§ 172, 249, 257
6	§ 252
7	§§ 160, 162, 252
8	§§ 64, 186f, 251, 255, 398, 404, 427g, 428b, 433, 439, 441
9	§§ 439, 440
10	§§ 404, 417, 427, 429
11	§ 426
12	§§ 160, 161, 200
13	§ 163
14	§ 161
15	§§ 163, 167a, 433
16	§§ 163, 167a, 171, 172, 173, 189, 200, 331
17	§ 172
18	§ 144
19	§ 209
20	§§ 137, 240
21	§§ 136, 239, 254, 345
22	§§ 80, 211, 368
23	§§ 80, 368
24	§§ 155, 191, 205, 223, 232, 367
25	§§ 133, 135, 136, 137, 138, 154, 156, 291, 315, 329, 416
26	§§ 139, 140, 141, 142, 146, 367

No.	Sec.
27	§§ 145, 150, 264
28	§ 209
29	§§ 129, 130, 137, 143, 173, 175, 231, 239, 259b, 347, 364, 454f
30	§§ 174, 175, 189, 190, 194, 198, 200, 209, 214, 331
31	§§ 171, 174, 198c
32	§§ 171, 213, 365
33	§§ 204, 239
34	§§ 195, 200, 231, 233
35	§§ 216, 221, 223, 232, 704
36	§ 335
37	§§ 110, 113, 258b, 259
38	§ 114
39	§§ 117, 129, 176
40	§§ 154, 409
41	§ 119
42	§§ 112, 120
43	§ 129
44	§§ 52, 129, 519
45	§§ 216, 221, 224
46	§§ 332, 352, 711
47	§§ 351, 352
48	§ 352
49	§ 352
50	§§ 352, 418c, 420
51	§ 352
52	§§ 340, 341, 352, 353, 354, 376
53	§§ 352, 376
54	§§ 352, 354
55	§ 352
56	§§ 162, 226, 352
57	§§ 236, 362, 369
58	§§ 152, 174, 224, 348, 349
59	§ 386
60	§§ 386, 388, 606
61	§ 606
62	§§ 190, 388, 606
63	§§ 389, 606
66	§ 393
67	§§ 352, 355
68	§§ 385, 428
69	§ 445
70	§§ 90, 106, 107, 346
72	§ 444
73	§§ 250, 255, 257, 291, 385, 404
74	§ 703
75	§ 704
76	§§ 392, 409, 420, 704
77	§§ 391, 704, 706
78	§§ 335, 391
79	§§ 169, 321
80	§ 391
83	§ 393
84	§ 394
86	§ 404
87	§ 91
92	§§ 401, 427
93	§ 703
94	§ 555

CITATIONS OF ADMIRALTY RULES.

No.	Sec.
1	§§ 560, 561
2	§§ 567, 567c
3	§§ 563, 567c
4	§§ 567c, 582, 585
5	§§ 567a, 580c, 584, 585
6	§§ 562, 570
7	§§ 565, 567c, 590a
8	§§ 562, 571
9	§§ 565, 571
10	§§ 565, 567b, 571
11	§§ 571, 587
12	§§ 567b, 571, 586
13	§§ 561a, 564, 568
14	§§ 561a, 564, 575, 592a
15	§§ 563, 564
16	§§ 561a, 564, 571, 572
17	§§ 561a, 564, 569
18	§§ 564, 572
19	§§ 564, 572
20	§ 572
21	§§ 561, 572, 606
22	§§ 560, 561, 606
24	§§ 562, 570, 573, 580a
25	§§ 569, 570
26	§§ 565, 575
27	§ 578
28	§§ 568, 575, 579, 581
29	§§ 575, 586
30	§§ 577, 581
31	§§ 577, 581
32	§§ 577, 581
33	§§ 575, 581
34	§§ 578, 587, 588
35	§ 578
36	§§ 567b, 568, 578
37	§§ 567b, 581, 584
38	§§ 581, 581b
39	§ 568a
40	§ 586
41	§§ 575, 589

No.	Sec.	No.	Sec.
42	§ 589	53	§§ 593, 602
43	§§ 584, 589	54	§§ 594, 596
44	§§ 560, 572	55	§§ 593, 596, 601
45	§ 592a	56	§§ 563, 574, 596
46	§ 583	57	§§ 569, 602
47	§ 590a	58	§ 601
48	§ 589	59	§ 606
49	§ 579	60	§ 606
50	§ 580b	61	§ 606
51	§§ 593, 596, 598, 600	62	§ 606
52	§§ 584, 601	63	§ 606

CITATIONS OF SUPREME COURT RULES.

No.	Sec.	No.	Sec.
3	§§ 3, 453	26	§ 707
4	§ 479	27	§ 707
5	§§ 3, 160, 164, 699	28	§ 705b
6	§§ 248, 673, 704, 705e, 707f	29	§ 703
8	§§ 699, 704	30	§§ 707, 708
9	§§ 699, 704, 705, 705a	31	§§ 706, 707
10	§§ 417, 420, 428, 704, 705, 706	32	§ 707
		33	§ 704
11	§ 704	34	§§ 467, 493, 703
12	§§ 592a, 709	35	§§ 699, 704, 705, 707
13	§§ 329, 355, 707	36	§§ 493, 699, 703
14	§ 704	37	§§ 689, 689e, 689f, 699
15	§ 227	39	§ 712
16	§§ 705, 705a, 707	48	§ 352
17	§ 707	62	§ 677
18	§§ 705, 707	63	§ 677
19	§§ 705, 705a, 707	64	§ 677
20	§ 707	75	§ 704
21	§§ 699, 701, 705, 707	76	§ 704
22	§§ 700, 707	77	§ 704
23	§ 712	91	§ 705b
24	§§ 408, 417		

CITATIONS OF RULES OF CIRCUIT COURTS OF APPEALS.

No.	Sec.	No.	Sec.
10	§ 698	22	§§ 705, 705a
11	§§ 699, 701, 704, 705, 707	23	§§ 412, 420, 706
13	§§ 560, 703, 592	24	§§ 699, 701, 705, 707
14	§§ 699, 704, 700a	25	§ 707
15	§ 704	26	§ 706
16	§§ 704, 705, 705a	29	§ 708
17	§ 705b	30	§ 712
18	§ 704	31	§ 407
19	§ 705	34	§ 704
20	§ 705b	37	§ 698
21	§ 707	75	§ 700

ADMIRALTY RULES OF THE C. C. A. FOR THE SECOND AND NINTH CIRCUITS.

No.	Sec.	No.	Sec.
1	§ 592	4	§ 592
2	§ 592	8	§ 592a
3	§ 592	15	§ 592

CITATIONS OF RULES OF COURT OF CLAIMS.

No.	Sec.	No.	Sec.
4	§ 676	48	§ 682
6	§ 676	49	§ 682
7	§ 676	50	§ 682
8	§ 676	51	§ 682
10	§ 479	52	§ 682
12	§ 676	53	§ 682
13	§ 676	54	§ 682
14	§ 676	55	§ 682
15	§ 673b	56	§ 682
16	§ 673b	57	§ 682
17	§ 673b	58	§ 682
18	§ 673b	59	§ 682
19	§§ 227, 673b	60	§ 682
21	§ 673	62	§ 682
22	§ 673	64	§ 682
23	§§ 673, 674	65	§ 682
25	§§ 673b, 675	66	§ 682
26	§ 673b	67	§ 682
27	§ 673b	68	§ 682
28	§§ 673b, 679	69	§ 682
29	§ 674	70	§ 682
30	§§ 673, 674	72	§ 682
31	§ 674	73	§ 682
32	§§ 673b, 674, 675	74	§ 680
33	§ 674	75	§ 680
35	§ 678	76	§ 682
36	§ 682	77	§ 680
37	§§ 674, 682	79	§ 680
38	§ 675	83	§ 680
39	§§ 674, 682	86	§ 680
40	§ 682	89	§ 677
41	§ 682	92	§§ 680, 683
42	§ 682	94	§ 683
43	§§ 677, 682	95	§ 683
44	§§ 677, 682	96	§ 686
45	§§ 677, 682	97	§ 682
46	§ 682	102	§§ 673b, 680
47	§ 682		

RULES OF APPEALS FROM COURT OF CLAIMS.

No.	Sec.	No.	Sec.
1	§ 686	4	§ 680
2	§ 686	5	§§ 680, 686
3	§§ 686, 700		

CITATIONS OF GENERAL ORDERS IN BANKRUPTCY.

No.	Sec.
III	§ 629
IV	§ 627
VI	§§ 614, 628, 637
VII	§§ 627, 637
VIII	§§ 618, 629
IX	§ 627a
X	§ 659
XI	§§ 627a 628, 638
XII	§§ 633, 638, 651, 655
XIII	§§ 638, 640
XIV	§ 640
XV	§ 640
XVI	§ 640
XVII	§§ 638, 640, 650
XVIII	§§ 140, 634, 641a, 642
XX	§ 638
XXI	§§ 643, 645
XXII	§§ 638, 638b
XXIII	§ 638
XXIV	§ 642
XXV	§ 640
XXVI	§ 638
XXVII	§§ 610, 638
XXVIII	§ 643
XXIX	§ 642
XXX	§ 651
XXXI	§ 655
XXXII	§§ 615, 655
XXXIV	§§ 658, 659
XXXV	§§ 659, 660, 662, 663
XXXVI	§ 667
XXXVII	§ 220
XXXVIII	§ 627a

INDEX

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Vol. II begins at § 197, page 1125; Vol. III begins at § 453, page 2201; Vol. IV begins at § 670, page 3597.

A.

ABATEMENT—
Defect in jurisdiction may be set up at any time, § 363, p. 1818.
Cured by filing bill of revivor, § 216, p 1187.
What causes abatement of suits in equity, § 216, p. 1187.
Effect of, § 217, p. 1194.
Common-law procedure respecting, § 216, p. 1192; § 453, p. 2204; § 459, p. 2283.
Of appeal or writ of error in Supreme Court of the United States, for failure to make representatives of deceased persons parties, § 697, p. 2454.
see also PLEAS.
ABATEMENT AND REVIVOR—
Of suits in equity, §§ 216-224, pp. 1186-1209.
Of actions at law, § 216, p. 1190; § 453, p. 2201.
see COURT OF CLAIMS.
ABSENT PARTY (see PATENT CASES; NATIONAL BANKS)—
When interest of, in controversy is very small, § 124, p. 736.
ACCIDENT—
As a subject of relief in equity, § 79, p. 546.
ACCOUNT—
When opened by equity, § 151d, p. 894.
Bill for, what to contain, § 153, p. 908.
Discovery in bill demanding an, § 348, p. 1755.
Cross bills need not be filed in certain actions for an, § 198, pp. 1130, 1131.
Of receiver, § 308, pp. 1548, 1549; § 312, p. 1576; § 321, pp. 1616, 1617, 1618; § 384, p. 1871.
Of receiver, master passing, § 317, p. 1602.
Reference to master to take, § 384, p. 1871.
In which form to be brought before master, § 389, p. 1880.
Errors in master's statement of, § 393, p. 1928.
Decrees for, shall specify the time from which the account is to be taken, § 404, p. 1986.
see MASTER.
ACCOUNTING—
Of bailiffs, § 151d, p. 894.
Merchants, § 151d, p. 894.
Trustees, § 79, p. 544.
Guardians, § 79, p. 544.
Receivers, § 79, p. 334; § 308, p. 1547; § 317, p. 1602; § 321, p. 1616; § 384, p. 1871.
Bill for, § 79, p. 555.
When stockholders are necessary parties to suit for an, against corporation, § 113, p. 701.
Suit for, by partner, who necessary parties to, § 119, pp. 717-718.

Vol. II begins at § 197, page 1125; Vol. III begins at § 453, page 2201; Vol. IV begins at § 670, page 3597.

ACCOUNTING (continued)—
Between partners, necessary parties to, § 120, p. 728.
Decree for, should contain a submission by the plaintiff to account, § 400, p. 1976.
ACKNOWLEDGMENT—
Want of, whether invalidating bond given on removal of cause, § 547, p. 3006.
ACTION AT LAW—
When not enjoined, § 79b, p. 559.
ACTIONS—
Survival of, § 216, p. 1192.
ACTS—
Of state and territorial legislatures, introducing in evidence, § 333m.
In bankruptcy, see BANKRUPTCY.
see STATUTES.
ADDRESS—
In bills, rules relative to, and form of, § 134, p. 755; § 135, p. 756.
ADEQUATE REMEDY AT LAW (see REMEDY AT LAW).
ADJUSTMENT—
Of liability, as a subject of jurisdiction in equity, § 79, p. 544.
ADMINISTRATION—
Ancillary jurisdiction, § 51, p. 180.
Ancillary letters, foreign administrator, § 92, p. 589.
Necessary parties to bills in equity, when right of, is in dispute, § 126, p. 736.
Institution of administration proceedings in State courts does not divest Federal court of jurisdiction over property of deceased judgment debtor in its custody, § 54, p. 205.
ADMINISTRATOR—
Suits against, § 52, p. 189.
Suits against, by next of kin, § 79, p. 544, n. 1.
Capacity of foreign, to sue, § 92, p. 589; § 119, p. 714.
Foreign, when cannot be sued, § 94, p. 592.
When to be made a party to suits affecting estate, § 110, p. 677.
When necessary parties to suits, § 113, p. 692.
Parties to suits against, § 141, p. 794.
Citizenship of, when a party to a suit, § 44, pp. 152, 153; § 46, p. 163.
Appointment of, when there is a suit against trustee of a fund of an intestate, § 113, p. 692.
Evidence in actions by or against, § 339, pp. 1714, 1715.
Abatement and revival of suits, § 216, p. 1191.
see EXECUTORS AND ADMINISTRATORS.
ADMINSTRATOR'S SURETIES—
Suit against, § 79, p. 544.
ADMIRALTY—
Answer, § 575, pp. 3163-3166.
default on failure to, § 575, p. 3162.
requisites of, § 575, p. 3162.
how verification of answer to interrogatory obviated, § 575, p. 3163.
defenses by way of counter-claims, § 575, p. 3165.
contributory negligence no bar to recovery, § 575, pp. 3165, 3166.
issue on new facts in, § 575, p. 3166.
Appeals (see APPEAL AND ERROR).
Appraisement, § 573, p. 3159.
Assignment of error, § 592, p. 3201.
Bond to the marshal, § 572, p. 3158.
Costs, § 411, p. 2006; § 590a, p. 3195.

Vol. II begins at § 197, page 1125; Vol. III begins at § 453, page 2201; Vol. IV begins at § 670, page 3597.

ADMIRALTY (continued)—
Damages, § 575, p. 3165.
Decrees
interlocutory, § 584, p. 3182.
final, § 585, pp. 3184-3186.
Exceptions, to pleadings, § 578, pp. 3168-3170.
Evidence, § 583, p. 3179.
depositions, § 583a, p. 3181.
documentary evidence, § 583b, p. 3181.
Jurisdiction, in general, § 560, pp. 3099-3103.
contracts enforceable in, § 560a, p. 3103.
liens enforceable in, § 560b, p. 3105.
torts, § 560c, p. 3116.
claims for negligence, § 560d, p. 3119.
death claims, § 560e, p. 3122; § 576, p. 3167.
effect of State Workmen's Compensation laws, § 560f, p. 3124.
concurrent jurisdiction of State courts, § 560g, p. 3126.
limitation of, by residence, § 560h, p. 3127.
controversies between foreigners, § 560i, p. 3128.
claims by foreign seamen against foreign vessels, § 560j, p. 3129.
Laches, § 576, pp. 3166-3168.
time limit for salvage suits, § 576, p. 3167.
jurisdiction over death claims, § 560e, p. 3122; § 576, p. 3167.
State practice when followed, § 576, p. 3167.
limitations, § 576, p. 3167.
Libels, § 561, pp. 3130-3134.
what libel must contain, § 561, p. 3130.
proceedings *in rem*, § 561, pp. 3131-3132.
proceedings *in personam*, § 561, pp. 3131-3132.
prayer for relief, § 561, p. 3133.
joinder of causes of action in, § 561a, pp. 3134, 3135.
security for libelant for costs, § 562, pp. 3135, 3136.
in forma pauperis, § 562, p. 3136.
co-libelant, § 563, p. 3137.
libel against more than one vessel, § 563, p. 3138.
cross-libel, § 580, pp. 3171, 3172.
security by cross libelant, § 580a, p. 3172.
security for damages of cross libelant, § 580b, pp. 3172, 3173.
abatement and revivor, § 580c, pp. 3173, 3174.
interrogatories and discovery, § 581, pp. 3174-3176.
dismissal of libel by the libelant, § 581a, p. 3176.
dismissal for failure to prosecute, § 581b, p. 3177.
of review, § 591, pp. 3195, 3196.
Mandamus in, § 457, p. 2252.
Parties, § 119, p. 437; § 563, p. 3135.
Petition to bring in additional parties, § 574, pp. 3160-3162.
Priorities, § 590, pp. 3192-3195.
Prize causes, proceedings in, § 605, pp. 3239-3244.
Proceedings for limitation of liability of shipowners, § 593, p. 3207.
vessels in respect to which limitation of liability may be obtained, § 594a, p. 3214.
court where petition may be filed, § 594, pp. 3215, 3216.
privity or knowledge of owner, § 595, pp. 3216-3219.
libel or petition for, § 596, pp. 3219-3222.
surrender to secure, § 597, pp. 3222-3224.
appraisement in proceedings for, § 598, pp. 3224-3226.
injunctions in proceedings to limit liability, § 599, pp. 3226, 3227.

Vol. II begins at § 197, page 1125; Vol. III begins at § 453, page 2201; Vol. IV begins at § 670, page 3597.

ADMIRALTY (continued)—
monition, § 600m, pp. 3227, 3228.
proof of claims in proceedings for, § 601, pp. 3228-3230.
answer in proceedings for, § 602, pp. 3230, 3231.
trial of proceedings for, § 603, pp. 3231-3233.
Process
mesne process, § 564, pp. 3138-3140.
in rem, § 565, pp. 3140, 3141.
cases in which the res cannot be arrested, § 566, pp. 3141-3144.
libels *in personam* against the United States, § 566a, pp. 3144-3148.
in personam, § 567, pp. 3148, 3149.
foreign attachment, § 567a, pp. 3149-3151.
garnishee process, § 567b, pp. 3151, 3152.
arrest in admiralty, § 567c, pp. 3152, 3153.
return of process and defaults, § 568, pp. 3153, 3154.
opening of default, § 568a, p. 3154.
Prohibition, writ of, § 456, p. 2248.
Pure Food and Drugs Act, § 607, pp. 3250-3253; § 494, p. 2629; § 506m, p. 2711.
Release of property from custody of marshal, § 569, p. 3154; § 572, p. 3158.
security required to obtain *supersedeas* where property is in custody of marshal under, § 569, p. 3154.
Sales, § 586, pp. 3186-3188.
perishable property, § 587, pp. 3188, 3189.
petition against proceeds of sale, § 589, pp. 3190-3192.
Security by claimants for costs, § 570, p. 3155.
Seizures, proceedings on, § 606, pp. 3244-3250, § 607, pp. 3250-3253.
exemption from, § 566, p. 3141.
proceedings for the condemnation and sale of property under suits to enforce penalties and forfeitures, § 606, p. 3244.
suits on behalf of the United States, § 606, pp. 3244, 3245.
Stipulations, § 571, p. 3155.
Summary proceedings to collect sailors' wages, § 604.
Trials, § 582, pp. 3177, 3178; § 329a, p. 1643; § 583, p. 3179.
by jury in admiralty, § 582, p. 3178.
new trials, § 582b, p. 3179.
verdict reviewable by appeal, § 582, p. 3179.
see FORMS.
Rules in, pp. 4631-4643.
see APPEAL AND ERROR.
ADMISSIONS—
Effect on value of matter in dispute, § 22, p. 71.
Not necessary to charge specifically in bill in order to give in evidence, § 137, p. 774.
By demurrer, § 366, p. 1827.
And denials in answer independent of discovery, § 174, pp. 997-1003.
see also EVIDENCE.
ADVANCING APPEALS—
On calendar of Supreme Court, § 707.
ADVICE—
Receiver applying to court for, § 308, p. 1547.
To receivers, § 310, p. 1561.
see also INSTRUCTIONS.
AFFIDAVITS—
To bills, when required, § 156, pp. 919, 920.
Failure to support bill by, in certain cases demurrable, § 367, p. 1836.

Vol. II begins at § 197, page 1125; Vol. III begins at § 453, page 2201; Vol. IV begins at § 670, page 3597.

AFFIDAVITS (continued)—
To support application for leave to amend, § 215, p. 1182.
Necessary to support an *ex parte* application for an injunction to restrain the infringement of a patent, § 277, p. 1397.
Upon an application for an injunction, § 293, p. 1436.
To bill of costs, § 423, p. 2076.
To show value of matter in dispute where it does not appear of record, § 696, p. 3766.
Of deposit in mail of notice and brief, on motion to dismiss appeal or writ of error, § 705e, p. 3851.
see also EVIDENCE.
AFFIRMANCE—
Motions for, § 705f, p. 3853.
By Supreme Court of judgment or decree, § 711, p. 3873; § 712, p. 3906.
By divided court, § 711, p. 3875.
AFFIRMATION—
In lieu of oath, § 335, p. 1710.
AFFIRMATIVE PROMISE—
Injunction to restrain violation of negative promise, though court has in the particular case no power to compel keeping of affirmative promise, § 281, p. 1409.
AGENTS—
Making parties to suits against principals, § 111, p. 679.
Bill by principal against, § 79, p. 544.
Citizenship of as affecting jurisdiction, § 42, p. 139.
Service upon, of corporation, § 164a, b, c, d, pp. 937-948.
In possession of property not indispensable parties, § 119, p. 715.
AGREEMENT—
Alternative relief in action affecting, § 138, p. 775.
Between counsel, must be reduced to writing, or made in open court, § 330, p. 1649.
Bill to reform and enforce, not multifarious, § 142, p. 799.
ALABAMA—
Divided into three districts, § 66, p. 276.
counties and times and places of holding court therein enumerated, § 66, p. 276.
District of, included within Fifth Circuit, § 4, p. 10.
ALASKA—
Within Ninth Circuit, § 66, p. 279.
Writ of prohibition to District Court of, § 456, p. 2248.
District Court of, jurisdiction, § 81, p. 561.
Divided into four divisions, § 66, p. 279.
Places of holding terms, § 66, p. 279.
ALIENAGE—
When not terminated, § 46, p. 159.
ALIENATION OF PROPERTY—
Injunctions to restrain, § 272, p. 1356.
ALIEN ENEMY—
Demurrer for being, § 367, p. 1833.
ALIEN ENEMY ACTS, § 462a, pp. 2310, 2311.
ALIEN IMMIGRATION ACT, § 463, pp. 2325-2332.
ALIEN PROPERTY CUSTODIAN, § 96k, pp. 630-633.
ALIENS—
Controversy between, § 45, p. 158.
When incapable of being plaintiffs, §§ 85, 87, p. 580.
If party to bill, necessary to aver citizenship of foreign State, §§ 134, 135, pp. 755-762.

Vol. II begins at § 197, page 1125; Vol. III begins at § 453, page 2291; Vol. IV begins at § 670, page 3597.

ALIENS (continued)—
Cause of demurrer, § 367, p. 1833.
Defendant, when cannot remove case to District Court, § 537f, p. 2893.
Jurisdiction of suit by or against, § 5, p. 14; § 46, p. 166; § 61, p. 191.
Right to remove case, § 537f, p. 2893.
In what district sued, § 62, p. 249; § 45, p. 156.
ALIMONY—
Value of matter in dispute in a suit for, § 6, p. 34.
ALLOWANCE—
To counsel in receiverships, § 321a, p. 1618.
see also COSTS; APPEAL AND ERROR.
ALTERATIONS—
In answer, §§ 191, 192, pp. 1121, 1122.
ALTERNATIVE—
Bill must not state two inconsistent states of fact and ask for relief in the, § 138, p. 775.
When relief in the alternative may be prayed for, § 138, p. 775.
AMBASSADORS—
Jurisdiction of cases affecting, § 1, p. 1.
Original jurisdiction of United States Supreme Court over, § 3, p. 4.
AMENDMENTS—
In general, § 206, p. 1160.
rest in discretion of court, § 206, p. 1160.
leave to make, when granted on sustaining demurrer, § 206, p. 1160.
statutory power to grant, § 206, p. 1160.
liberally made in favor of States, charities, infants, idiots and lunatics, § 206, p. 1162.
Answers
whether bill may be taken *pro confesso* for failure to answer, § 171, p. 987.
Bills of particulars, § 246, p. 1253.
Common law
of pleading, how far State practice respecting, is followed, § 453, p. 2207, § 454j, p. 2230.
of judgments by courts that rendered them, § 481, p. 2508.
writs of attachment, § 470, p. 2385.
Discovery
rarely allowed to bill of discovery, § 347, p. 1754.
Hearing
which may be disregarded at hearing, § 376, p. 1858.
Informations and bill in equity.
to bill on objection for multifarious being sustained, § 143, p. 803.
enforced to plead new matter, § 144, p. 804.
for purpose of praying proper relief, § 154, p. 913.
for omission of a waiver, tender or offer, § 153, p. 907.
for omission of signature to bill, § 155, p. 918.
Jurisdiction.
how far jurisdiction conferred by amendment, § 40, p. 127; § 544, p. 2981.
Petitions in bankruptcy, § 628, p. 3335.
Petition on removal of cause, § 546, p. 2996.
Pleadings, see WRITS, PROCESS AND PLEADINGS.
Process, see WRITS, PROCESS AND PLEADINGS.
Replication, § 203, p. 1156.
Writs, process and pleadings at law and in equity
writs and process, § 207, p. 1162; § 455h, p. 2247.

Vol. II begins at § 197, page 1125; Vol. III begins at § 453, page 2201; Vol. IV begins at § 670, page 3597.

AMENDMENTS (continued)—
pleadings at common law, § 208, p. 1163.
when bills in equity can be amended, § 209, p. 1163.
form of amendment of a bill, § 210, p. 1166.
effect of, § 210a, p. 1166.
time from which amendment takes effect, § 210b, p. 1168.
what amendments may be made to bills in equity and declarations at common law, § 211, p. 1171.
amendment by pleading matters subsequent to the filing of the bill, § 212, p. 1176.
proceedings upon an amended bill, § 213, p. 1178.
amendment of answers and pleas, § 214, p. 1179.
practice in obtaining leave to amend, § 215, p. 1182.
amendments upon appeal or error, § 215a, p. 1184.
review of rulings on amendments, § 215b, p. 1184.
writs of error, § 699.
see also CORRECTION OF DECREE OTHERWISE THAN BY APPEAL.
see also REMOVAL TO FEDERAL COURT.
AMOUNT IN CONTROVERSY—
That it is not large enough to give court jurisdiction, a ground of demurrer, § 367, p. 1833.
See MATTER IN DISPUTE; also VALUE.
ANCILLARY JURISDICTION (see JURISDICTION).
ANCILLARY LETTERS OF ADMINISTRATION—
By foreign administrator, § 92, p. 589.
ANCILLARY RECEIVERS—
Defined, principles regulating appointment of, § 304, p. 1500.
ANOTHER SUIT PENDING—
Objection of, can be raised by demurrer, § 367, p. 1835.
Subject of plea in defense, § 176, p. 1008.
ANSWERS—
Amendment of, § 214, p. 1179.
when bill may be amended before, § 209, p. 1163; § 212, p. 1177.
time to, extended by amendment, § 213, p. 1178.
court may refuse leave to file after bill is amended, § 213, p. 1179.
Bills, in general
denies, admits or qualifies each statement in the bill *seriatim*, § 136, p. 762.
to interrogatories in a bill, § 152, p. 907.
taking bill *pro confesso* for failure to, § 171, p. 988.
to supplemental bill, § 195, p. 1122.
to bill of revivor, § 224, p. 1208.
Defenses peculiar to patent cases, § 188, p. 1106.
Demurrers
losing right to demur to petition for intervention by interposing an answer, § 254, p. 1269.
defendant may demur to discovery if his answer subjects him to a pain, penalty or forfeiture, § 348, p. 1758.
Disclaimers, § 196, p. 1123.
form of, § 196, p. 1124.
Discovery, § 174, p. 997.
admissions and denials independent of discovery, § 174, p. 997.
Filing of
when to be filed, § 203, p. 1155.
motions to take answers off the file, § 193, p. 1121.
demurrer cannot be filed to, § 365, p. 1827.

Vol. II begins at § 197, page 1125; Vol. III begins at § 453, page 2201; Vol. IV begins at § 670, page 3597.

ANSWERS (continued)—
adverse parties may file answer denying the fact stated in the petition, or setting up other facts in avoidance, § 254, p. 1269.
Frame of answer and formal requisites, § 190, p. 1117.
Impertinence and scandal in, § 237. p. 1236; § 238, p. 1240.
Insufficiency, exceptions for, § 194, p. 1121.
Objections
objections which can be taken by, § 348, p. 1755.
a mode of objecting to want of parties, § 129, p. 739.
exceptions for impertinence not to be taken after, § 237, p. 1236.
as a mode of objecting to multifariousness in bills, § 143, p. 802.
Pleadings, defenses in, § 175, p. 1003.
requisites of answer, what may be pleaded in, § 175, p. 1004.
with pleas, § 175, p. 1004.
irregular practice to unite with cross-bill in same pleading, § 200, p. 1149.
Proceedings to compel answer, § 189, p. 1116.
Receiver may be appointed before, § 315, p. 1598.
Signature and oath to answer, §§ 191, 192, pp. 1119, 1120.
Supplemental answers, § 195, p. 1122.
Waiver
waiving, under oath, §§ 152, 153, p. 907.
as evidence, § 153, p. 907.
to bill without objection to want of signature, a waiver, § 155, p. 919.
Forms, see FORMS.
see ADMIRALTY.
ANTICIPATED DEFENSE—
Counter averments to avoid, § 144, p. 805; § 145, p. 814.
ANTI-NARCOTIC LAW, § 506p, p. 2716.
ANTI-TRUST AND MONOPOLY ACT—§§ 5, 61, 105, 283, 333, 339, 416, 416a, 506 l.
Bills under, § 151a, p. 875.
Anti-Trust Act, § 276b, p. 1378; § 506e, p. 2697.
Anti-Monopoly Act, §§ 643, 688, 506e, pp. 2697, 2698.
Pleading in equity, § 131, p. 745.
Pleading at common law, § 454 l, p. 2235.
Suit under, brought by representative of a class, § 115, p. 706.
Injunctions against strikers, § 276b, p. 1378.
see MONOPOLIES; INDICTMENTS.
APPEAL AND ERROR—
In general, § 687, pp. 3651-3656.
Admiralty, appeals in, § 592, pp. 3196-3204.
time of taking appeals, § 592, p. 3196.
parties against whom joint decree is entered must join in appeal, § 592, p. 3197.
consolidation of suits, § 592, p. 3198.
time for appeals to be taken after entry of final decree, § 592, p. 3198.
appellate proceedings, § 592, p. 3199, 3200.
taking of new proofs, amendment of pleadings, § 592, p. 3201.
bond on appeal, § 592, p. 3201.
security for damages and costs, § 592, p. 3201.
contents of transcript, § 592. p. 3202.
District Court has no authority to retry questions of priority upon evidence, § 592, p. 3204.
bill of exceptions, § 592, p. 3202.
further proof, § 592a, pp. 3204-3207.

Vol. II begins at § 197, page 1125; Vol. III begins at § 453, page 2201; Vol. IV begins at § 670, page 3597.

APPEAL AND ERROR (continued)—
Amendments
upon appeal or error, § 215a, p. 1184.
of the original record, § 710, p. 3872.
Appeals, § 700, pp. 3793-3795.
cross appeals, practice in taking, § 700, p. 3794.
right to second appeal, § 700, p. 3795.
Argument, § 707, pp. 3858-3868.
printed arguments, § 707, pp. 3858, 3865.
call and order of the docket, § 707, pp. 3859, 3860, 3861.
calendar practice of C. C. A., Appendix V.
cases involving jurisdiction of lower court, § 707, p. 3861.
when neither party ready at second term, § 707, p. 3861.
adjournment, § 707, p. 3862.
briefs, § 707, pp. 3862, 3865, 3866.
no appearance of plaintiff in error or appellee, § 707, p. 3866.
no appearance of defendant in error or appellee, § 707, p. 3866.
oral argument, § 707, pp. 3866, 3867.
opinions of the court, § 707, p. 3866.
judges who may sit in C. C. A., § 707, p. 3868.
Assignment of errors, § 701, pp. 3798-3806.
records and briefs, § 701, pp. 3798, 3799.
assignment must be single and may be disregarded for duplicity, § 701, p. 3801.
form of, § 701, p. 3802.
notice of error not specified, § 701, p. 3806.
Bankruptcy, appeals in, § 666, pp. 3569-3678; § 667, pp. 3578-3587; § 669, pp. 3592-3594.
appeal from allowance of claim may be taken by trustee, § 667, p. 3582.
appeal by creditor from order confirming composition or granting discharge, § 667, p. 3583.
all parties aggrieved may join in appeal, § 667, p. 3583.
appeal from adjudication of involuntary bankruptcy, § 667, p. 3582.
trustee not to give bond, § 667, p. 3584.
appeals to be within ten days, § 667, p. 3584.
review of prior orders upon appeal from final decree by court of review, § 667, p. 3586.
writs of error in, § 666, pp. 3571-3573.
Circuit Courts of Appeals, writs of error from and appeals to, § 693, pp. 3722-3735.
jurisdiction, when judgment final, § 693, p. 3722.
appeals in proceedings for injunctions and receivers, § 692, p. 3724.
from Supreme Courts of Hawaii and Porto Rico, § 693, p. 3724.
from District Court for Alaska, certificate of question to Supreme Court, § 693, p. 3725.
United States Court for China, § 693, p. 3725.
practice and procedure in Fifth Circuit, § 693, p. 3726.
jurisdiction of appellate courts, § 693, p. 3727.
jurisdiction of appeals from order of Secretary of Agriculture concerning violations of act concerning stockyards, § 693, pp. 3727-3730.
when decision of C. C. A., reviewed by certiorari, § 693, p. 3730.
judges who may sit in C. C. A., § 693, p. 3734.
allowance of, § 693, p. 3735.
remand by Supreme Court to C. C. A., § 693, p. 3735.
power to issue writs, § 693, p. 3735.

Vol. II begins at § 197, page 1125; Vol. III begins at § 453, page 2201; Vol. IV begins at § 670, page 3597.

APPEAL AND ERROR (continued)—
Contempt proceedings, §§ 436, 437, pp. 2154-2158; § 692, p. 3710; § 695, p. 3746.
Costs, appeal from taxation of, § 424, p. 2070.
Criminal cases, §§ 536, 536a, pp. 2875-2884.
by government, § 536, pp. 2875-2877.
judgment in criminal cases reviewed by writ of error, § 536, p. 2875.
when must be sued out, § 536, p. 2875.
when writ of error may be taken by or on behalf of United States, § 536, p. 2875.
by defendant, § 536a, pp. 2877-2884.
time when writ to be sued out, § 536a, pp. 2877, 2884.
reversal of error limited, § 536a, p. 2877.
review, of question of law on agreed statement of facts, § 536a, p. 2878.
orders rarely reviewable, § 536a, p. 2878.
erroneous admission of testimony, § 536a, p. 2879.
reversal of judgment, § 536a, pp. 2879-2881.
no exception taken if court of error refuses to consider correctness of instructions, § 536a, p. 2881.
when returnable, § 536a, p. 2883.
Court of Claims, § 686, pp. 3648-3650; § 97, p. 378; § 690, p. 2385; § 696, p. 2438.
transcript of pleadings, § 686, p. 3648.
finding of facts, § 686, p. 3648.
order of allowance by appeal, § 686, p. 3649.
application for, § 686, p. 3650.
time and manner, § 686, p. 3650.
Courts of Indian Territory, appeals from cases in, § 66, p. 316.
Damages, action to recover, § 454 l, p. 2234.
Decisions
in general, § 711, pp. 3873-3876.
final determination of the controversy, § 711a, pp. 3876-3880.
review of questions of discretion, § 711b, pp. 3880-3884.
review of findings of fact, § 711c, pp. 3884-3886.
review of questions of damages, § 711d, pp. 3886-3888.
review of rulings upon evidence, § 711e, pp. 3888, 3889.
review of rulings upon interlocutory applications, § 711f, p. 3890.
objections not raised below, § 711g, pp. 3892-3898.
consideration of matter subsequent to proceedings brought up for review, § 711h, p. 3898.
review of proceedings taken by consent or by default, § 711i, pp. 3899, 3900.
errors not prejudicial, § 711j, pp. 3900-3903.
Decree, appeal from, § 173, p. 995; § 201, p. 703; § 397, p. 1968; § 443, p. 2166.
appeal from final decree taking bill *pro confesso*, § 173, p. 995.
appeal from a decree dismissing a cross-bill, § 201, p. 703.
from what decrees appeal lies, § 397, p. 1968.
correction of decree otherwise than by appeal, § 443, p. 2166.
Demurrer for joinder of improper parties cannot be raised for first time on appeal, § 130, p. 742.
District Court, appeals from, § 694, pp. 3736-3740.
Further proof on appeal, § 709, pp. 3871, 3872.
Habeas corpus proceedings, § 462, p. 2310; § 467, pp. 2360-2367.

Vol. II begins at § 197, page 1125; Vol. III begins at § 453, page 2201; Vol. IV begins at § 670, page 3597.

APPEAL AND ERROR (continued)—
Injunctions, from, § 300, p. 1464; § 695, p. 3755.
Interlocutory orders, appeal from, § 255, p. 1270; § 695, p. 3740.
Intervention, orders upon, § 259e, pp. 1314, 1315; § 695, pp. 3748-3750.
Judgments, orders and decrees which may be reviewed by writs of error or appeals, § 695, pp. 3740-3757.
interlocutory orders, § 695, pp. 3740, 3755.
final judgments, § 695, p. 3742.
judgments of dismissal, § 695, p. 3746.
orders disposing of collateral proceedings, § 695, p. 3746.
decree dismissing bill, not final nor appealable, when cross-bill still pending undetermined, § 695, p. 3751.
orders purely administrative not appealable, § 695, p. 3756.
Mandate, § 712, pp. 3904-3915.
recall of mandate, § 712, pp. 3904, 3905.
interest on money, § 712, pp. 3906, 3907.
compelling restitution, § 712, p. 3908.
filing of, § 712, p. 3909.
new trial may be ordered, when no provision for procedendo, § 712, p. 3915.
enforcement of, § 712a, pp. 3915, 3916.
Multifariousness, § 143.
objections for multifariousness cannot be taken for the first time upon appeal, § 143, p. 801.
decision overruling objection on ground of multifariousness not reviewed on appeal, § 143, p. 803.
Orders, appeals from
appeal from order granting an injunction, § 291, p. 1431; § 300, p. 1464.
no appeal from order granting or refusing rehearing, § 445, p. 2171.
Receivers
appeal from order appointing, § 291, p. 1431; § 300, p. 1464; § 325, p. 1631; § 695, p. 3755.
appeal by receivers, § 311, p. 1569; § 321, p. 1616.
compensation of receivers rarely if ever increased on appeal, § 322, p. 1621.
Record, printing of, § 706, pp. 3854, 3858.
rules regulating, in Supreme Court, § 706, pp. 3855, 3856.
rules regulating in Circuit Court of Appeals, § 706, pp. 3856, 3857.
records printed in court below used in court of review, §§ 417, 417a, 706, pp. 2028-2034, 3858.
form of printed records and briefs, § 707, p. 3865.
Rehearings, § 708, pp. 3868-3871.
Return, § 704, pp. 3824-3836.
removal of causes by writ of error or appeal, § 704, p. 3824.
filing application for review, § 704, p. 3824.
filing of papers, and documents, § 704, pp. 3826, 3827.
remedy for improper matter in transcript, § 704, p. 3828.
record on appeal, reduction and preparation, § 704, pp. 3828, 3829.
cost, correction of omissions, § 704, p. 3830.
agreed statements, § 704, p. 3831.
translations, § 704, p. 3832.
models, diagrams and exhibits of material, § 704, p. 3833.
remedy by certiorari for a diminution of the record, § 704, p. 3833.
docketing cases, § 704, p. 3834.
Rulings of court on trial where jury is waived by consent, reviewable on, § 473, p. 2405.

Vol. II begins at § 197, page 1125; Vol. III begins at § 453, page 2201; Vol. IV begins at § 670, page 3597.

APPEAL AND ERROR (continued)—
Second writ of error or appeal, § 713, pp. 3917-3924.
decision of former appeal is law of case, § 713, p. 3920.
modification of opinion, § 713, p. 3922.
decision of former writ set aside if clearly erroneous, § 713, p. 3922.
dismissal for want of jurisdiction, § 713, p. 3922.
judgment of reversal, § 713, p. 3924.
court of review may award a supersedeas, § 713, p. 3924.
Suit to enforce a claim against the U. S., appeal by plaintiff in, § 95, p. 594.
Supersedeas, § 703, pp. 3809-3824.
bond in error and on appeal, § 702, p. 3807; § 703, pp. 3810, 3817.
application not to be made to court of review, § 703, p. 3812.
approval of bond, § 703, p. 3813; § 702, p. 3808.
indemnity required, § 703, p. 3815.
appeals in proceedings for injunctions and receivers, § 703, p. 3816.
trial court may grant, § 493, p. 2618.
injunction pending appeal, § 703, p. 3818.
conviction of crime punishable by death, § 703, p. 3819.
custody of prisoners on habeas corpus, § 703, p. 3819.
obstructing execution of writ of, § 703, pp. 3821, 3822.
summary judgments against sureties, § 703, p. 3823.
rights of surety, § 703, p. 3823.
Supreme Court, review by
of decisions of Federal courts, § 688, pp. 3657-3672.
question of jurisdiction must be one involving the District Court as a Federal court, § 688, p. 3657.
in any case in which jurisdiction of court is in issue, § 688, pp. 3657-3662.
in case question of jurisdiction shall be certified to Supreme Court from court below for decision, § 688, pp. 3662-3664.
final sentences and decrees in prize causes, § 688, p. 3664.
construction or application of Constitution, § 688, pp. 3664-3665.
constitutionality of any law or validity or construction of any treaty of U. S., § 688, pp 3665, 3666.
constitution or law of a State claimed to be in contravention of Constitution of U. S., § 688, p. 3667.
writ of error on behalf of U. S., review of judgment of acquittal in criminal case, § 688, p. 3668.
interlocutory injunctions as to orders of Interstate Commerce Commission, § 688, p. 3670.
venue and procedure in suits to enforce, suspend or set aside orders of board, § 688, p. 3670.
alleged unconstitutionality of State statutes, § 688, p. 3670.
of decision of Circuit Courts of Appeals, § 688a, pp. 3672-3676.
see CERTIORARI.
of decision of Court of Claims, § 690, pp. 3693-3695.
of decision of courts of District of Columbia, § 691, pp. 3695-3698.
of decision of the District Court of Alaska, § 691a, pp. 3698, 3725.
of decision of the courts of the Island Territories, § 691b, pp. 3699-3701; § 693, p. 3724.
of decision of the District Court of the Canal Zone, § 691c, p. 3701.

Vol. II begins at § 197, page 1125; Vol. III begins at § 453, page 2201; Vol. IV begins at § 670, page 3597.

APPEAL AND ERROR (continued)—
on appeal to Supreme Court, no objection can be taken to the admissibility of evidence not objected to in the court below, § 329, p. 1640.
judge of a District Court has no power to enjoin enforcement of judgment in State court after appeal to U. S. Supreme Court and a supersedeas, § 270, p. 1345.
Supreme Court to State court, writ of error from, § 692, pp. 3701-3709.
judgments and decrees of State courts, § 693, pp. 3701-3705.
cases removed from State courts, § 692, p. 3706.
precedence of, § 692, p. 3706.
determination whether Federal question was decided, § 692a, pp. 3709-3713.
raising Federal question in State court, § 692b, pp. 3713-3718.
practice upon, § 692c, pp. 3718-3722.
when plaintiff in error has right to review, § 692c, p. 3720.
must be accompanied by a citation and a bond, § 692c, p. 3721.
Time within which writs of error and appeal must be taken, § 698, pp. 3778-3785.
application, § 698, p. 3778.
District courts to Circuit Courts of Appeals, § 698, p. 3780.
appeals from judgments of Courts of Bankruptcy, § 698, p. 3781.
appeals to Supreme Court, § 698, p. 3781.
State statute as to time of suing, § 698, p. 3782.
decision containing directions for decree not considered a decree, § 698, p. 3783.
day in which order, judgment or decree entered excluded, § 698, p. 3783.
extension of, § 698, p. 3784.
when appeal is taken, § 698, p. 3784.
Transcript (see RETURN AND RECORD).
Value of matter in dispute upon, § 696, pp. 3757-3767.
judgments reviewable without regard to value, § 696, p. 3758.
value must be estimable in money, § 696, p. 3760.
when no appeal or writ of error can be maintained, § 696, p. 3761.
burden of proof on plaintiff in error or appellant, § 696, p. 3766.
Will, value of right to appeal from probate of, § 6, p. 36.
Writs of error, § 699, pp. 3785-3792.
returnable to Supreme Court or Circuit Court of Appeals, practice and procedure to obtain, § 699, pp. 3786, 3787.
issuance of, § 699, p. 3786.
State practice not followed, § 699, p. 3787.
process, § 699, p. 3787.
sealing and testing of, § 699, p. 3787.
writ not dismissed because returned a few days after the return day, § 699, p. 3788.
by government in criminal cases, § 536, pp. 2875-2877.
by defendant in criminal cases, § 536a, pp. 2877-2884.
amendment, § 699, pp. 3789, 3790.
removal of causes by, § 699, p. 3791.
service of, § 699, p. 3792.
right to second writ, § 699, p. 3792.
granting to stay execution of sentence of trial court, § 493, p. 2613.
jurisdiction given Circuit Courts over, § 493, p. 2615.
Forms in, see FORMS.

Vol. II begins at § 197, page 1125; Vol. III begins at § 453, page 2201; Vol. IV begins at § 670, page 3597.

APPEARANCE—
Generally, waives service of subpœna, § 162, p. 933.
Defined, § 168, p. 976.
general, special and gratis, § 168, p. 976.
Effect of, § 170, p. 982.
Effect upon removal of cause, of want of general appearance in Federal court, § 555, p. 3053.
General appearance in Supreme Court, what constitutes, § 169, p. 976.
When a waiver of failure to serve citation, § 700a, p. 3798.
APPLICATIONS TO THE COURT (see INTERLOCUTORY APPLICATIONS AND PETITIONS).
APPOINTMENT OF RECEIVER (see RECEIVER).
APPRAISEMENT—
Of goods taken in execution under writ of *fieri facias*, § 427, p. 2091.
APPRAISERS—
In admiralty, § 573, p. 3159.
ARBITRATORS—
Bill to set aside award of, § 79, p. 549.
Making parties to suits against principals, § 111, p. 682.
ARGUMENT—
Of motions, practice upon, § 252, p. 1262.
Notice of, how far State practice respecting, is followed, § 453, p. 2207.
Of appeals and writs of error in the Supreme Court, § 707, pp. 3858-3868.
ARIZONA—
Constitutes one district, § 66, p. 282.
Places of holding terms, § 66, p. 282.
Included within Ninth District, § 66, p. 282.
Time within which cause to be docketed in United States Supreme Court in case of appeals and writs of error from, § 698, pp. 3778-3785.
ARKANSAS—
Divided into two districts, § 66, p. 217.
counties and times and places of holding court therein enumerated, § 66, p. 282.
Districts of, included within Eighth Circuit, § 4, p. 12.
ARREST—
In civil suits, § 61, p. 226.
Whether injunction can be obtained to restrain illegal, § 275, p. 1364.
Of prisoner upon a second warrant pending hearing upon a return to a writ of *habeas corpus*, § 466, p. 2345.
In civil actions, when permitted, § 471, pp. 2397-2401.
imprisonment for debt, § 471, p. 2397.
discharge, § 471, p. 2398.
jail limits, § 471, p. 2398.
distress warrant, § 471, p. 2399.
execution against officers, § 471, p. 2400.
sale of lands regulated, § 471, p. 2400.
conveyance of lands, § 471, p. 2400.
levy to be lien, § 471, p. 2400.
exemption from, § 471, p. 2401.
requisitions, § 471, p. 2401.
ART—
Injunction to restrain publication of works of, § 263, p. 1322.
ARTICLES OF WAR, § 483d, pp. 2536-2541.

Vol. II begins at § 197, page 1125; Vol. III begins at § 453, page 2201; Vol. IV begins at § 670, page 3597.

ASSESSMENTS—
Bill to collect, § 82, p. 569.
State statutes imposing, upon streets, § 82, p. 569.
Bill to prevent, § 79.
Value in a bill to prevent, § 7, p. 44.
Bill to collect against one defendant for several lots not multifarious, § 142.
ASSIGNEE—
In bankruptcy or insolvency cannot enforce collateral obligation given creditor, § 79, p. 546.
When possession by, not possession by court, § 53, p. 199.
When restriction regarding jurisdiction applies, § 63, p. 261.
Right of assignor to sue in Federal court must be averred by assignee in his pleading, § 63, p. 262.
When assignor is necessary party to suit by, § 119, p. 719.
Of debentures for drawback of duties, jurisdiction of suits by, § 76, p. 385.
Jurisdiction of suits by, § 63, p. 256.
When assignor a necessary party to suit by, § 112, p. 687.
Suits by and against, see PARTIES.
Pleading by, § 63, p. 266.
ASSIGNMENT—
Removal of cause in case of colorable, § 537, p. 2896.
Assignment of error, § 701, p. 3798.
see APPEAL AND ERROR.
ASSISTANCE—
Writ of, see ENFORCEMENT OF DECREES AND ORDERS.
ASSOCIATION—
Citizenship of members, how determined, § 48, p. 177.
When members of unincorporated, are necessary parties to suits affecting, § 113, p. 695.
ATTACHMENT—
Effect of state attachment on Federal jurisdiction, § 56, p. 212.
To compel answer, § 189, p. 1116.
Remain in force after removal, § 555e, p. 3069.
Effect upon, of removal of cause to Federal court, § 555, p. 3052.
To enforce orders and decrees, § 426, p. 2084.
Of property, § 470, pp. 2385-2397.
as provided by State laws, § 470, pp. 2385, 2387.
amendment of writ, § 470, pp. 2386, 2387.
effect of State attachment on Federal jurisdiction, § 56, p. 212.
effect upon, of removal of cause to Federal court, § 555, p. 3052.
garnishees in suits by U. S., § 470, pp. 2392, 2397.
personal service of writ, § 470, p. 2386.
postal suits, attachment in, § 470, pp. 2394, 2395.
process against ministers and their domestics, § 470, pp. 2389, 2390.
releasing property from, § 470, pp. 2388, 2389.
replevy of property taken under revenue laws, § 470, p. 2389.
State practice when followed, § 470, pp. 2385, 2397.
wages of seamen not subject to attachment, § 470, p. 2391.
writs of attachment in Federal courts before jurisdiction by service of original process, § 470, p. 2386.
motion to quash, § 470, pp. 2393, 2394.
value of matter in dispute, § 9, p. 47.
see also ENFORCEMENT OF DECREES AND ORDERS; GARNISHMENT.
ATTENDANCE—
Of witnesses, §§ 340-343, pp. 1733-1746.

Vol. II begins at § 197, page 1125; Vol. III begins at § 453, page 2201; Vol. IV begins at § 670, page 3597.

ATTORNEYS—
Liens of, § 422a, p. 2074.
Making parties to suits against principals, § 111, p. 679.
Right to practice in courts of the United States, § 169, p. 977.
See also COUNSEL; COURT OF CLAIMS.
ATTORNEY'S FEES—
Part of the jurisdictional amount, § 20, p. 69.
Which are taxable as costs, amounts, § 416, p. 2018.
Belonging to party, and not to the attorney, § 416, p. 2019.
See BANKRUPTCY; FEES.
ATTORNEY-GENERAL—
Proceedings by, for lawful occupancy of land, § 81, p. 567.
Allegations in bill to impeach patent or other grant in action not brought by, § 131, p. 750; § 144, p. 808.
Motions on behalf of, § 251, p. 1261.
Injunctions to restrain corporations at suit of, § 264, p. 1323.
Information by, § 131, p. 744; § 274, p. 1359.
Intervention by, § 258, p. 1302; § 3, p. 5; § 131, p. 749.
Right of precedence, § 252, p. 1262.
AUCTION—
Sales at public, by masters, § 394, p. 1931.
AUCTIONEERS—
Parties to suits against principals, § 111, p. 682.
AVOIDING DECREES—
Bills for, § 452, p. 2198.

B.

BAIL—
Admitting prisoner to, pending hearing upon a return to writ of *habeas corpus*, § 466, p. 2355.
Given in cause prior to removal to Federal court, effect of removal on same, § 555, p. 3052.
On allowance of writ of error to review a conviction of a capital or infamous crime, § 703, p. 3819.
see PRACTICE IN CRIMINAL CASES.
BAILIFF'S ACCOUNTING, § 79, p. 554.
BALANCE—
Decree for, in foreclosure of mortgage, § 404, p. 1987.
BANK—
Bill against, § 28, p. 101.
Receiver of, when a proper party to suits against, § 113, p. 693.
Creditors of an insolvent, necessary parties to suit by stockholders to cancel certificates of, § 113, p. 693.
Of what State national, is regarded a citizen, § 47, p. 169.
Appointment of receiver of property of national, § 302, p. 1482.
see NATIONAL BANK.
BANKRUPTCY—
Definitions of words and phrases in bankruptcy law, § 608, p. 3256.
Jurisdiction
in general, § 608, pp. 3254-3263.
over attorneys, § 608a, pp. 3263-3265.
by consent, § 609, pp. 3265-3268.
over matters and proceedings in, § 5, p. 19; § 608, pp. 3259-3265; § 635, pp. 3363-3368.
over plenary suits, § 5, pp. 19, 20; § 610, pp. 3268-3274.
extraterritorial, § 611, pp. 3274-3276.
ancillary, § 612, pp. 3276-3279.

Vol. II begins at § 197, page 1125; Vol. III begins at § 453, page 2201; Vol. IV begins at § 670, page 3597.

BANKRUPTCY (continued)—
of State courts, in cases affecting, § 613, pp. 3280-3285.
as affected by residence or place of business, § 614, pp. 3285-3291.
to give court jurisdiction, residence of bankrupt must be bona fide, § 614, p. 3285.
Practice, in general, § 615, pp. 3291-3293.
When District Court may take property from State Court, § 53, p. 198.
Acts in bankruptcy, §§ 620-626, pp. 3313-3327.
fraudulent transfer, concealment or removal of property, § 621, pp. 3214-3316.
transfer of property with intent to create a preference, § 622, pp. 3316-3320.
preferences by legal proceedings, § 623, pp. 3320-3322.
general assignments for benefit of creditors, § 624, pp. 3322-3323
appointments of receivers or trustees, § 625, pp. 3323-3326.
admission in writing, § 626, pp. 3326-3327.
Adjudications of, § 637, pp. 3375-3381; § 637a, pp. 3381-3385.
Arrest of bankrupt, § 632, p. 3347.
Bankrupts
individuals who may be, § 616, pp. 3293-3297.
corporations, § 617, pp. 3297-3299.
unincorporated associations, § 617a, p. 3299.
partnerships, § 618, pp. 3300-3306.
Circuit Court of Appeals, review by, § 666, pp. 3569-3578.
Claims
proof and allowance of claims, § 645, pp. 3463-3475.
what proof of claim shall consist, § 645, pp. 3463-3467.
what debts of bankrupt may be proved and allowed against his estate, § 645, pp. 3467-3476.
when security is surrendered, claim may be allowed without deduction, § 645, p. 3469.
objections to claims need not be under oath, § 645, p. 3469, n. 9.
proof of claim may be amended, § 645, p. 3466, n. 4.
time to file claim cannot be extended, § 646, p. 3476.
disallowance of claim is *res adjudicata* in subsequent suit upon same, § 645, p. 3468.
time for proof of claim, § 646, pp. 3476-3478.
provable claims, § 647, pp. 3478-3480.
set-offs and counter-claims, § 648, pp. 3481-3488.
priorities and liens, § 649, pp. 3489-3503.
the order of payment of debts, § 649, p. 3491.
lienor may lose priority for laches, § 649, p. 3501.
compositions, § 653, pp. 3518-3524.
when bankrupt may offer terms of composition, § 653, p. 3518.
when judge shall confirm composition, § 653, p. 3521.
confirmation of composition may be denied, § 653, p. 3521, n. 13.
Creditors
who may petition for involuntary bankruptcy, § 619, pp. 3307-3313.
number to join, § 619, pp. 3307, 3308.
general assignment for benefit of, § 624, p. 3323.
process and notices to, § 629, p. 3339.
support of allegations in petition by, § 639, p. 3409.
notice by mail of examinations of bankrupt, § 638a, pp. 3398-3404.
meetings of, § 640, pp. 3409-3414.
who is secured creditor, § 640, pp. 3410, 3411.
who may vote at meetings, § 640, pp. 3410, 3411.

Vol. II begins at § 197, page 1125; Vol. III begins at § 453, page 2201; Vol. IV begins at § 670, page 3597.

BANKRUPTCY (continued)—
creditors of firm have priority over creditors of individual members, § 649, p. 3497.
burden of proof to support specifications on, § 655, p. 3536.
when bankrupt and creditors not generally necessary parties, § 113, p. 692.
Declaration and payment of dividends, § 652, pp. 3514-3518.
Discharge of bankrupts, § 655, pp. 3527-3538.
when application for discharge may be filed, § 655, p. 3527.
of what debts discharge in bankruptcy releases bankrupt, § 655, p. 3530.
specifications of objections to discharge must be verified, § 655, p. 3532, n. 8.
judge to decide bankrupt's right to discharge, § 655, p. 3529.
revocation of, § 658, pp. 3550-3552.
petition for revocation to state discharge obtained through fraud of bankrupt, § 658, p. 3551.
obligations released by, § 657, pp. 3545-3550.
obligations not released by, § 657, pp. 3545-3550, notes.
grounds for refusing, § 656, pp. 3538-3545.
Evidence, § 639, pp. 3405-3408.
Examinations in,
of bankrupt, § 638a, pp. 3398-3402.
ten days' notice to creditor of examination of, § 638a, p. 3398.
before whom held, § 638a, p. 3400.
penalty for failure to appear, § 638a, p. 3402.
of strangers, § 638b, pp. 3402-3405.
before whom held, § 638b, p. 3404.
of third person to proceeding is discretionary, § 638b, p. 3402.
Exemptions of bankrupt property, § 650, pp. 3504-3512.
when no trustee appointed, court sets apart exemptions, § 650, p. 3509, n. 10.
exemptions should be claimed in schedules, § 650, p. 3509.
Exemption of bankrupt from arrest, § 651, pp. 3512, 3513.
Fees
costs and fees, § 659, pp. 3552-3556.
clerk's fees, § 660, pp. 3556, 3557; § 417, p. 2028.
marshal's fees, § 661, pp. 3557, 3558.
referee's fees, § 662, pp. 3558-3560.
trustee's fees, § 663, pp. 3560-3563.
receiver's fees, § 664, pp. 3563, 3564.
attorney's fees, § 665, pp. 3564-3569.
Injunctions in aid of, § 633, pp. 3348-3356.
injunction may be granted against prosecution in State Courts to collect debts, § 633, p. 3352.
what matters court of bankruptcy can enjoin, § 633, p. 3353.
referee may issue injunction, § 633, p. 3355; § 638, p. 3391.
injunction may be issued without notice, § 633, p. 3355.
Law of 1898, pp. 4729-4770.
Parties in, § 616, p. 3293.
Petitions, § 627, pp. 3327-3333.
schedules, § 627a, pp. 3333-3334.
amendments to, § 628, pp. 3335-3339.
who may file, § 616, p. 3293.
fees on filing, § 644, p. 3458.
person against whom involuntary petition filed entitled to trial by jury, § 637, p. 3377.

Vol. II begins at § 197, page 1125; Vol. III begins at § 453, page 2201; Vol. IV begins at § 670, page 3597.

BANKRUPTCY (continued)—
revocation of discharge, § 658, p. 3551.
for review, § 668, pp. 3587-3592.
Pleadings by respondents, § 630, p. 3342.
Preferences
right of trustee to set aside preferences, liens and conveyances, § 644, pp. 3440-3463.
when set aside, § 644, pp. 3440-3463.
jurisdiction of suits to set aside, § 610, p. 3268; § 644, pp. 3447-3451.
practice in such suits, § 644, pp. 3460-3463.
what liens are dissolved by adjudication, § 644, p. 3440.
what preferences may be avoided, § 644, pp. 3445-3451.
liens given or accepted in good faith not affected by bankruptcy, § 644, p. 3451.
trustee must prove creditor had reasonable cause to believe of intention to give preference, § 644, p. 3441, note 1.
suit to recover preference should be brought in equity, § 644, p. 3460.
what bill must contain, § 644, p. 3460.
transfer of property with intent to create a preference, § 622, pp. 3316-3320.
knowledge of debtor to create preference material, § 622, p. 3317.
what acts are held to be transfers with intent to create preferences, § 622, p. 3317.
by legal proceedings, § 623, pp. 3320-3322.
Receivers, § 634, pp. 3356-3363.
when referee may appoint receiver, § 634, p. 3357.
receiver is merely custodian, § 634, p. 3358.
receiver may be authorized to carry on business of bankrupt, § 634, p. 3361.
receiver may be authorized to borrow money and issue receivers' certificates, § 634, p. 3361.
Reclamations, § 649a, pp. 3502, 3503.
References, § 638, pp. 3385-3398.
referees appointed by court of bankruptcy, § 638, p. 3385.
jurisdiction of referees, § 638, p. 3386.
duties of referees, § 638, p. 3387.
referee may order sale of assets, § 638, pp. 3390.
referee may make summary order for payment of money or delivery of property held by bankrupt, § 638, p. 3390.
Reopening estates, § 654, pp. 3525-3527.
Review by Supreme Court of U. S., § 669, pp. 3592-3597.
Summary orders
for payment of money or delivery of property, § 635, p. 3363.
court of bankruptcy may determine validity of all claims against property in possession of bankrupt, § 635, p. 3368.
application for order for payment of money or delivery of property should be based on written petition, § 635, p. 3368.
notice of proceeding necessary, § 635, p. 3369.
order may be enforced by imprisonment, § 635, p. 3372.
Trials, § 637, pp. 3375-3384.
person against whom involuntary petition filed is entitled to a trial by jury, § 637, p. 3377.
right to jury trial may be waived, § 637, p. 3376.
how trial conducted, § 637, p. 3381.

Vol. II begins at § 197, page 1125; Vol. III begins at § 453, page 2201; Vol. IV begins at § 670, page 3597.

BANKRUPTCY (continued)—
Trustees
when suits can be instituted by, § 608, p. 3254.
appointment of, § 640, pp. 3409-3416; § 625, pp. 3323-3326; § 650, p. 3509, note 10, 506t, p. 2728.
qualifications of, § 641, pp. 3415-3416; § 506t, p. 2730.
accounts and reports, § 642, p. 3425.
duties of, § 642, pp. 3420-3427.
title and powers of, § 643, pp. 3427-3440.
arbitration of controversies by, § 643, pp. 3438, 3439.
trustee may compromise or prosecute suits, § 643, p. 3439.
judgment against, cannot be enforced by levy, § 643, p. 3436.
sale of bankrupt's property, § 643, p. 3427, note 1.
what property passes to trustee, § 643, p. 3427, note 1.
what transfers by bankrupt trustee may avoid, § 643, pp. 3439, 3440.
Warrants of seizure, § 631, p. 3345.
Forms, see FORMS.
see APPEAL AND ERROR; INDICTMENTS.
BEARER—
When order or draft is payable to, § 63, p. 257.
BIDS—
At master's sales, § 394, p. 1938, n. 45.
BILL—
Accounting, for, § 151d, p. 894.
Address and introduction
address and introduction, rules relative to, and form of, §§ 134, 135, pp. 755-762.
taking advantage of omission as to residence of parties and other defects in address and introduction, § 135, p. 759.
Administrator, against, by next of kin, § 79, p. 544, n. 1; § 44, p. 152; § 54, p. 199.
Affidavits to, when required, § 156, p. 919.
Alimony, to collect, § 151c, p. 891.
Allegations
as to jurisdiction, § 145, pp. 810-825.
as to value of matter in dispute, § 6, p. 39.
in bills to impeach patent or other grant, § 137, p. 768, n. 11; § 144, p. 808.
as to permission from attorney-general, § 131, p. 749.
Amendment of, §§ 211-213.
when may be amended, § 209, p. 1163.
when copy of, required to be furnished, § 209, p. 1163.
what amendments may be made, § 211, p. 1171.
amendment by pleading matters subsequently to the filing of the bill, § 212, p. 1176.
proceedings upon an amended bill, § 213, p. 1178.
when amended, may be disregarded at hearing, § 376, p. 1858.
Ancillary jurisdiction
to set aside, construe, etc., a judgment or decree, § 51, pp. 181, 182.
to interfere with the enforcement of an interlocutory decree, § 51.
for reformation of policy, when ancillary, § 51, p. 183.
Assignee to enforce assignor's right, bill by, § 79, p. 544, n. 1.
Bills by U. S., see INFORMATIONS.
Bondholder, § 79, p. 549, n. 20.
Bonds, to compel issue of, § 79, p. 552, n. 36.
Boundaries, bills to determine controversies as to, §§ 3, 131, p. 746.

Vol. II begins at § 197, page 1125; Vol. III begins at § 453, page 2201; Vol. IV begins at § 670, page 3597.

BILL (continued)—
Cancellation of documents, bill to compel, § 79, p. 554.
Certainty, § 137, p. 766.
not necessary to charge admissions specifically in order to give them in evidence, § 137, pp. 768, 769.
Certiorari, § 159, p. 927.
Clouds on title, bills to set aside
to quiet title, § 151, p. 903.
to cancel marriage contract, § 151f, p. 903, n. 5.
to set aside contract entered into while intoxicated, § 151f, p. 903, n. 5.
to set aside contract obtained by fraud, § 151f, p. 903, n. 5.
Contracts, bills to cancel illegal, § 79, p. 555, n. 42.
Corporation, to dissolve, § 79, p. 545.
to control, § 79, p. 545.
Creditor's bill, § 151d, p. 894.
to have equitable assets applied to debt, § 151c, p. 891.
Damages for a conversion, § 79, p. 553, n. 39.
Definition and classification of, § 132, pp. 750-752.
into original, not original, bills in the nature of original, original bills in the nature of bills not original, § 132, pp. 750-752.
when court will take jurisdiction of bills not original, § 132, p. 752.
ordinary kind, which seek relief concerning right, claimed by plaintiff in opposition to defendant, § 132, p. 752.
Discovery, § 347, p. 1750.
Dismissal
dismissal of, upon hearing, § 377, p. 1861.
without hearing, §§ 360-362, pp. 1810-1815.
Examination of witness abroad, § 79, p. 549.
Exhibition on Sunday, bills to enjoin the opening of, § 79, p. 551, n. 35.
Frame of bill in equity, § 133, pp. 752-755.
frame of bill generally considered, clauses enumerated, § 133, pp. 752-755.
common confederacy clause no longer deemed essential, § 133, p. 753.
charging part no longer deemed essential, § 133, p. 753.
jurisdiction clause no longer deemed essential, § 133, p. 753.
that plaintiff is without remedy at law, statement of, no longer necessary, § 133, p. 753.
Fraudulent misrepresentation, § 79, p. 547, n. 11.
Inconsistency and bills with a double aspect, § 138, p. 775; § 154, p. 911.
asking for relief in alternative, when allowed, § 138, p. 775.
Informations and bills by U. S.
information under English practice, § 131, p. 744.
relator under English practice, § 131, p. 744.
distinctions between information and bill, § 131, p. 744.
effect of death of relator upon proceedings, § 131, p. 745.
filing of bill by government of United States, § 131, p. 745.
informations in courts of some of the States, § 131, p. 749.
by United States to enforce priority of payment, § 131, p. 746.
Injunction, bills for, § 79, p. 551.
injunction not prayed for in, § 290, p. 1429.
Insurance policy, bill to collect, § 79, p. 552, n. 36.
Interpleader
bills of interpleader, who may file, and contents of, § 157, p. 920.
in the nature of interpleader, § 158, p. 926.

Vol. II begins at § 107, page 1125; Vol. III begins at § 453, page 2201; Vol. IV begins at § 670, page 3597.

BILL (continued)—
Judgment
to set aside or stay proceedings under, of State court, § 53, p. 198; § 270, p. 1340.
to set aside, § 79, p. 549.
to set aside judgment or decree for fraud, § 79, p. 549; § 51, p. 281.
Legatee against executors, by, § 79, p. 544.
Libels, to enjoin, § 79, p. 552, n. 35.
Married woman, bills by, § 79, p. 544, n. 1.
Multifariousness
multifariousness, in general, § 139, pp. 780-782.
defined, § 139, p. 780.
by misjoinder of plaintiffs, § 140, p. 782.
who can be properly united as plaintiffs, § 140, p. 782.
privity between plaintiffs usually essential; exceptions, § 140, p. 785.
by misjoinder of defendants, § 141, p. 788.
without misjoinder of parties, § 142, p. 798.
objections for multifariousness, § 143, p. 801.
when bill is not multifarious, § 142, p. 799.
doubt in, construed against the pleader, § 144, p. 808.
general, referred to allegations, specific, § 144, p. 808.
special provisions of the Federal equity rules and practice as to bill, § 144, p. 804.
Municipal corporation to enjoin sale of property on execution, § 79, p. 544, n. 1.
Municipal ordinance, to set aside, § 79, p. 554.
Narrative or stating part of bill, § 136, pp. 762-766.
drawn without reference to technical rules, § 136, p. 763.
to contain all facts essential to plaintiff's cause of action, § 136, p. 763.
Navigation, bills to remove obstruction to, § 79, p. 551, n. 35.
Note, bills to collect, § 79, p. 552, n. 36.
Partition, § 79, p. 553, n. 38.
Patents
bills to enjoin the infringement of patents, § 146, p. 830.
against infringer of a patent, § 146, p. 830.
for a patent when refused by commissioner, § 147, p. 848.
to quiet possession under land patent, § 79, p. 554, n. 41.
to cancel patent obtained by fraud, § 79, p. 555.
Prayer for relief, § 154, p. 913.
form of, § 154, p. 913.
President
against President of United States, § 94, p. 593.
Principal agent, bills by, § 79, p. 554, n. 1.
Property
real, to obtain possession, § 79, p. 553.
personal, to obtain possession of, § 79, p. 553.
Public officer, bill to remove, § 79, p. 551, n. 35.
Pleading waivers and offers
to enjoin collection of taxes, § 153, p. 910.
against state board of equalization, § 153, p. 910.
Political rights, bills to protect, § 154, p. 917.
Railroad commission, § 79, p. 552, n. 36.
Rules of equity pleading as to bills, § 141, p. 788.
Scandal and impertinence, §§ 237, 238, pp. 1236-1242.
remedy in case of scandal or impertinence, § 239, p. 1242.
remedy by one not a party to the suit, § 239, p. 1242.

Vol. II begins at § 197, page 1125; Vol. III begins at § 453, page 2201; Vol. IV begins at § 670, page 3597.

BILL (continued)—
Signature, § 155, p. 918.
Specific performance
of contract for sale of corporate stock, § 151c, p. 900.
to compel railroad to maintain a terminus, § 151e, p. 898.
to compel specific performance of contract to build railroad, § 151e, p. 898.
to enforce decree, § 151e, p. 901.
to cancel insurance policy, § 151e, p. 900.
State law creating new rights enforced by Federal courts.
for cancellation of usurious securities, § 82, p. 570.
to set aside will for fraud, § 82, pp. 567, 568.
to quiet title to land, State statute authorizing, § 82, p. 569.
Stock, bills to compel transfer of, § 79, p. 545.
Stockholders', § 77, p. 547, n. 11; § 145, p. 809.
Tax, to compel levy of, § 79, p. 552.
Taxpayers, bills by, § 151g, p. 906.
to prevent assessment, § 151g, p. 906.
to enjoin municipality from expending funds, § 151g, p. 906.
Testimony, bill to perpetuate, § 79, p. 549; § 345, p. 1746.
to take testimony *de bene esse*, § 346, p. 1950.
Trustees
debtor of trust estate, bills against, § 79, p. 544, n. 1.
bills against, § 79, p. 544, n. 1.
for possession of land held in trust, bills by, § 79, p. 554.
Waivers and offers in, § 153, p. 907.
Wills
to set aside probate, § 79, p. 549, n. 22.
to cancel will, § 79, p. 549, n. 22.
Forms in, see FORMS; JURISDICTION; CROSS-BILLS; PARTIES, TAKING BILLS PRO CONFESSO; DISMISSING BILLS OTHERWISE THAN AT A HEARING; CORRECTION OF DECREE OTHERWISE THAN BY APPEAL.
BILL OF COSTS (see TAXATION).
BILLS IN THE NATURE OF BILLS OF REVIEW, § 450, p. 2194.
BILLS OF EXCEPTIONS—
Principles relative to, in admiralty, § 578, p. 3168.
see EXCEPTIONS.
BILLS OF EXCHANGE—
Injunctions to restrain negotiation or indorsement of, § 267, p. 1334.
Transfers of, § 272, p. 1356.
Jurisdiction in suits affecting, § 5, p. 14; § 63, p. 259.
Suits by assignees of, § 63, pp. 256, 257.
Suits by payee, § 63, p. 263.
Checks, § 63, p. 259.
see FOREIGN BILL OF EXCHANGE.
BILLS OF LADING—
How far decisions of State courts relative to, are binding upon Federal tribunals, § 477, p. 2449.
BILLS OF PARTICULARS, § 522, p. 2780; § 242, p. 1240.
No part of indictment, § 522, p. 2780.
When bill may be ordered, § 522, p. 2780.
When denied, § 522, p. 2780.
Grant of, lies within discretion of court, § 522, p. 2781.
Distinction between motions to make pleadings more definite and certain and bills of particulars, § 240, p. 1245.
In general, § 242, p. 1248; § 522, p. 2780.
Practice upon motion for, §§ 243, 250.

Vol. II begins at § 197, page 1125; Vol. III begins at § 453, page 2201; Vol. IV begins at § 670, page 3597.

BILLS OF PARTICULARS (continued)—
Remedy for failure to give, § 244, p. 1251.
Form of, § 245, p. 1252.
Amendment of, § 246, p. 1253.
(See PRACTICE IN CRIMINAL CASES).
BILLS OF PEACE—
Necessary parties to, § 112, p. 690.
Defined, characteristics, § 266, p. 1332.
Jurisdiction in, § 140, pp. 785-786; § 141, p. 796.
BILLS OF REVIEW—
Jurisdiction of, § 51, p. 188.
Definition and characteristics of, §§ 447-449, pp. 2179-2188.
For errors of law, § 447a, p. 2179.
Provisions peculiar to, for matters of fact newly discovered, § 448, p. 2184.
Provisions common to all, § 449, p. 2188.
BILLS OF REVIVOR—
By what acts suits are abated, § 216, p. 1187.
Effect of abatement, § 217, p. 1194.
When a suit may be revived, and effect of revivor, § 218, p. 1196.
Who may revive a suit, § 219, p. 1198.
Effect of revivor, § 218a, p. 1197.
Manner of revivor, in general, § 221, p. 1202.
Definition and parties to bills of revivor, § 222, p. 1204.
Frame of, and requisites, § 223, p. 1205.
Proceedings upon, § 224, p. 1206.
Bills in the nature of bills of revivor in general, § 225, p. 1209.
frame of, and proceedings thereupon, § 226, p. 1211.
Bills of revivor and supplement, definition and requisites, § 228, p. 1214.
Supplemental bills in the nature of bills of revivor, § 229, p. 1215.
What renders a suit defective, § 230, p. 1215.
Supplemental bills, § 231, p. 1218.
parties and frame of, § 232, p. 1226.
proceedings upon, § 233, p. 1228.
Bills in the nature of supplemental bills, in general, § 234, p. 1231.
Frame and requisites of, § 235, p. 1233.
proceedings upon, § 236, p. 1234.
BILLS OF REVIVOR AND SUPPLEMENT (see BILLS OF REVIVOR).
BLIND PERSON—
How to verify affidavit, § 335, p. 1709.
BOARD OF GENERAL APPRAISERS, § 76, p. 385.
BOND—
Bill to compel issue, § 79, p. 552, n. 36.
Value of matter in dispute in a suit on a, § 6, p. 34.
Suits on, required by Federal orders, § 33, p. 118.
Bill to set aside, regulate, etc., § 51, pp. 181, 182.
Bill in Federal court to compel payment of interest on, out of taxes, § 105, p. 662.
Parties to bill to restrain an illegal issue, of, § 119, p. 724.
When required by State statute upon injunction, § 83, p. 575.
Collection of injunction bonds, § 298, p. 1457.
By receiver, § 319, p. 1607.
Filed with petition for removal secures right to costs, § 408, p. 1994.
How far decisions of State courts relative to municipal bonds are binding upon Federal tribunals, § 477, p. 2450; § 375, p. 1855.
On removal of cause, § 547, p. 3000.

Vol. II begins at § 197, page 1125; Vol. III begins at § 453, page 2201; Vol. IV begins at § 670, page 3597.

BOND (continued)—
Given in a cause prior to removal to Federal court, effect of removal on same, § 547, p. 3000.
To marshal in admiralty, § 572, p. 3158.
see also SECURITY; UNDERTAKING; REMOVAL TO FED RAL COURT.
BONDHOLDERS—
Bill by, § 79, p. 549, n. 20.
Trustee of, on same side of suit as, § 41, p. 137.
Parties to suit by, of bonds secured by a trust mortgage, § 112, p. 684; § 113, p. 699.
Suit by minority of to foreclose, § 113, p. 700.
Parties in foreclosure suits by, § 113, p. 700.
Suit against a committee of, representing a class, § 115, p. 706.
Suit by, against State, § 105b, p. 662.
Suits by plaintiff on behalf of himself and others similarly situated, § 114, p. 701.
When trustees of railroad mortgage need not be made parties to foreclosure suit by, § 118, p. 713.
Obtaining injunction in suit affecting corporation, § 264, p. 1324.
Of corporations, appointing receivers at suit of, § 302, p. 1482; § 302a, p. 1483.
BOOKKEEPER—
Of corporation, when might be made party to suit against corporation under English practice, § 111, p. 679.
BOOKS—
Introduction of, in evidence, §§ 333a-b-c-d-e-f-g-h-i-j-k-l-m-n-o, pp. 1657-1694.
BOUNDARIES—
Suits by States to determine, § 3, p. 5.
Proper mode of proceeding in case of disputed, § 3, p. 9.
BOWMAN ACT, § 96, p. 598.
BREACH OF CONFIDENCE—
Defendant may demur to bill if his answer would involve a, § 348, p. 1759.
BREACH OF CONTRACT—
Injunctions to prevent, § 267, p. 1334.
Injunctions to prevent, in matters not affecting land, § 281, p. 1409.
BRIEFS IN APPELLATE COURTS—
To be filed with clerk, and furnished to counsel on opposite side, § 707, pp. 3861, 3862.
What to contain, § 707, p. 3862.
see also AMENDMENTS TO RULES OF CIRCUIT COURT OF APPEALS.
BURDEN OF PROOF—
In showing diverse citizenship, § 46, p. 167.
see EVIDENCE.

C.

CALENDAR—
Of motions, § 252, p. 1262.
Bringing suit to a hearing, § 369, p. 1841.
Precedence of appeals on, § 707, pp. 3858-3860.
CALIFORNIA—
Divided into two districts, § 66, p. 284.
counties and times and places of holding court therein enumerated, § 66, p. 284.
Districts of, included within Ninth Circuit, § 4, p. 12.
CANADIAN SHIPPING ACT, § 593, p. 3207.

Vol. II begins at § 197, page 1125; Vol. III begins at § 453, page 2201; Vol. IV begins at § 670, page 3597.

CANAL ZONE—
District Court of, jurisdiction, § 70a, p. 351.
Review of decisions of District Court of, § 4, p. 10; § 691c, p. 3701.
CANCELLATION—
Of instruments, § 79, pp. 554, 555.
CAPITAL CRIME (see CRIME; CRIMINAL PROSECUTION).
CAPITAL PUNISHMENT—
Conviction of, §§ 688, p. 3668; § 698, p. 3779; § 703, p. 3819.
Writ of error in cases of, § 707, p. 3860.
see CRIMINAL PROSECUTION; APPEAL AND ERROR.
CAPTURED AND ABANDONED PROPERTY ACT, § 673, p. 3612.
CARMACK AMENDMENT—
Action against common carriers, § 454k, p. 2231.
Respective rights of shippers and carriers, § 593, p. 3211.
CARRIER—
Receiver of railroad, a common carrier, § 312, p. 1582.
How far decisions of State courts relative to common carriers are binding upon Federal tribunals, § 477, p. 2449.
see also CORPORATIONS.
CAUSE PETITIONS—
So called because made in a cause, § 253, p. 1266.
CERTAINTY—
In bills, § 137, p. 766.
Bill deficient in, demurrable, § 367, p. 1836.
Waiver of objection to lack of, § 137, p. 775.
In answers, § 175, p. 1004.
see BILLS.
CERTIFICATES—
Of receivers, § 309, p. 1552.
Exemplifying books and papers to be used in evidence, § 333d, p. 1667.
Clerk, to authentication of record on appeal, § 704, p. 3824.
Of citizenship, suits to cancel, § 151b, p. 885.
CERTIORARI—
Bills of, § 132, p. 751; § 159, pp. 927, 928.
Writs of, under common law practice, § 460, pp. 2285-2291.
statutory writs of, from Supreme Court, to review decision of
Circuit Courts of Appeals, § 467, p. 2363; § 689, p. 3676.
Court of Customs Appeals, § 689a, p. 3679.
Court of Appeals of District of Columbia, § 689b, p. 3679.
Supreme Court of Hawaii, Porto Rico, and the Philippines, § 689c, p. 3680.
District Court of the Canal Zone, § 691c, p. 3701.
State Courts, § 689d, p. 3681.
for diminution of the record, § 704, p. 3833.
after removal of causes, § 553, p. 3037.
with writ of *habeas corpus*, § 466, p. 2350.
see FORMS.
CESTUI QUE TRUST—
When necessary parties to suits affecting trust property, § 113, p. 697.
see also BENEFICIARY.
CHANGE OF RESIDENCE—
Purpose of, does not prevent change of citizenship, § 46, p. 167.
CHARGE—
State statute limiting powers of judge to comment on the facts in charge to jury, or directing that such charge be in writing, effect of in Federal court, § 473j, p. 2426.
When trial judge may comment upon the facts, § 473, p. 2425.

Vol. II begins at § 197, page 1125; Vol. III begins at § 453, page 2201; Vol. IV begins at § 670, page 3597.

CHARGE (continued)—
General exception to, when unavailing, § 479, p. 2499.
Exception to refusal of court to charge, § 479, p. 2498.
CHARITY—
Necessary parties to suit brought by one entitled to, on behalf of himself and others similarly situated, § 114, p. 704.
Informations filed on behalf of, § 131, p. 745.
Liberal amendments in favor of, § 206, p. 1162.
Relief granted without regard to allegations in bill, § 154, pp. 917, 918.
CHARTERS—
Injunctions to restrain corporations from violating their, § 264, p. 1323.
Party whose land has been taken by corporation under power of eminent domain may obtain injunction for using such lands for purpose not allowed by company's charter, § 264, p. 1325.
CHATTEL—
Injunction to restrain alienation of a specific, § 272, p. 1356.
Injunction to prevent sales and transfers of, § 272, p. 1357.
CHEROKEE ACT, § 671a, p. 3608.
CHINA, UNITED STATES COURT OF, § 73, p. 277.
CHINESE EXCLUSION LAW, § 694, p. 3736.
See IMMIGRATION; HABEAS CORPUS.
CIRCUIT COURTS—
Abolished, § 2, p. 3, n. 1.
CIRCUIT COURTS OF APPEALS—
Appellate jurisdiction, § 696, p. 3757.
Jurisdiction, § 4, p. 9; § 300, p. 1464; § 688, p. 3657; § 689, p. 3676; § 693, p. 3722; § 695, p. 3740; § 696, p. 3757.
Power to issue writs, § 4, p. 9.
Territorial jurisdiction, § 4, p. 10.
Terms and places of holding, § 4, pp. 9-12.
Review by, § 666, p. 3567.
Review of decisions by Supreme Court, §§ 688-689f, pp. 3657-3684.
Certification of questions from, to Supreme Court, § 689f, p. 3688.
Limitation of time for review of decisions of, by Supreme Court, § 689f, p. 3688.
Writs of error from, § 692, p. 3701; § 699, p. 3785; § 693, p. 3722.
Printing records in, § 706, p. 3854.
Briefs in, § 707, p. 3854.
see also AMENDMENTS TO RULES.
Proceedings upon decisions by, §§ 711-711j, pp. 3873-3904.
Mandates, §§ 712, 712a, pp. 3904-3917.
see also APPEALS AND ERROR; BANKRUPTCY.
CIRCUITS—
Enumerated and described, § 66, pp. 276-342.
CITATION—
To defendants in error or respondent, § 699, p. 3787; § 700a, p. 3795.
Failure to serve, when ground of dismissing case, § 700a, p. 3795.
Failure to serve, how waived, § 700a, p. 3798.
CITIZENS—
Of different States, jurisdiction of Federal courts in controversies between, § 1, p. 1; § 5, p. 14; § 40, p. 125.
Of same State, § 5, p. 14.
Suits against States by, § 105, p. 657.
Of what State corporation regarded as a, § 47, p. 169.
national bank regarded as a, § 47, p. 169.
Of what State a corporation is presumed to be, § 135, p. 757.

Vol. II begins at § 197, page 1125; Vol. III begins at § 453, page 2201; Vol. IV begins at § 670, page 3597.

CITIZENS (continued)—
If party desiring to intervene in a suit is citizen of same State as one of the defendants, that will usually not deprive the court of jurisdiction, § 258, p. 1286.
CITIZENSHIP—
Of infant as affecting jurisdiction, § 90, p. 584.
Necessary allegation in a bill, § 135, p. 755.
Averment of, must be as of the time of commencement of suit, § 135, p. 757.
Change of, after jurisdiction has attached, § 45, p. 158.
Effect of change of, for purpose of suing in Federal courts, § 46, p. 167.
Not determined by form of pleadings, § 40, p. 126.
Of natural persons, determination of, § 46, p. 159; § 454e, p. 2217.
Of corporations, § 47, p. 169.
Of unincorporated stock companies, § 48, p. 177.
Of partnerships, § 49, p. 178.
Not determined by intention, § 46, p. 165.
Allegation of, § 46, p. 168.
Evidence of, § 46, p. 168.
As affecting jurisdiction of Federal courts, § 46, p. 167.
Not determined by residence, § 46, p. 160.
Of members of voluntary association, § 115, p. 706.
Costs when action is dismissed for want of jurisdiction for lack of difference of citizenship, § 408, p. 1994.
see also REMOVAL OF CAUSES; RESIDENCE; BILLS.
CIVIL LAW—
Source of equitable practice and jurisprudence, § 78, p. 542.
Practice of taking libels *pro confesso*, § 172, p. 990.
CIVIL RIGHTS LAWS—
Suits under, § 5, p. 13.
Practice in removal of cases arising under, § 552, p. 3033.
Right of removal from State to Federal court, § 537, p. 2885.
see INDICTMENTS.
CLAIMS—
Suits to collect claims against the United States, § 5, p. 17; §§ 95-100, pp. 593-640.
Suits concerning mining, § 31, p. 107.
Suits for, claims founded on Constitution and laws of the United States, § 96b, p. 605.
Practice in enforcing such claims, § 96c, p. 605.
Effect of rejection of, by Comptroller of the Treasury, § 96, p. 600.
Appeal by the plaintiff in such cases, § 97, p. 633.
Against a corporation which has been sold, after discharge of receiver, the purchaser is the proper party to suit to enforce, § 113, p. 694.
proof of, against receivers, § 320, pp. 1616-1618.
preferred claims in receiverships, § 305, p. 1509; § 305a, p. 1510.
see COURT OF CLAIMS; BANKRUPTCY.
CLASS—
Suits against one or more of a, proper parties in, § 115, p. 706.
Suits by or against one or more persons as representatives of a class.
Claiming a common right, § 116, p. 707.
Extent to which bound by suit against representatives of, § 115, p. 706.
Statement that complainant sues so should be in address clause of a bill, § 135, p. 755.
Suits for plaintiff alone and representing a, not multifarious, § 142, p. 799.
Suits on behalf of members of, see also INTERVENTION.

Vol. II begins at § 197, page 1125; Vol. III begins at § 453, page 2201; Vol. IV begins at § 670, page 3597.

CLAYTON ACT, §§ 151a, 276a, 291, 297, 454 l.
Restriction upon injunctions against strikers, § 276a, p. 1373.
Contempt proceedings under, § 430b, p. 2137.
see INJUNCTIONS; ANTI-TRUST ACT.
CLERICAL ERROR (see also CORRECTION OF DECREE OTHERWISE THAN BY APPEAL).
CLERKS OF COURTS—
Direction to enter appearance, § 169, p. 976.
Approval of bond on writ of error cannot be delegated by judge to clerk, § 702.
Undertaking to, for fees, by plaintiff in error, on docketing cause and filing record in United States Supreme Court, §§ 704, 705.
No security for fees to clerk of Supreme Court of United States required in writs of error in criminal prosecutions, § 702.
Power to issue blank writs, § 455a, p. 2246.
Certificates of, § 333o, p. 1692.
Transcripts by, § 333o, pp. 1691, 1692.
Fee of, in Supreme Court and Circuit Court of Appeals, § 417, p. 2028; § 417b, p. 2031.
Fee of, in District Court, § 417c, p. 2034.
Of District Courts, duties of office, § 257, p. 1278.
CLIENT—
Costs as between solicitor and, § 422, p. 2071.
CLOSING—
At hearing, § 374, p. 1852.
Argument in appellate court, § 707, pp. 3866, 3867.
CLOUD UPON TITLE (see PARTIES; BILL; TITLES).
CLUBS (see VOLUNTARY ASSOCIATIONS).
CO-DEFENDANT—
Answer can pray relief against, § 173, p. 997.
Whether admissions of one defendant can be used against, § 330. p. 1648.
COLLECTOR—
Recovery against, execution, § 427a, p. 2089; § 427f, p. 2092.
COLLUSION—
Removal of receiver because original appointment was obtained by, § 323, pp. 1624, 1625.
Bill to impeach for, § 451, p. 2196.
Remanding cause improperly removed to Federal court, § 556e, p. 1391.
COLLUSIVE ASSIGNMENT—
Removal of cause in case of, § 537g, p. 2896.
Dismissal for, § 363, p. 1817.
COLOR—
Witness not to be excluded on account of, § 339, p. 1714, n. 1.
COLORADO—
Constitutes one judicial district, § 66, p. 285.
Times and places of holding court therein enumerated, § 66, pp. 219, 220, 285, 286.
Districts of, included within Eighth Circuit, § 4, p. 10.
COMBINATION—
Bill charging, when multifarious, § 141, p. 798.
Injunction to restrain, § 151a, p. 875.
COMITY—
Between State and Federal courts, § 52, p. 189; § 60b, p. 225.
COMMERCE—
Compliance with Interstate Commerce Act compellable in certain cases by injunction, § 276c, p. 1379, § 151a, p. 871.
Suits to protect, § 5, p. 20; § 61, p. 239; § 105, p. 658.

Vol. II begins at § 197, page 1125; Vol. III begins at § 453, page 2201; Vol. IV begins at § 670, page 3597.

COMMERCE COURT, § 75, p. 385.
COMMERCIAL LAW—
What principles of, applicable in Federal courts, § 477, p. 2448.
COMMISSION—
To take testimony, see EVIDENCE.
COMMISSION OF REBELLION—
When will issue, § 189, pp. 1116, 1117.
COMMISSIONERS—
Fees of, § 418, p. 2052.
National Park Commissioners, § 483h, pp. 2549, 2550.
United States Commissioners, § 483g, pp. 2547-2549.
COMMISSIONERS OF PATENTS—
Bill against, § 147, p. 849.
Injunction against, § 147, p. 850.
COMMITMENT—
Notice of motion for process of, to be served personally, § 251, p. 1258.
Order of, § 429, p. 2120.
Order cannot be altered at subsequent term, § 430a, p. 2136.
COMMITTEE—
For lunatic on suit brought, § 107, p. 675.
suits by, § 91, p. 587.
Appointment of new, when old dies, § 91, p. 588.
Practice in England, § 91, p. 588.
Suits against a committee chosen to represent a class of defendants, § 115, pp. 705, 706.
Creditors in bankruptcy; bondholders, stockholders or intervening parties, § 619, p. 3307.
COMMON CARRIER—
Receiver of railroad a, § 312, p. 1582.
How far decisions of State courts relative to, are binding upon Federal tribunals, § 477, p. 2449.
see also CARRIER.
COMMON INJUNCTIONS (see INJUNCTIONS).
COMMON LAW—
Acts upon property, not persons, § 78, p. 543.
Origin of, § 78, p. 543.
Source of equitable practice and jurisprudence, § 78, p. 542.
Desire to soften rigors of, the foundation of equity jurisprudence, § 78, p. 542.
Distinction between, and equity, § 78, p. 543.
see also PRACTICE AT COMMON LAW.
COMMON-LAW PROCEDURE (see PRACTICE AT COMMON LAW).
COMMON RIGHT—
Suits by or against one or more persons as representatives of a, § 116, p. 707.
COMPELLING—
Witness to testify, § 343, p. 1743.
Proceedings compelling answer for, § 189, p. 1116.
COMPENSATION—
Suits to recover, § 5, p. 20.
Terms as to, of receiver, imposed by court on appointment, § 306, p. 1538.
When receiver obliged to act without, § 318, p. 1605.
Of receivers, § 322, p. 1620.
Of master, § 395, p. 1964.
COMPETENCY—
Of witnesses, see EVIDENCE.

Vol. II begins at § 197, page 1125; Vol. III begins at § 453, page 2201; Vol. IV begins at § 670, page 3597.

COMPETITION—
Suits to restrain unfair, in patent cases, § 146, p. 830.
in trademark cases, § 148, p. 852.
in copyright cases, § 150, p. 861.
No injunction to restrain, § 264, p. 1324.
See also MONOPOLY.
COMPLAINT—
Dismissal of, § 473g, p. 2418.
Judgment unconditionally dismissing, may be reviewed by writ of error from Supreme Court to State court, § 692, p. 3701.
see also BILLS; PARTIES; PLEADINGS.
COMPTROLLER OF THE CURRENCY—
Appointment of receiver by, § 302, p. 1492.
Introducing in evidence papers executed by, § 333a, p. 1659.
When not a necessary party to suit against a receiver of a national bank, § 113, p. 693.
CONCLUSIONS OF LAW—
Not to be stated in bills, § 137, p. 767.
Not to be stated in affidavit, § 337, p. 1713.
see also FACTS.
Denial of, § 174, p. 1002.
Demurrer does not admit, § 366a, p. 1829.
CONCURRENT JURISDICTION—
Of State and District Courts, § 5, p. 19; § 52, p. 190.
Dismissal of bill for failure of plaintiff to elect whether he will proceed at law or in equity, § 368, p. 1839.
CONDEMNATION PROCEEDINGS—
Injunction affecting, § 270, p. 1341.
Removal of, § 538f, pp. 2913-2915; § 542, p. 2955; § 482, p. 2524.
Separable controversies in, § 541c, pp. 2943-2945.
United States, practice in, § 5, p. 15; § 482, pp. 2513-2525.
condemnation of sites, jurisdiction, procedure, § 482, pp. 2513, 2514, 2515.
condemnation of land for river and harbor improvements, purchase, donations, § 482, p. 2514.
condemnation of land for fortifications and coast defenses, § 482, pp. 2414, 2415, 2417.
commissions on purchases of sites, payment, § 482, p. 2516.
State practice, when followed, § 482, pp. 2515, 2518, 2519, 2522, 2524.
conveyance of land to citizen of another State, § 482, p. 2518.
review of proceedings by certiorari, § 482, p. 2523.
liability for costs upon appeal, § 482, p. 2523.
CONDITIONAL DECREE—
Sometimes made without reference to pleadings, for the purpose of doing equity, § 153, p. 908.
see also DECREES.
CONFLICT OF LAWS—
When *lex fori* governs, § 477b, p. 2463.
see STATE COURTS; STATE STATUTES.
CONFORMITY—
Of practice in Federal courts to State, § 453, p. 2201.
CONGRESS—
Suits for removal of members of, § 5, p. 18.
Exemption of members of, from service of process, § 167, p. 967.
When writ of *ne exeat republica* cannot be issued against members of, § 327, p. 1635.

Vol. II begins at § 197, page 1125; Vol. III begins at § 453, page 2201; Vol. IV begins at § 670, page 3597.

CONGRESS (continued)—
Introducing in evidence extracts from the journal of the Senate or of the House of Representatives, § 333j, p. 1683.
Recovery against officer of either House of; execution, § 427f, pp. 2094, 2095.
Practice on removal of suits against officers of either House of, § 551, p. 3025.
CONNECTICUT—
Constitutes one judicial district, § 66, p. 286.
times and places of holding court therein enumerated, § 66, p. 286.
The districts of, included within the Second Circuit, § 4, p. 10.
CONNOLY THEODORE—Article by, § 466, p. 2348, n. 5.
CONSENT—
To relief sought as affecting necessary parties, § 122, p. 735.
Decrees entered upon, what to be stated in, § 404, p. 1983.
Dismissal of suit on, costs and fees, § 417c, p. 2035, n. 7.
Amendment of order or decree entered by, § 444, p. 2168.
A case of which the Federal court could not otherwise take jurisdiction cannot be removed from State court by, § 538, pp. 2906, 2907.
Cause which was properly removed to Federal court cannot be remanded on consent, § 556, p. 3075.
Appeals from decrees entered by consent, § 711i, p. 3899.
CONSIDERATION—
Inadequacy of, § 151f, p. 903, n. 5.
CONSOLIDATION OF SUITS—
Common-law procedure respecting, § 453, p. 2204.
At law and in equity, § 138, p. 775; § 472, p. 2401.
orders to save costs by consolidating causes of like nature, § 472, pp. 2401, 2402.
when allowed, § 472, pp. 2402, 2403.
remand of one suit improperly removed, not prevented by consolidation of two suits, § 472, p. 2403.
see INDICTMENTS.
CONSPIRACY (see INDICTMENTS).
CONSTITUTION—
As affecting jurisdiction of Federal courts, § 1, p. 1.
Distinctions made by, between law and equity, § 80, p. 560.
Suits arising under, § 1, p. 1; § 5, p. 14; § 24, p. 73; § 25, p. 84.
to redress deprivation, right, privilege or immunity secured by, § 5, p. 18.
Must be a clear question under, on the pleadings, § 24, p. 77.
Suits against United States upon claims under, § 95, p. 595.
Custody of property where Federal courts exercise jurisdiction under Constitution and laws of United States, § 59, p. 220.
Liability of States to suits by private persons under, § 105, p. 657.
Suits of one State against another, under, § 104, p. 654.
Power of Congress to enact law allowing in a single specified suit against a corporation chartered by it, matters and defendants to be joined, in a manner that would otherwise constitute multifariousness, § 143, p. 803.
Exemption under, of certain Federal officers from process, § 167, p. 967.
Writs of error, in any case, in District Court, brought on account of the deprivation of any right or privilege secured by the, § 688, p. 3657.
Review by writ of error, of decision of State court affecting, § 692, p. 3701.
see also CONTRACT.

Vol. II begins at § 197, page 1125; Vol. III begins at § 453, page 2201; Vol. IV begins at § 670, page 3597.

CONSTITUTIONAL LAW—
Rulings involving, upon hearing, § 375, p. 1856.
State statutes regulating procedure in Federal courts, effect of, § 477c, p. 2464.
CONSTRUCTION—
Of State statute by State court, how far binding on Federal tribunals, § 477c, p. 2467.
CONSTRUCTIVE FRAUD—
As a subject of equitable jurisdiction, § 79, pp. 547, 548.
CONSTRUCTIVE TRUSTS—
As subjects of equitable jurisdiction, § 79, pp. 545, 546.
CONSULAR COURTS—
Jurisdiction and practice, § 74, p. 367.
Appeals from, § 693, p. 3725.
CONSULS—
Jurisdiction of cases affecting, § 1, p. 1.
Original jurisdiction of United States Supreme Court in controversies affecting, § 3, p. 4.
Jurisdiction of District Courts in suits against, § 5, pp. 19, 25.
Introducing in evidence copies of papers in the office of a, § 333 l, p. 1685.
Consular certificates, § 333 l, p. 1685.
CONTAGIOUS DISEASE—
Provisions as to holding to terms of United States Supreme Court in case of, § 3, p. 7.
CONTEMPT AND CONTEMPT PROCEEDINGS—
Punishment for, by District Court, § 5, p. 26.
Proceedings discharged by amendment, § 210, p. 1168.
Notice of motion for process of, to be served personally, § 251, p. 1258.
Party in, restricted to certain motions, § 251, p. 1261.
Receiving fees by counsel assigned to person suing in *forma pauperis*, a, § 253, p. 1267.
Interference with receiver, a, § 311, p. 1574.
Witness refusing to testify, § 343, p. 1743.
By publication, § 428a, p. 2105.
Perjury as, § 428b, p. 2111.
In disobedience to orders by persons not parties, § 428c, p. 2114.
Notice of decree before punishment for, § 428d, p. 2116.
Time when proceedings should be instituted, § 429a, p. 2118.
Practice in criminal proceedings, § 430a, p. 2123.
Proceedings under Prohibition Law, § 430c, p. 2140.
Common-law procedure respecting, § 453, p. 2205.
Jurisdiction of Federal courts to punish acts committed before removal of cause, § 555f, p. 3070.
When amendment of bill discharges, § 210a, p. 1168.
see also ENFORCEMENT OF DECREES AND ORDERS.
CONTINUANCE—
Executor or administrator becoming party entitled to a, § 216, p. 1189.
Adjournments, § 473a, p. 2406.
see also POSTPONEMENT.
CONTRACT—
Relief in equity against, § 79, p. 547; § 151f, p. 903.
When not specifically enforced, § 151f, p. 903, n. 5.
To build bridge, when not specifically enforced, § 151f, p. 903, n. 5.
Bills to contain no unnecessary recitals of, § 237, p. 1238.
Alternative relief in action affecting, § 138, p. 778.

Vol. II begins at § 197, page 1125; Vol. III begins at § 453, page 2201; Vol. IV begins at § 670, page 3597.

CONTRACT (continued)—
Injunction to enforce specific performance of, affecting land, § 265, p. 1331.
Injunctions to compel the performance or prevent the breach of, § 267, p. 1334.
Injunctions to compel the performance or prevent breach of, not affecting land, § 281, pp. 1409-1412.
Injunction to restrain defendant from violating negative promise contained in a, § 281, p. 1409.
With receiver, § 307, p. 1545.
How far decisions by State courts upon the law of contracts by corporations are binding upon the Federal courts, § 477, pp. 2454, 2455.
How far construction of, by State courts will be followed in Federal tribunals, § 477c, p. 2466.
see SPECIFIC PERFORMANCE OF CONTRACTS.
Effect of State statute authorizing decrees of specific performance, § 82, p. 571.
Bill to cancel illegal, § 79, p. 555, n. 42.
Bill to cancel marriage, § 151f, p. 903, n. 5.
Suits upon, § 5, p. 19.
Suits on assignee claims under, § 63, p. 264.
When assignee of one party may be sued by the other party, § 63, p. 266.
Suits on, with United States, § 96, p. 598; § 671, p. 3599.
Suits for extra work under contract with government agent, § 96a, p. 605.
Owners of partial interest in, for land, when not necessary parties to suit on, § 119, p. 718.
Specific performance of, for land, § 119, p. 718.
Necessary parties to suit on, § 120, p. 725.
Of corporation, presumed to be within charter, § 144, p. 808.
CONTRIBUTION—
As a subject of jurisdiction in equity, § 79, p. 548.
CONTRIBUTORY NEGLIGENCE—
How far decisions of State courts upon law of, are binding upon the Federal tribunals, § 477, p. 2452.
Pleading, § 454i, p. 2228.
CONTROVERSY—
Between citizens of different States, § 40, pp. 125-130.
how determined, § 41, p. 130.
Between two States, § 104, p. 654.
Confined to questions of property, § 104, p. 654.
Separable controversies, § 541, p. 2930.
Between State sheriffs and United States marshals, § 56, p. 211.
CONTUMACIOUS WITNESS—
Compelling to testify, § 343, p. 1743.
CONVERSION—
Of property, not ground for bill in equity, § 79, pp. 552, 553, n. 38.
Suit for, § 63, p. 258, n. 1.
CONVICT—
Time of, to bring appeal or writ of error, § 698, p. 2457.
see also CRIMINAL PROSECUTIONS.
COPYRIGHT—
Jurisdiction of cases concerning, § 5, p. 27.
To restrain the infringements of, § 278, pp. 1399-1406.
exclusive rights as to copyrighted works, § 278, pp. 1399, 1402.

Vol. II begins at § 197, page 1125; Vol. III begins at § 453, page 2201; Vol. IV begins at § 670, page 3597.

COPYRIGHT (continued)—
when injunction void, for lack of jurisdiction, § 278, p. 1400.
service and enforcement, § 278, p. 1405.
pleadings in bill to enjoin infringements, § 143, p. 801.
complete title to, must be alleged in a bill for infringement, § 144, p. 809.
bill of infringement of, § 138, p. 775; § 142, p. 801; § 153, p. 412.
injunction to restrain infringement of, § 105c, p. 666; § 267. p. 1334; § 278, p. 1399.
Pleadings at common law in, § 454n, p. 2238.
Statutes, compliance with, § 144, p. 807.
State statutes of limitation upon, effect of, § 61, p. 232.
Suits arising under laws of United States, § 29, p. 103.
CORAM NOBIS—
Writ of error, when allowed, § 481, p. 2510.
CORPORATIONS—
Abatement of action against, by dissolution, § 216, p. 1193.
Allegation that defendant corporation is about to exceed its powers insufficient; facts to be shown, § 137, p. 773.
Answers by, § 191, p. 1119.
to be made by principal officer, § 174, p. 1001.
discovery cannot be required of, § 174, p. 1001.
but officers can be required to answer fully, § 174, p. 1001.
Assignees, suits by, of choses in action of, § 63, pp. 256, 257, n. 1.
Bills, verification of, in suits affecting, § 145, p. 515; § 156, p. 920.
Books of, inspection, § 332, p. 1652.
Charters and franchises
chartered by Congress, jurisdiction of suits, by or against, § 24. p. 81.
franchises not forfeited by bill in equity filed by private citizen, § 79, p. 545.
power of Congress to pass law allowing, in a single specified suit against corporation chartered by it, matters and defendants to be joined in a manner that would otherwise constitute multifariousness, § 143, p. 803.
contracts by, presumed to be within charter, § 144, p. 808.
injunctions to restrain corporation from violating their charters, § 264, pp. 1323-1331.
Citizenship
effect of citizenship, § 41, pp. 137, 138.
consolidated citizenship of, § 47, p. 174.
location of principal office does not affect the citizenship of, § 47, pp. 176, 177.
of what State regarded as a citizen, § 47, p. 169; § 135, p. 757.
Foreign corporations
regulation of suits by, § 83, p. 576.
State officer enjoined, from revoking license, § 105, p. 666.
Licenses
State officer enjoined from revoking license of foreign, § 105, p. 666.
refusal to issue new license, § 105, p. 666.
Officers
when proper parties to suit against, § 111, pp. 680, 681.
when improper parties, § 111, p. 679.
Parties
Federal corporations as parties, § 27, p. 98.

Vol. II begins at § 197, page 1125; Vol. III begins at § 403, page 2201; Vol. IV begins at § 670, page 3597.

CORPORATIONS (continued)—
who to be made parties in a suit against, under English practice, § 111, p. 679.
parties to a suit to enforce a claim against a third party, § 120, p. 731.
suit to prevent waste of corporate assets, § 120, p. 731.
when a necessary party, § 120, p. 732.
bill for a dissolution and accounting for the benefit of one stockholder, § 120, p. 733.
if party to bill, law of State creating same to be stated, § 135, p. 757.
Receivers
suit against receiver of, parties to, § 113, p. 693.
parties to suits to enforce claims against, when corporation has been purchased after discharge of receiver, § 113, p. 694.
when receiver of property of, will be appointed, § 302, p. 1480.
suits in the name of, by receiver, § 311, p. 1569.
claims against, when corporation has been purchased after the receiver is discharged, parties to suit to enforce, § 113, p. 694.
Relief, alternative, asked for in suit affecting interest in, § 138, p. 775.
Reorganization of, § 258b, pp. 1288, 1289.
Resident, of what State deemed to be, § 61d, p. 241.
State statute affecting
State statute cannot regulate, suits by foreign, § 83, p. 576.
State statute concerning suits by or against consolidating corporations followed, § 83, p. 576.
how far decisions of State courts upon the law of contracts by corporations are binding upon Federal tribunals, § 477, p. 2448.
agreement by, not to remove into Federal court any suit brought against it within a State, § 537m, p. 2902.
Stockholders
individual liability of stockholders, § 82, pp. 572, 574.
when stockholders are necessary parties to suits affecting, § 113, p. 694.
parties to suit by stockholder, on behalf of himself and others similarly situated, § 114, p. 701.
suing stockholders of, as representing a class, § 115, p. 706.
directors need not be joined in suits by stockholders, § 119, p. 720.
bill to compel issue of stock, misjoinder, § 140, p. 783.
joinder of corporation and stockholders in a suit on a bond, § 141, p. 791.
necessary averments in suits affecting rights assertable by, § 145, p. 809.
bills in suits affecting, when to be verified, § 145, p. 809; § 156, p. 920.
allowing stockholders to intervene in suits affecting, § 258c, p. 1291.
Subpoena, service of, upon, § 164, p. 937.
Territorial corporations, § 27, pp. 99, 100.
see also PARTIES; FOREIGN CORPORATIONS; BANKRUPTCY.
CORRECTION OF DECREE OTHERWISE THAN BY APPEAL—
In general, § 443, p. 2166.
Of judgments by courts that rendered them, § 481, p. 2508.
Amendment upon decree without a rehearing, § 444, p. 2167.
Petitions for rehearing, § 445, p. 2171.
practice upon, § 445, p. 2175.
Supplemental bills in the nature of bills of review, § 446, p. 2177.

Vol. II begins at § 197, page 1125; Vol. III begins at § 453, page 2201; Vol. IV begins at § 670, page 3597.

CORRECTION OF DECREE OTHERWISE, ETC. (continued)—
Bills of review, § 447, p. 2179.
provisions peculiar to, for matters of fact newly discovered, § 448, p. 2184.
provisions common to both kinds of bills of review, § 449, p. 2188.
bills in the nature of bills of review, § 450, p. 2194.
Bills to impeach decrees on account of fraud, § 451, p. 2195.
collusion, § 451, p. 2196.
surprise, § 451, p. 2196.
Bills to suspend or avoid the operation of decrees, § 452, p. 2198.
COSTS—
In general, § 407, p. 1992.
definition and distinction between costs at law and in equity, § 407, p. 1992.
Admiralty, § 411, p. 2006; § 562, p. 3135.
Answers
for separate answers, § 190, p. 1118.
for exception to insufficiency of answer, § 194, p. 1121.
Bankruptcy, § 659, p. 3552.
Classification of, § 414, p. 2018.
Common law, costs at, § 408, p. 1992.
Criminal proceedings, § 408a, p. 1997.
Disbursements
miscellaneous disbursements, § 420, pp. 2064-2066.
disbursements for copies of papers, § 419a, p. 2060.
bills for printing and lithographing, § 419b, p. 2061.
premiums paid surety companies, § 419c, p. 2063.
Dismissal of bill
dismissing bill with, where a disclaimer is made and it appears that defendant was made a party without reason, § 196, p. 1124.
plaintiff dismissing his bill without costs, § 361, p. 1810.
Error and appeal
in court of removal, § 412, p. 2011.
on remand after removal, § 412, p. 2011.
when judgment on, is reversed for want of jurisdiction below, § 412, p. 2011.
when both parties appeal, § 412, p. 2011.
when case dismissed for want of jurisdiction in court of original jurisdiction, § 412, pp. 2010, 2011.
appeal from taxation for costs, § 424, p. 2078.
security for, not required in writs of error to convictions of crime, § 702, p. 2481.
security for, on writ of error or appeal, § 702, p. 3807.
Fees
Attorney's fees, §§ 416-416e, pp. 2018-2026.
Clerk's fees, Supreme Court of the United States, § 417, p. 2028.
Circuit Courts of Appeals, § 417a, p. 2031.
Courts of Customs Appeals, § 417b, p. 2034.
District Courts, § 417c, p. 2034.
Marshal's fees, Supreme Court of the United States, § 418, p. 2042.
generally, § 418, pp. 2041-2049.
Witness' fees, § 419, pp. 2055-2062.
Fund, costs out of a, § 421, pp. 2066-2071.
Judgment, where none allowed against the United States, § 95, p. 595.
Master's report, for exceptions to, § 393, p. 1931.

Vol. II begins at § 197, page 1125; Vol. III begins at § 453, page 2201; Vol. IV begins at § 670, page 3597.

COSTS (continued)—
Motions
making of separate motions discouraged as to, § 251, pp. 1260, 1261.
in appellate court on motion to dismiss for want of jurisdiction, § 408, p. 1994.
Parties
making persons parties to suits to mulct for, § 111, p. 679.
for expunging scandalous matter, § 239, p. 1242.
costs between party and party, § 415, p. 2018.
Patent cases, § 410, p. 1285.
Payment of
as condition of leave to amend, § 143, p. 803; § 215, p. 1183.
when to form a subject of prayer for relief, § 154, p. 917.
amending bill as of course without payment of costs, § 209, p. 1164.
Receiver, preferred claim against, § 311, p. 1570.
Remand
upon remand of cause improperly removed to Federal court, § 556, p. 3090.
imposed upon a remand, § 556c, p. 3090.
Security for, § 425, pp. 2079-2083.
Solicitor and client, costs between, § 422, p. 2071.
Taxation of costs, § 423, p. 2076.
Testimony, costs for taking, § 352, p. 1775.
Trademark cases, costs in, § 410, p. 1285.
see also SECURITY FOR COSTS; TERMS; DISTRICT ATTORNEY; COMMISSIONERS; CLERKS; MARSHALS; WITNESSES; BANKRUPTCY; ATTORNEY'S FEES; CLERK'S FEES; FEES.
COUNSEL—
Agreements between, must be reduced to writing or made in open court, § 330, p. 1649.
Fees of, §§ 416-416e, pp. 2018-2026.
when payable out of fund in court, § 422, p. 2071.
when fees of, required to be paid by party desiring to intervene, § 258, p. 1285; § 260, p. 1316.
Hearing
on hearing, § 374, p. 1852.
time allowed on argument in appellate court, § 707, p. 3866.
Motions and petitions
"as soon thereafter as counsel can be heard words," usually employed in notices of motion, § 251, p. 1259.
when to sign notice of motion, § 251, p. 1259.
former English practice respecting, as to argument of motions by, § 252, p. 1264.
assigning under English practice to petitioner suing *in forma pauperis*, § 253, p. 1267.
Receivers
whom receiver may not retain as, § 312, p. 1281.
allowances to, in receiverships, § 321, p. 1617.
Signatures
signature of, to bill, § 155, p. 918.
signature of, to amended bill, § 210, p. 1166.
signature of, to bill of revivor, § 223, p. 1206.
when signature of, necessary to petition for intervention, § 254.
COUNTER AVERMENTS—
To avoid anticipated defense, § 136, p. 765.

Vol. II begins at § 197, page 1125; Vol. III begins at § 453, page 2201; Vol. IV begins at § 670, page 3597.

COUNTER-CLAIMS—
When allowed, § 198, p. 1130.
Defenses by way of, in admiralty, § 575, p. 3165.
Distinction between counter-claims and defense, § 198c, p. 1143.
New parties to, § 199, p. 1145.
Patent and trade-mark cases, § 198a, p. 1141.
Suits by the United States, § 95, pp. 594, 595.
Time of filing, § 200, p. 1149.
see also SET-OFF; CROSS-BILLS.
COUNTY—
Is a corporation, § 63, p. 259.
Subject to suit, § 105, p. 658.
State law cannot direct jurisdiction over, § 83, p. 575; § 105, p. 658.
Called judicial district, § 453, p. 2208.
COUPONS—
Bill by holder of, § 79, p. 329.
Amount of, when included in estimating value of matter in dispute, § 6, p. 36.
COURT FUNDS—
Petition for payment of, § 253, p. 1266.
COURT-MARTIAL—
Accused may testify, § 523, p. 2798.
Writ of prohibition, against, § 456, p. 2551.
COURT OF CLAIMS—
Abatement and revivor, § 678, pp. 3625, 3626.
Amendments, § 675, pp. 3621, 3622.
Assignee, right to use, § 673a, pp. 3614-3617.
Attorneys in, § 676, pp. 3623-3625.
Consolidation, § 675a, p. 3623.
Costs, § 685, p. 3648.
Discontinuance and withdrawal of papers, § 679, p. 3626.
Evidence before the, § 682, pp. 3631-3641.
oaths and acknowledgments, § 682, p. 3631.
witnesses, § 682, pp. 3631, 3632, 3635.
commissioners to take testimony, § 682, p. 3631.
when testimony not to be taken, § 682, p. 3632.
general provision as to depositions, § 682, pp. 3632, 3636, 3637, 3638.
depositions on written interrogatories, § 682, pp. 3632, 3633.
depositions on oral examination, § 682, pp. 3633, 3634, 3636.
examination of claimant, § 682, p. 3634.
cross-examination, § 682, p. 3634.
evidence from the executive departments, § 682, pp. 3638, 3639.
production of original papers by claimant, § 682, p. 3639.
printing, § 682, pp. 3639, 3641.
burden of proof and evidence as to loyalty, § 682, p. 3641.
Judgments, § 684, pp. 3645-3648.
claims forfeited for fraud, § 684, p. 3645.
no interest on claims, § 684, p. 3646.
certified by Secretary of Treasury, § 684, p. 3646.
final judgments a bar, § 684, p. 3646.
payment, § 684, p. 3647.
Jurisdiction, § 671, pp. 3598-3607; § 96, p. 598.
equitable, § 671a, pp. 3607-3609.
patent cases, § 671b, pp. 3609, 3610.
Motions, § 677, p. 3625.

Vol. II begins at § 197, page 1125; Vol. III begins at § 453, page 2201; Vol. IV begins at § 670, page 3597.

COURT OF CLAIMS (continued)—
New trials, § 683, pp. 3641-3645.
motion of claimant, § 683, p. 3641.
motion of United States, § 683, p. 3642.
rehearing of point presented and considered in argument, § 683, p. 3645.
Notices, § 677, p. 3625.
Organization of, § 670, pp. 3597, 3598.
Parties plaintiff, § 673, pp. 3612-3614.
Petitions and claims, § 673b, pp. 3617-3620.
Pleadings by defendant, § 674, pp. 3620, 3621.
References, § 681, p. 3631.
Statute of limitations in, § 672, pp. 3610-3612.
Trials, § 680, pp. 3626-3631.
session, § 680, p. 3626.
calendar, § 680, p. 3627.
request for finding of fact, § 680, pp. 3627, 3628, 3629.
briefs, § 680, pp. 3627, 3628, 3629.
neglected cases, § 680, p. 3630.
demurrers and pleas, § 680, p. 3630.
advancement of cases, § 680, p. 3630.
War claims, § 671, p. 3600.
liability of the United States for, §§ 96a, 96b, pp. 600-605.
see APPEAL AND ERROR; NEW TRIALS.
COURT OF CUSTOMS APPEALS, § 77, p. 393.
COURTS (See respective titles: and DISTRICT OF COLUMBIA; HAWAII; PHILIPPINE ISLANDS; PORTO RICO; CHINA; VIRGIN ISLANDS).
COVENANT—
Against ancestor, who necessary party to a bill to enforce, § 110, p. 678.
Injunctions to enforce specific performance of, relative to land, § 265, p. 1331.
CREDITORS—
Corporation, creditors of
obtaining injunction, § 264, p. 1325.
appointment of receiver in suits of, § 302a, p. 1483.
Parties
of estate, not to be joined as party with receiver, § 113, p. 693.
of insolvent debtor, when necessary party to suit brought by or against insolvent debtor, § 113, pp. 692, 693.
necessary parties to suits by, on behalf of himself and others similarly situated, § 114, pp. 703, 704.
bill by, to reach land of debtor, necessary parties, § 119, p. 722.
parties to bill to enforce liability of stockholders, § 119, p. 723.
parties to suit to enforce a lien, § 120, p. 732.
several, on different obligation cannot unite in one bill, § 140, pp. 784, 785.
cannot join with a purchaser upon a sheriff's sale to set aside a fraudulent conveyance, § 140, p. 784.
Revivor, filing bill of, § 219, p. 1198.
suit by, against a stockholder as representing a class for capital of a dissolved corporation, § 115, p. 706.
see BANKRUPTCY.
CREDITOR'S BILL—
Admiralty, decree in, not within jurisdiction of Federal court, § 51, p. 186.
Cross-bill cannot be filed simply to reduce claim to judgment, § 198, pp. 1130, 1131.

Vol. II begins at § 197, page 1125; Vol. III begins at § 453, page 2201; Vol. IV begins at § 670, page 3597.

CREDITOR'S BILL (continued)—
Equitable jurisdiction over, § 151d, p. 894.
Members of different firms joined in, § 141, p. 795.
Parties to suit brought by one on behalf of himself and others similarly situated to recover prize money, § 114, p. 704.
Receiver appointed upon, not necessary party in ancillary foreclosure suit, § 113, p. 693.
Removable, when founded on a state judgment, § 538, p. 2907.
Removal to Federal court, § 51, p. 188; § 538j, pp. 2916, 2917.
State law authorizing, § 82, p. 572.
Value of matter in dispute in, § 15, p. 57.
see PRIZE CAUSES.
CRIME (see CRIMINAL PROSECUTION; HABEAS CORPUS; CONVICTION OF CAPITAL OR INFAMOUS CRIME; PRACTICE IN CRIMINAL CASES).
CRIMINAL PROSECUTION—
Civil rights laws, practice on removal of cases arising under, § 552, p. 3033.
Competency of witnesses in, § 339b, p. 1729.
Fraud, defendant in certain cases obliged to answer charge of, § 348, pp. 1759, 1760.
Injunctions, will not be issued to stay, § 271, p. 1349.
when injunctions will be issued, § 271, p. 1350.
Jurisdiction of District Court, § 5, p. 25.
Practice in, § 483, p. 2526.
Revenue officers, and officers of either House of Congress, practice upon removal to Federal court, § 551, pp. 3025-3032.
Writ of error
to Supreme Court of United States, § 688, p. 3657.
to Circuit Court of Appeals in, § 693, p. 3722.
time to take out writ of error in, § 698, p. 3778.
no security required upon a writ of error to a judgment of conviction of a capital crime in a court of the United States, § 702, p. 3808.
entitled to preference on hearing, § 707, p. 3860.
see PRACTICE CRIMINAL CAUSES.
CROSS-BILLS—
Appeal from decree dismissing, § 698, p. 3778.
Definition and origin of, § 197, p. 1125.
Filing of
who can file, § 200, p. 1149.
time of filing, § 200, p. 1149.
frame and requisites of, § 200, p. 1149.
Jurisdiction over, irrespective of citizenship of, § 51, pp. 180, 181, 182; § 199, p. 1145.
New parties to, § 199, p. 1145.
Original bills, § 132, p. 752.
Petition of intervention, cross-bills sustained as, § 258, p. 1292.
Proceedings upon, § 201, p. 1150.
Relief by, against co-defendant, § 175, p. 1004.
Subpœna
service of subpœna under, § 165, p. 951.
service of subpœna to answer, § 201, p. 1150.
see COUNTER-CLAIMS.
CROSS-LIBEL, § 580, p. 3171.
CUSTODY OF COURT—
When it begins, § 52, p. 194.
When it terminates, § 52, p. 195; § 60, p. 224.
CUSTOM ADMINISTRATIVE ACT, § 457c, p. 2263.

Vol. II begins at § 197, page 1125; Vol. III begins at § 453, page 2201; Vol. IV begins at § 670, page 3597.

D.

DAMAGES—
Costs upon nominal damages, § 410, p. 2004.
Death, damages for, § 5602, p. 3122.
Delay, awarded by appellate court for, § 712, p. 3906.
Injunction, necessity of alleging special, § 264, p. 1324.
Injunction bonds, § 298, p. 1457.
Loans, damages for excessive, at common-law, § 81a, p. 566.
Personal injury, damages for, § 560, p. 3123.
Reference to master to assess, § 377, p. 1862.
Recovery by bill in equity, independently of other equitable relief, § 79, p. 553, n. 39.
Suits for, against United States, § 5, p. 19; § 36a, p. 600.
Verdicts and awards sustained, § 560d, p. 3119.
see NEW TRIALS; APPEAL AND ERROR.
DEATH—
Of relator, effect of, upon proceedings, § 131, p. 745.
Action abating by, of plaintiffs, § 216, p. 1187.
Of party pending appeal or writ of error, § 697, pp. 3767-3778.
Effect of death of party before time allowed for taking appeal, or bringing writ of error has expired, § 697, p. 3776.
Abatement of suits by, see ABATEMENT AND REVIVOR; BILLS OF REVIVOR.
Place of trial of offenses punishable with, § 61, p. 239.
DE BENE ESSE—
Issuing subpœna in case of taking, § 340, pp. 1734, 1735.
Bills for taking testimony, § 156, p. 563; § 346, p. 1750.
Depositions *de bene esse* under the Acts of Congress, § 354, pp. 1780-1791.
DEBENTURES—
For drawback of duties, jurisdiction of suits by assignees of, § 5, p. 17.
DECEDENT'S ESTATE—
Suits relating to, § 54, p. 200.
Against, by assignee of a claim, § 63, pp. 262, 263.
DECISIONS—
How pleaded, § 237, p. 1237.
Rules of, upon a hearing, § 375, p. 1853.
Weight of, upon a hearing, § 375, p. 1854.
Rules of, in trials at common law, § 477, p. 2448.
see APPEAL AND ERROR.
DECLARATORY PART—
Of decree, § 404, p. 1983.
DECREE—
Absolute decree, § 400, p. 1974.
Admiralty, § 584, p. 3183; § 585, p. 3184.
Appeal, decree distinguished from decision for purposes of, § 698, p. 3778.
Bills
impeaching upon the ground of fraud, § 132, pp. 751, 752.
to suspend operation of, on special circumstances, § 132, pp. 751, 752.
to avoid, on the ground of matter subsequent, § 132, pp. 751, 752.
to obtain a judicial construction of a previous, § 132, p. 752.
to set aside, § 132, p. 752.
to enforce, § 51, pp. 180, 181; § 442, p. 2163.
jurisdiction of, to set aside, for fraud, § 51, pp. 187, 188.

Vol. II begins at § 197, page 1125; Vol. III begins at § 453, page 2201; Vol. IV begins at § 670, page 3597.

DECREE (continued)—
Conditional decrees, § 400, p. 1974.
conditional, sometimes entered for the purposes of doing equity, § 153, p. 908.
Definition and classification, § 396, p. 1968.
Discontinuance before, § 361, pp. 1814, 1815.
Enrollment of, § 406, p. 1990.
Federal court, suit to make decree of State court, decree of, § 51, p. 188.
Final and interlocutory decrees, § 397, pp. 1968-1971; § 585, p. 3184; § 695, pp. 3740-3757.
bill to interfere with the enforcement of an interlocutory, § 51, pp. 188, 189.
court may make a final decree upon the hearing, § 377, p. 1859.
Frame of decree, § 404, pp. 1982-1989.
Interlocutory decrees, see FINAL DECREES.
In personam, § 398, pp. 1971-1973.
In rem, § 399, p. 1973.
Leave given to apply for further orders at foot of, § 377, p. 1862.
Mandatory injunctions rarely granted before a, § 287, p. 1427.
Motions at the foot of a decree, § 405, pp. 1989-1990.
Multifariousness
decrees not rendered void by, § 143, p. 803.
necessity of separate decrees does not make bill multifarious, § 140, pp. 783, 784.
Nisi, § 401, pp. 1977-1981.
in the nature of decrees *nisi*, § 402, p. 1981.
Parties
who bound by, § 110, p. 677.
to provide for all the rights which different persons have in the matters decided, § 110, p. 677.
all persons should be made parties to suit who are interested in, § 110, p. 677.
decrees as against absent parties or such as are without the jurisdiction, § 115, p. 707; § 117, p. 710.
from what decrees a party may appeal, § 695, p. 3740.
parties indispensable to, § 120, p. 724.
Pro confesso, § 172, pp. 990-995.
taking bill *pro confesso*, appeal from, § 172, p. 993.
Relief, alternative, in action to set aside, § 138, p. 777.
Time of entry of decree, § 403, p. 1982.
see CORRECTION OF DECREE OTHERWISE THAN BY APPEAL; ENFORCEMENT OF DECREES AND ORDERS; HEARING; INTERLOCUTORY APPLICATION AND PETITIONS; JUDGMENTS; PARTIES; APPEAL AND ORDER.
DECREE OF FEDERAL COURT—
Jurisdiction of bill to restrain, regulate, set aside, construe, or enforce, § 51, pp. 180, 181.
DECRETAL ORDER—
Defined, § 255, p. 1270; § 396, p. 1968.
DEDIMUS POTESTATEM—
Taking testimony by a commission under a, § 345, p. 1746; § 353, p. 1779.
Commissions under, § 353, p. 1779; § 356, pp. 1795-1799.
Proceedings, § 357, pp. 1799-1803.
DEEDS—
Trustees under, when necessary parties to suits affecting property covered by, § 113, p. 699.
Bill to set aside trust, parties to, § 113, p. 701.

Vol. II begins at § 197, page 1125; Vol. III begins at § 453, page 2201; Vol. IV begins at § 670, page 3597.

DEEDS (continued)—
Parties to bill to set aside, of sale of land, § 119, p. 719.
Alternative relief in action to set aside, § 138, p. 776.
By receiver, § 307, p. 1543(3).
Permitting master under Lord St. Leonard's Act to execute deed or other written instrument in the name of a party who refuses to do so, § 441, pp. 2161, 2162, n. 1.
see also GRANTS.
DEFAULT—
Opening, how far State practice respecting opening of, followed, § 453, p. 2208.
When a constructive admission, § 331, p. 1650.
Dismissing bill for want of prosecution, § 362, p. 1815.
Appeal from decree entered *pro confesso*, § 695, p. 3740.
Effect of no appearance for plaintiff in error, when case is called for argument, § 707, p. 3866.
see also TAKING BILLS PRO CONFESSO.
DEFECTS—
In suits, § 230, p. 1215.
DEFENDANTS—
Abatement by death of, § 216, p. 1188.
Acts of defendants when in pursuance of a common scheme may be joined, § 141, p. 795.
Class, represented by one or more, § 116, p. 709.
Cross-bills, filing of, see CROSS-BILLS.
Extent those of a class not joined as, are bound, § 115, p. 706; § 116, p. 710.
Fictitious name, defendant cannot be made under, § 135, p. 760.
Foreign executors and administrators, § 109, p. 676.
Idiots, lunatics and persons of weak mind, § 107, pp. 675.
Infants as, § 106, p. 673.
Married women, § 108, pp. 675, 676.
Misjoinder of, § 141, pp. 788-798. See BILLS.
Objection to multifariousness in bills, § 143, p. 802.
Omission from bills of such as are not within jurisdiction of court, § 117, p. 711.
Parties desiring to intervene as plaintiffs may be made, § 258b, pp. 1286, 1287.
Receiver when defendant can move for appointment of, § 316, p. 1602.
Relief
alternative relief against, § 138, p. 778.
one can seek relief against another in a cross-bill only, § 198, p. 1144.
persons interested in relief prayed for who do not join as plaintiffs should be made as, § 110, p. 677.
States as, liability to private person, § 105, pp. 657-672.
suit by other States, § 104, pp. 654-657.
suit by the United States, § 103, p. 654.
United States as, liability to private person, § 95, pp. 593-598.
Who may be, § 94, p. 592.
Who cannot be, § 94, p. 592.
United States ordinarily, § 94, p. 592.
foreign States, § 94, p. 592.
sovereigns, for acts done in a political capacity, § 94, p. 592.
the individual States under certain circumstances, § 94, p. 592.
receivers without leave, § 94, p. 592.
foreign executors and administrators, § 94, p. 592.
the President of the United States, § 94, p. 593.
see also BILLS; CO-DEFENDANTS; PARTIES; PLAINTIFFS.

Vol. II begins at § 197, page 1125; Vol. III begins at § 453, page 2201; Vol. IV begins at § 670, page 3597.

DEFENSES—
Counter averments to avoid anticipated, § 136, p. 765.
Equitable estoppel in pais, § 185a, p. 1058.
Election of remedies, § 185b, p. 1061.
When it affects value of matter in dispute, § 23, pp. 72, 73.
Which are pleadable by way of answer, § 175, pp. 1003, 1004.
Peculiar to patent cases, § 188, pp. 1106-1116.
Purchase for valuable consideration, § 185c, p. 1063.
DELAWARE—
Constitutes one judicial district, § 66, p. 286.
times and places of holding court therein enumerated, § 66, p. 286.
Districts of, included within the Third Circuit, § 4, p. 10.
DELAY—
Dissolution of interlocutory injunction for delay in bringing cause to a hearing, § 296, p. 1447.
Dismissal of bills for want of prosecution, § 362, p. 1815.
Interest awarded where writ of error or appeal was taken merely for, § 712, p. 3907.
DELIVERY OF PROPERTY—
Injunctions to prevent, § 282, p. 1412.
Injunctions to compel, § 282, p. 1412.
DEMURRER—
Abolished in equity, § 364, p. 1824.
Admissions by, § 366, pp. 1827-1832.
Allegations not stated positively are demurrable, § 136, p. 763; § 137, p. 771.
Amendment, § 215, p. 1183.
Classification of demurrers to the relief, § 365, p. 1827.
Common law, § 454f, pp. 2219-2221.
defects of form, § 454f, p. 2219.
overruled with leave to amend, § 454f, pp. 2220, 2221.
Constructive admission, when a, § 331, p. 1650.
Definition and general characteristics, § 365, p. 1827.
Derivation of, § 365, p. 1827.
Discovery
defined and classified, § 348, p. 1758.
causes of, § 365, p. 1827.
Petition for intervention, objections to form of, to be taken by, § 259b, p. 1310.
Plaintiff's pleading, where after removal to Federal court he proceeds on wrong side of the court, § 555, p. 3056.
see PLEADINGS AT COMMON LAW.
DEPOSITIONS—
In District of Columbia, § 342, p. 1742, n. 14.
Common-law procedure respecting, § 453, p. 2204; § 473, p. 2413.
Taken before removal of cause to Federal court, whether witness can be compelled to sign same after removal, § 555h, p. 3072.
To be embodied with record on appeal, § 704, p. 3825.
see also EVIDENCE; PRACTICE AT COMMON LAW.
DERIVATIVE TITLE—
Setting forth in bill, § 144, p. 805.
DEVISEES—
When necessary parties to a bill against the executor, § 113, p. 692.
Suit by to quiet title, § 138, p. 775.
DIFFERENCE—
Of citizenship, as affecting jurisdiction, § 454d, p. 2216.
Of citizenship, how determined, § 46, p. 159.
Of citizenship, averments of, § 135, p. 758.

Vol. II begins at § 197, page 1125; Vol. III begins at § 453, page 2201; Vol. IV begins at § 670, page 3587.

DIRECTIONS—
Receiver applying to court for, § 308, p. 1547.
To receivers, § 310, p. 1561.
see also INSTRUCTIONS.
DIRECTOR—
Bill against to enforce two distinct liabilities is multifarious, § 141, p. 790, n. 14.
Discontinuance of suit by stockholders as against wishes of majority of directors, § 361, p. 1813.
Effort of plaintiff to secure action by, on part of stockholders, to be set forth, § 145, p. 809.
Parties to bill to restrain, from making a fraudulent sale, § 119, p. 720.
Receiver, director of corporation, not usually appointed as, § 318, p. 1605.
Suit against corporation by stockholder, director not necessary party, § 119, p. 720.
Suit against, when at law, § 81, pp. 340, 341; § 96i, pp. 615-629.
when in equity, § 81, p. 341; § 96i, pp. 615-629.
DISABILITY OF JUDGE—
What constitutes, §§ 371, 372, pp. 1846-1851.
How raised, §§ 371, 372, pp. 1846-1851.
Who to act in case of, § 256, p. 1277.
DISBURSEMENTS (see COSTS).
DISCHARGE—
Of receiver's sureties, § 319, p. 1608.
Of writ *ne exeat*, § 328, p. 1638.
Of receiver, § 324, p. 1626.
Of bankrupt, § 655, p. 3527.
see also REMOVAL; BANKRUPTCY.
DISCHARGE OF ACCUSED—
By writ of *habeas corpus*, § 461, p. 2292.
DISCLAIMERS—
Definition of, § 196, p. 1123.
Form of, § 196, p. 1124.
Of patent claims, § 277, pp. 1395, 1396; § 410, p. 2005.
see ANSWERS.
DISCONTINUANCE (see DISMISSING BILLS OTHERWISE THAN AT A HEARING).
DISCOVERY—
Allegation of facts sought, § 136, pp. 764, 765.
Bills of, § 132, p. 751; § 347, pp. 1750-1754.
Bill of revivor cannot be had for, § 218, pp. 1196, 1197.
Demurrers to the, § 348, p. 1758; § 367, p. 1832.
Discovery not compelled exposing person to penalty and forfeiture, § 153, p. 912.
English practice allowed strangers to be made parties to suit in certain cases for the sake of a, § 111, p. 679.
Practice as to, § 174, p. 998.
President of a corporation made party for the purpose of, § 145, p. 815.
see ANSWERS; CROSS-BILLS; INTERROGATORY CLAUSE.
DISMISSAL—
Admissions by a motion to dismiss, § 366, p. 1827.
effect of conclusions of law, § 366a, p. 1829.
effect of facts of which the court takes judicial notice, § 366b, p. 1831.
Bill upon hearing, § 377, p. 1862; § 360, p. 1810.
Collusive jurisdiction, § 363, p. 1817.

Vol. II begins at § 197, page 1125; Vol. III begins at § 453, page 2201; Vol. IV begins at § 670, page 3597.

DISMISSAL (continued)—
Consent, § 114, p. 703; § 705b, pp. 3843-3845.
Default, § 705a, pp. 3840-3843.
Failure to
perfect or revive suit, § 362, p. 1815.
on plaintiff's part to elect whether procedure will be at law or in equity, § 368, pp. 1836-1840.
Moot cases, § 705d, pp. 3847-3850.
Motions to dismiss
in general, § 705, pp. 3836-3840.
practice upon, § 705e, p. 3850.
Plaintiff, dismissal by, § 361, pp. 1810-1815.
Prejudice, dismissal without, § 377, p. 1861.
Waiver of estoppel, § 705c, p. 3845.
Want of, dismissal for
equity, § 368, p. 1836.
jurisdiction, § 363, pp. 1817-1824.
prosecution, § 362, pp. 1815-1817.
DISSOLUTION—
Of interlocutory injunctions, § 296, pp. 1446-1451.
Of partnership, appointment of receiver on, § 302, pp. 1480, 1481.
Suit against corporation after, Equity Rule 94 does not apply, § 145, p. 814.
DISTRICT ATTORNEY—
Motion on behalf of, § 251, pp. 1261, 1262.
DISTRICT COURTS—
Assignees, suits by, in, § 63, p. 256.
Clerk's fees in, § 417a, p. 2031.
see COSTS.
Jurisdiction
appellate jurisdiction, § 467, p. 2364.
in condemnation proceedings to acquire real estate for United States Government, § 5, p. 15; § 482, p. 2524.
criminal jurisdiction, § 5, p. 25.
equitable jurisdiction in, § 84, p. 577.
original jurisdiction of, § 5, p. 13.
subjects of jurisdiction of, enumerated, § 5, pp. 13-20.
jurisdiction of suits by tenants in common or joint tenants when the United States is one of the tenants, § 98, p. 636.
territorial jurisdiction and terms of holdings, § 66, pp. 276-342.
jurisdiction under Tucker Act, § 96b, p. 604.
Limitation on jurisdiction, § 61c, p. 246.
Orders, what judges may grant, § 256, p. 1277.
Proceedings in, after removal of cause to, § 544, p. 2979.
Process, no service beyond its district, § 64, p. 268.
Review of judgments and decrees of, § 688, p. 3657; § 693, p. 3722; § 694, p. 3736.
Rules of practice prescribed for, by Supreme Court, § 84, pp. 577, 578.
Rules of practice promulgated by, § 84, p. 577.
Testimony, no power to enact rules regulating taking of, § 473d, p. 2413.
see REMOVAL OF CAUSES; APPEAL AND ERROR; BANKRUPTCY.
DISTRICT OF COLUMBIA—
Courts of, § 68, p. 346.
Supreme Court of, § 68, p. 345.
Court of Appeals of, § 69, p. 347.
Depositions in, § 342, p. 1742.

Vol. II begins at § 197, page 1125; Vol. III begins at § 453, page 2201; Vol. IV begins at § 670, page 3597.

DISTRICT OF COLUMBIA (continued)—
Power of Supreme Court to issue writ of prohibition, § 456, p. 2250.
mandamus, § 458, pp. 2270-2275.
quo warranto, § 468c, p. 2377.
Whether courts of, have jurisdiction in equity, § 68, p. 346.
Appeals from Supreme Court of, § 688, p. 3657; § 698, p. 3778; § 711, p. 3874.
DIVISION OF OPINION—
No costs granted on, § 407, p. 1992.
In appellate court, § 711a, p. 3876.
DIVISIONS OF JUDICIAL DISTRICTS—
In what suit must be brought, § 61, pp. 226, 227.
Enumerated, § 64, pp. 267, 268.
DOCKET—
Appellate court, § 704, p. 3835.
Failure of plaintiff in error to docket case and file record in time, § 704, p. 3834.
Defendant in error may, if he chooses, docket the cause and file the record, § 704, p. 3835.
see also CALENDAR; PREFERENCES.
DOCUMENTARY EVIDENCE (see EVIDENCE).
DOCUMENTS—
Loss of, as a subject of relief in equity, § 79, p. 546.
see INSTRUMENTS; INSPECTION; SUBPOENA DUCES TECUM; PROFERT.
DOUBLE ASPECT—
Bills with, § 138, pp. 775-780.
DOUBT—
Construed against the pleader, § 144, p. 808.
DRAWBACKS OF DUTIES—
Jurisdiction of suits by assignees of debentures for, § 5, p. 17.
DUPLICATE WRITS, § 61, p. 226.
DURESS—
As a subject of relief in equity, § 79, p. 548.
DUTY—
Performance by officer not compelled by bill in equity, § 79, p. 552, n. 36.
Suits for drawback of, § 5, p. 17.
Bill by city to establish the right to levy, § 116, p. 709.
Of receivers, § 312, p. 1579.
Dwight, Theodore W., Writs of Prohibition, § 456, p. 2248, n. 1.

E.

EJECTMENT—
Action by assignee for, § 63, p. 257.
Assisted by injunction, § 79, p. 552, n. 38.
Necessary parties on filing bill to stay proceedings in, § 120, p. 734.
State statute giving right to two trials in action of, how far binding upon Federal tribunals, § 477c, p. 2470.
Bill for same purpose as, § 79, p. 552, n. 38.
Value of matter in dispute, § 8, p. 46.
Suit against land of the United States, § 95, p. 595.
Against a State officer, § 105c, p. 664.
Service of publication in actions of, § 166a, p. 954.
ELECTION—
Under a will, as a subject of relief in equity, § 79, p. 548.
Dismissal of a bill for failure of plaintiff to elect whether he will proceed at law or in equity, § 368, p. 1839.

Vol. II begins at § 197, page 1125; Vol. III begins at § 453, page 2201; Vol. IV begins at § 670, page 3597.

ELKINS ACT—
Relief prayed may be stated and sought in alternative forms, § 138, p. 775.
Regulating commerce with foreign nations and among States, § 339b, p. 1731.
Word "concession" in act, catchall to all who tend to defeat purpose of law, § 506f, p. 2701.
EMINENT DOMAIN—
Party whose land has been taken by, may obtain injunction against corporation for using such lands for purposes not allowed by the corporation's charter, § 264, p. 1323.
see CONDEMNATION PROCEEDINGS.
EMPLOYERS' LIABILITY ACT—
Refusal of Federal court to take jurisdiction because no reference to statute in plaintiff's pleading, § 24, p. 79, n. 33.
In force in Canal Zone, § 70, p. 350.
Recovery under, § 186u, p. 1096.
Limitation of liability of shipowners, § 593, p. 3207.
Answer in proceedings for limitation of liability, § 602, p. 3231.
ENDORSEMENT—
Of writ, how far State practice followed respecting, § 453, p. 2206.
Of summons, how far State practice followed respecting, § 453, p. 2206.
ENFORCEMENT OF DECREES AND ORDERS—
In general, § 426, p. 2084.
Action by court itself, Lord St. Leonard's Act, § 441, p. 2162, n. 1.
Assistance, writ of, § 440, p. 2160.
Bills to carry decrees into execution, § 442, pp. 2163-2165.
Employers' Liability Act, § 24, p. 79, n. 33; § 537, p. 2886; § 593, p. 3211; § 602, p. 3231.
Enrollment of decrees, § 406, p. 1990.
Executions, § 427, pp. 2084-2096.
contempts, § 428, pp. 2096-2117.
notice of application for attachment, § 428d, p. 2116.
bearing upon, § 429, p. 2117.
writ of attachment, § 432, p. 2148.
execution of, § 433, pp. 2149-2151.
Review of commitment for contempt, § 434, p. 2152.
Sequestration, § 439, p. 2159.
EPIDEMIC DISEASE—
Provisions as to holding terms of United States Supreme Court in case of, § 3, p. 7.
EQUAL RIGHTS—
Suits under law conferring, § 5, p. 17.
EQUITABLE JURISDICTION—
In general, § 78, pp. 542, 543; § 81, p. 561.
Growth of, § 78, pp 542, 543.
see JURISDICTION.
Court of claims, § 671a, p. 3607.
Illustrations of, in the Federal courts, § 79, pp. 544-560.
Vested in what courts, § 81, p. 561.
Sources of, § 84, pp. 577-579.
Where no adequate remedy at law, § 81, p. 563.
EQUITABLE RIGHTS—
Injunctions to enforce, § 263, pp. 1321-1322.
Must be given by State or United States law, § 81, p. 562.
EQUITY—
Origin, § 78, p. 542.
Definition of, § 78, p. 542.

Vol. II begins at § 197, page 1125; Vol. III begins at § 453, page 2201; Vol. IV begins at § 670, page 3597.

EQUITY (continued)—
Differences between equity and common law, § 78, p. 543.
Has been in some cases followed by common law, § 78, p. 543.
When once it acquires jurisdiction, gives complete relief, § 78, p. 543.
Exercises control over persons, § 78, p. 543.
General survey of jurisdiction of, § 79, p. 544.
Distinction between law and, in Federal courts, § 80, p. 560.
New remedies adopted, § 78, p. 542.
When new remedy created by statute, § 81, pp. 564, 565.
Consolidation at law and in equity, § 472, p. 2401.
EQUITY OF REDEMPTION—
When mortgagor who has sold, is a necessary party to bill of foreclosure, § 112, p. 683.
see also FORECLOSURE; MORTGAGES.
Value of matter in dispute in a suit to enforce the, § 11, p. 49.
ERROR—
Writ of *habeas corpus* to correct, § 461g, p. 2300.
Order granting or denying motion for new trial cannot be reviewed upon writ of error, § 695, p. 3740.
Time when execution can be issued where writ of error lies to the Supreme Court, § 427b, pp. 2089-2091.
Failure to assign in Appellate court, effect of, § 704, p. 3834; § 707, p. 3865.
see also MISTAKE; WRITS OF ERROR AND APPEALS.
ESTOPPEL—
An affirmative defense, § 175, p. 1005.
EVARTS ACT—
Review by Circuit Court of Appeals since the, § 467, p. 2361; § 693, p. 3722.
Appeals under, in *habeas corpus* cases, § 467, pp. 2360-2367.
EVIDENCE—
In general, § 329, pp. 1640-1647.
Admissions, § 330, pp. 1647-1649.
constructive admissions, § 331, pp. 1650-1657.
Federal statutes regulating admission of, § 333, pp. 1659-1709.
not necessary to charge admissions specifically in bill in order to give in evidence, § 137, p. 774.
Affidavit, definition and use of, § 334, p. 1709.
manner of verifying, § 335, p. 1709.
title of, § 336, p. 1710.
form of, § 337, pp. 1711-1713.
execution, § 338, pp. 1713, 1714.
Bills
no evidence will be admitted to prove any fact not alleged in, § 136, p. 763.
if plaintiff has evidence which would take defendant by surprise, it should be indicated in, § 137, p. 774.
discovery in equity, § 348, pp. 1754-1766.
bill should state facts and not evidence, § 137, p. 774.
waivers and offers in bills as, § 153, p. 907.
bills of discovery, § 347, pp. 1750-1754.
Books and papers of
Executive Departments, in general, § 333, pp. 1657-1659.
Treasury Department, § 333a, pp. 1659-1664.
Post Office Department, § 333b, pp. 1664-1666.
Department of Interior, in general, § 333c, p. 1666.
Land Office and as to land grants and tax sales, § 333d, pp. 1667-1673.
Patent Office, § 333e, p. 1673.

Vol. II begins at § 197, page 1125; Vol. III begins at § 453, page 2201; Vol. IV begins at § 670, page 3597.

EVIDENCE (continued)—
Pension Bureau, § 333g, p. 1677.
consular offices, § 333 l, pp. 1685-1688.
Burden of proof, § 333v, pp. 1705-1709.
Common-law procedure respecting, § 453, pp. 2201-2209.
Congress, evidence of proceedings of, § 333j, p. 1683.
Consular certificates, § 333 l, pp. 1685-1688.
Copyright records, § 333f, p. 1676.
Dedimus potestatem commissions issued under, § 356, p. 1795; § 357, pp. 1799-1803.
proceedings upon, § 357, pp. 1799-1803.
Depositions
depositions *de bene esse* under the acts of Congress, § 354, pp. 1780-1791.
notice of taking, § 354a, pp. 1786-1788.
proceedings upon, § 354b, pp. 1788-1791.
form of under the acts of Congress, § 355, pp. 1791-1795.
what is brought up on a motion to suppress depositions, § 251, p. 1260, n. 27.
Discovery in equity, § 348, pp. 1754-1766.
Documentary, in general, § 332, pp. 1650-1657.
where proposed amendments consist of matters disclosed by, § 215, p. 1182.
Inspection
in equity, § 349, pp. 1766, 1768.
at common law, § 350, pp. 1768-1770.
Interstate Commerce Commission, evidence of proceedings before, § 333h, pp. 1678-1682.
Judicial notice, § 329a, p. 1640.
of statutes, § 237, p. 1237.
Letters rogatory, § 358, pp. 1803-1807.
Master, evidence before, § 391, pp. 1923, 1924.
Official correspondence, § 333i, p. 1682.
Patent cases, § 188, pp. 1109, 1110.
Presumptions
in suits under anti-trust laws, § 333p, p. 1694.
under Prohibition law, § 333q, p. 1695.
as to citizenship, § 333r, p. 1696.
upon assessment and collection of duties, § 333s, p. 1701.
upon assessment and collection of revenue, § 333t, p. 1702.
upon distress sales, § 333u, p. 1704.
in pension cases, § 333g, p. 1677.
Prima facie evidence, § 333v, pp. 1705-1709; § 522f, p. 2792.
Proof
of handwriting, § 332a, p. 1655.
of messages by telephone, § 332b, p. 1656.
of telegrams, § 332e, p. 1656.
Records,
public, § 333m, p. 1688.
State and territorial courts, § 333n, p. 1689.
Federal courts, § 333o, pp. 1691-1694.
Self-incrimination, § 339a, p. 1723.
State statute affecting, § 83, pp. 575, 576; § 359, p. 1807.
Statutes
Federal, evidence of, § 333k, p. 1683.
State and territorial, § 333m, p. 1688.
Miscellaneous, burden of proof and prima facie evidence, § 333v, pp. 1705-1709.

Vol. II begins at § 197, page 1125; Vol. III begins at § 453, page 2201; Vol. IV begins at § 870, page 3597.

EVIDENCE (continued)—
Statutory immunity and its effect, § 339b, pp. 1729-1733.
Subpoenas
ad testificandum, § 340, pp. 1733-1735.
service of, § 342, pp. 1740-1743.
duces tecum, § 341, pp. 1736-1739.
Testimony
taken in equity which may be used in other courts, § 344, p. 1746.
bills to perpetuate, requisites, § 345, pp. 1746-1750.
to take *de bene esse*, § 346, p. 1750.
present method of taking testimony within the jurisdiction, § 352, p. 1778.
testimony after cause is at issue, and beyond the jurisdiction of the court, § 353, pp. 1779, 1780.
taken in another suit, § 350a, p. 1770.
taken before a cause is at issue, § 351, p. 1771.
taken within the jurisdiction of the court after a cause is at issue, § 352, pp. 1772-1779.
taken in manner prescribed by state law, § 359, pp. 1807-1809.
Witnesses
competency of, § 339, pp. 1714-1733.
compelling witness to testify, § 343, pp. 1743-1746.
see SUBPOENA; SUBPOENA DUCES TECUM; ADMIRALTY; COURT OF CLAIMS; COURT OF PRIVATE LAND CLAIMS; WITNESSES; PRACTICE AT COMMON LAW; JUDICIAL NOTICE; BILLS; BANKRUPTCY; PRACTICE IN CRIMINAL CASES; PRESUMPTIONS.
EXAMINATION BEFORE TRIAL—
State statute authorizing, § 83, pp. 575-576; § 359, p. 1807.
To enable party to frame pleading, § 359, p. 1807.
Order for examination of party before trial made prior to removal to Federal court, effect of removal upon, § 555, pp. 3072-3073.
EXCEPTIONS—
Admiralty, § 578, p. 3168.
Bills of
common law procedure respecting, § 453, p. 2205.
contents of, § 479, pp. 2484, 2493, 2495-2497, 2499.
reversal of judgment, § 479, p. 2485.
what constitutes record in court of first instance, § 479, p. 2485.
record on appeal, § 479, p. 2487.
dismissal for use of wrong remedy, § 479, p. 2487.
record of former trial must be incorporated in, § 479, p. 2489.
what not necessary and disregarded by court, § 479, pp. 2490, 2491.
extension of time, § 479, p. 2492.
amendment of, § 479, p. 2494.
affidavit in support of motion for continuance, not considered. § 479, p. 2495.
exception or refusal to charge. § 479, pp. 2500-2502.
Master's reports, § 393, pp. 1926-1931.
EXECUTIONS—
Appraisal subsequent to levy, § 427d, p. 2091.
Certificate of probable cause, § 427f, p. 2092.
Common law procedure respecting, § 453, p. 2205.
Interests upon judgment, § 427e, p. 2092.
Proceedings by adverse claimant, § 427a, p. 2091.
Proceedings supplementary to, § 427g, p. 2094.
Stay of, § 427b, p. 2088.
Writs of, § 427a, p. 2088.
see also ENFORCEMENT OF DECREES AND ORDERS.

Vol. II begins at § 197, page 1125; Vol. III begins at § 458, page 2201; Vol. IV begins at § 670, page 3597.

EXECUTIVE DEPARTMENT—
Evidence of books and papers, § 333, pp. 1657-1659.
Suits under regulations of, § 96, p. 598.
EXECUTORS AND ADMINISTRATORS—
Abatement and revivor of suits, § 216, pp. 1191, 1192.
Accounting, when Federal court may compel, § 54, p. 202.
Allegations in bill by, that letters were taken out "in the proper court," § 144, p. 807.
Appeal or writ of error, right to bring, § 697, p. 3767.
Assignees, executors and administrators not considered as, § 63, p. 264.
Bill of revivor, brought in by, § 224, pp. 1206, 1207.
Citizenship of, as affecting jurisdiction, § 46, pp. 164, 168.
Evidence in actions by or against, § 339, pp. 1719, 1720.
Foreign
capacity of, to sue, § 92, pp. 589, 590.
when cannot be sued, § 94, p. 592.
Parties
when to be made a party to suits affecting estate, § 110, p. 678.
when necessary party to suits, § 113, p. 691.
necessary parties in suits against, § 119, p. 715.
devisees necessary parties to suit of foreclosure, § 120, p. 730.
Statutes of limitation, § 181, p. 1047.
EXECUTORY ASSIGNMENT—
Necessary parties to suit by assignee of, § 112, pp. 687, 688.
EXEMPLARY DAMAGES—
Value of matter in dispute in suits for, § 7, p. 45.
EXEMPLIFICATION—
Of books and documents to be used in evidence, § 333d, p. 1667.
EXEMPTION—
From service of subpoena, § 167, p. 966.
In bankruptcy, § 650, p. 3504.
see BANKRUPTCY.
EXHIBITION—
Bill to enjoin opening of, on Sunday, § 79, p. 551, n. 35.
EXHIBITS—
To be embodied with record on appeal, § 704, p. 3824, n. 1.
Models, diagrams, and exhibits of material used in court below, how to be transmitted to Supreme Court of United States, § 704, p. 3824, n. 1.
Attached to bill, § 144, p. 808.
Where left, § 479, p. 2495.
EXONERATION—
As a subject of jurisdiction in equity, § 79, p. 549.
EX PARTE—
Motions made, rules respecting, § 248, p. 1255; § 250, p. 1256.
Appointment of receiver not usually made, § 315, p. 1600.
Application for writ of *ne exeat republica* may be made, § 328, p. 1636.
EXPERT WITNESSES—
Power to determine whether or not, rests in trial judge, § 473d, p. 2415.
EXTRADITION—
Habeas corpus to review, § 462, pp. 2306-2310.
habeas corpus to examine the legality of prisoner's detention under extradition proceedings, § 462, p. 2306.
To another Federal District, § 489, pp. 2583-2590.
see PRACTICE IN CRIMINAL CASES; WARRANTS OF REMOVAL.
Extradition to foreign countries, § 490, pp. 2590-2595.
fugitives from foreign country or a country under control of U. S., § 490, pp. 2590-2592.

Vol. II begins at § 197, page 1125; Vol. III begins at § 453, page 2201; Vol. IV begins at § 670, page 3597.

EXTRADITION (continued)—
surrender of fugitive, § 490, p. 2593.
time allowed for, § 490, p. 2593.
place and character of hearing, § 490, p. 2593.
fees of commissioners, § 490, p. 2594.
payment of fees and costs, § 490, p. 2594.
continuance of provisions limited, § 490, p. 2594.
proceedings may be reviewed by *habeas corpus* if commissioner commits the prisoner, § 490, p. 2595.
Extraditable offenses, §490a, p. 2595.
Complaint for, 490b, pp. 2595, 2596.
Evidence upon applications for, § 490c, pp. 2596-2600.
Evidence on hearing, § 490c, p. 2596.
Custody and protection of persons extradited from foreign countries, § 490d, p. 2600.
Seamen, § 490e, p. 2601.
From the Philippines, § 490f, pp. 2601, 2602.
From one State to another, § 491, pp. 2602-2607; § 493, pp. 2611, 2612.
fugitives, § 491, p. 2602.
penalty for resisting agent, § 491, p. 2602.
accused not entitled to hearing before Governor, § 491, p. 2607.
proceedings when void for want of jurisdiction may be reviewed by *habeas corpus*, § 491, p. 2607.
EXTRATERRITORIAL—
Jurisdiction of equity, § 78, p. 542.

F.

FACTS—
Conclusions of law not to be stated in bills, § 137, p. 767.
Trials of issues of fact in common-law actions, § 474, p. 2434.
Findings of, § 474, p. 2434.
Reversals for errors of fact, § 687, p. 3655.
see also STATE OF FACTS.
FAILURE TO APPEAR (see TAKING BILLS PRO CONFESSO).
FALSE BRANDING OR MARKING ACT, § 607, p. 3250.
FALSE IMPRISONMENT—
Value of matter in dispute, § 7, p. 45.
FEDERAL CORPORATIONS—
Where parties are, § 27, p. 98.
Suits by and against receivers of, § 36, p. 121.
Service upon, § 164a, p. 937.
FEDERAL COURTS—
How far can interfere by injunction with matters in State courts, § 269, pp. 1336-1340.
see also UNITED STATES COURTS.
Enumerated, § 2, p. 2.
Equitable jurisdiction of, § 81, p. 561.
Receivers of, suits by and against, § 37, p. 122.
Litigation in, suits arising out of, § 39, p. 124.
Practice when suits are pending for the same cause in State and Federal courts, § 52, pp. 190, 191.
Concurrent jurisdiction, § 52, p. 190.
Special practice in injunctions, § 291, p. 1430.
Property in custody of, § 52, pp. 153, 192.
No jurisdiction of political questions between States, § 104, p. 654.
see JURISDICTION.
FEDERAL GOVERNMENT (see UNITED STATES).

Vol. II begins at § 197, page 1125; Vol. III begins at § 453, page 2201; Vol. IV begins at § 670, page 3597.

FEDERAL OFFICES—
Introduction in evidence of official documents in suits affecting, § 333 l, p. 1685.
see also CONGRESS; REVENUE OFFICERS, and other officers under respective titles.
FEDERAL QUESTION—
Necessary to give jurisdiction, § 24, pp. 74, 75.
Must be involved before writ of error from Supreme Court will be issued to State court, § 692b, p. 3717.
Existence of, distinctly to appear in record on writ of error from Supreme Court to State court, § 692b, p. 3717.
FEDERAL TRADE COMMISSION AND ACT—
Jurisdiction and practice of, § 77h, p. 524.
Injunctions against, § 100d, p. 651.
Decisions of, concerning matters within their jurisdiction, § 329a, p. 1642.
FEES—
Appraisers of goods taken in execution of writ of *fieri facias*, § 427d, p. 2091.
Attorney's fees, § 416, pp. 2018-2028.
when cannot be proved in bankruptcy, § 647, p. 3485, n. 9.
under Anti-Trust and Interstate Commerce Acts, § 416a, p. 2020.
under copyright law, § 416b, p. 2021.
for collecting War Risk insurance, § 416c, p. 2022.
docket fees, § 416d, p. 2023.
upon depositions, § 416e, p. 2026.
Auditor's, § 418b, p. 2052.
Clerk
undertaking to clerk, for fees, by plaintiff in error on docketing cause and filing record in United States Supreme court, § 704.
no security required to clerk of Supreme Court of United States for fees on writ of error in criminal prosecutions, § 702, p. 3807.
Consul's, § 418, p. 2052.
Counsel
of counsel assigned to petitioner suing *in forma pauperis*, § 413, p. 2017.
see COUNSEL.
Examiner's, § 418b, p. 2052.
Marshal's § 418, pp. 2041-2049.
Master's, § 418b, p. 2052.
Receiver's, § 322, pp. 1620-1624.
when obliged to act without, § 318, p. 1605.
Referee's, § 418b, p. 2052.
Stenographer's, § 418c, p. 2053.
Suits to recover, for official services, § 96, p. 366; § 671, p. 2301.
United States Commissioners, § 418a, p. 2049; § 483f, p. 2546.
Witnesses, § 418c, p. 2053.
see also COSTS; BANKRUPTCY; ATTORNEY'S FEES; CLERK'S FEES; COUNSEL FEES.
FEIGNED ISSUE—
When court may direct, § 377, p. 1862.
Old practice of, § 381, p. 1866.
see also ISSUES AT LAW.
FICTITIOUS NAME—
Defendant under, § 135, p. 760.

Vol. II begins at § 197, page 1125: Vol. III begins at § 453, page 2201; Vol. IV begins at § 670, page 3597.

FIERI FACIAS—
Appraisement of goods taken in execution under writ of, § 427d, p. 2091.
Rights of surety, § 703, p. 3823.
FIFTH CIRCUIT—
Districts included in, § 4, p. 10.
FILE—
Taking bill off, for want of signature, § 155, p. 919.
Motions to take answers off, § 193, p. 1121.
Striking disclaimer off, when insufficient, § 196, p. 1124.
Removal of cause after motion to take bill off, § 543, p. 2964.
FILING—
What constitutes a proper, § 417, p. 2039.
FINAL INJUNCTIONS (see INJUNCTIONS).
FINAL JUDGMENTS AND DECREES—
Defined, for purposes of writ of error from Supreme Court to State court, § 695, pp. 3757-3767.
see also DECREES.
FINAL PROCESS (see ENFORCEMENT OF DECREES AND ORDERS).
FINDINGS—
In common-law actions, § 474, pp. 2434-2435.
How far review on appeal may extend where jury trial is waived and the findings are special, § 474, p. 2434.
FLORIDA—
Divided into two districts, § 66, p. 286.
counties and times and places of holding court therein enumerated, § 66, p. 286.
Districts of, included within Fifth Circuit, § 4, p. 10.
Introducing in evidence transcripts from certain books of the District courts in, § 333o, p. 1691.
Certificate of Secretary of State of, § 333d, p. 1671.
FOOT OF DECREE—
Leave given to apply for further orders or directions at, § 377, p. 1862.
FORCE (see DURESS).
FORECLOSURE—
Effect of State statutes upon practice in, § 83, p. 574.
Statutes of limitations, § 181, p. 1047.
Mortgage on property in State court's custody, § 52, p. 193.
Value of matter in dispute in suits of, § 10, p. 48.
Parties to, by an executor, § 113, p. 692.
Multifariousness, § 141, pp. 788-798.
By bondholder, § 79, p. 549, n. 20.
Jurisdiction in, suit by assignee, § 63, p. 257, n. 1.
Who necessary parties to, § 112, p. 683.
Whether subsequent lienors are necessary parties to suit for, § 119, p. 716.
Whether prior incumbrancers are necessary parties to suit for, § 120, p. 730.
Of railroad mortgages, rules regulating appointment of receiver in, § 305a, p. 1509.
Decrees in foreclosures, § 404, p. 1987.
Sales, § 394, p. 1932.
Security required on applying for *supersedeas* in, § 510, p. 180.
see also MORTGAGE; EQUITY OF REDEMPTION; RAILROADS.
FOREIGN ADMINISTRATOR—
Who are included under the term, § 92, p. 589.
May sue for death of intestate, § 92, p. 590.
When trustee by devise, § 92, p. 590.

Vol. II begins at § 197, page 1125; Vol. III begins at § 453, page 2201; Vol. IV begins at § 670, page 3597.

FOREIGN ADMINISTRATOR (continued)—
Capacity of, to sue, § 92, p. 590.
When cannot be sued, § 94, p. 592; § 224, p. 1207.
FOREIGN BILL OF EXCHANGE—
What is, § 63, pp. 258, 259.
Definition, § 63, pp. 258, 259.
see BILLS OF EXCHANGE.
FOREIGN CORPORATIONS—
Effect of State statutes regulating suits by, § 83, p. 576.
Jurisdiction of Federal courts over, § 164c, p. 939.
Service of subpœna on, § 164c, p. 939.
Transaction of business of, within State or district for service of process, § 164d, p. 943.
see also CORPORATIONS.
FOREIGN COURT—
Power to restrain defendant from suing in, § 268, p. 1335.
FOREIGN EXECUTOR—
Capacity to sue, § 92, p. 589.
When cannot be sued, § 94, p. 592.
When suit cannot be revived against, § 224, p. 1207.
see also EXECUTOR.
FOREIGN GOVERNMENT—
Introducing in evidence documents belonging to or in the custody of officers of, § 333d, p. 1670.
Liability to suit, § 102a, p. 652.
FOREIGN RECEIVERS—
When, can sue, § 93, pp. 590, 591.
Capacity of, to sue, § 93, p. 592.
FOREIGN STATES—
When, cannot be sued, § 94, p. 592.
FOREIGN WITNESSES—
Examination of, as a subject of jurisdiction in equity, § 79, p. 549.
FORFEITURE—
As a subject of relief in equity, § 151, p. 903.
Suits for, in District courts, § 5, p. 27.
No person compelled to discover what will expose him to a, § 153, p. 912.
Defendant may object to discovery if his answer would subject him to a, § 348, p. 1758; § 581, p. 3175, n. 4.
FORGED INSTRUMENT—
Form of decree setting aside, § 404, p. 1986.
FORMAL PARTIES (see PARTIES, CITIZENSHIP OF).
FORMA PAUPERIS—
Petitions for leave to sue in, § 413, pp. 2013-2018.
On writs of error in criminal cases, § 413, p. 2014.
Compelling attendance of witnesses, § 522e, p. 2789.
FORMER PROCEEDINGS—
Recitals of, in decrees, § 404, p. 1982.
FORMS—
Admiralty
answer in admiralty, p. 4309.
appeal in admiralty
notice of appeal in admiralty, p. 4316.
petition on appeal, p. 4317.
appraisers and appraisement
notice to appraisers, p. 4308.
oath of appraisers, p. 4308.
order appointing appraisers, p. 4307.

Vol. II begins at § 197, page 1125; Vol. III begins at § 453, page 2201; Vol. IV begins at § 670, page 3597.

FORMS (continued)—
report of appraisers, p. 4308.
notice of appraisement, p. 4308.
bond to marshal, p. 4307.
claim of agent, p. 4304.
claim of owner, p. 4304.
final decree in admiralty, p. 4313, 4314.
final decree in admiralty for summary judgment on bond to marshal, p. 4315.
final decree and order of sale in admiralty, p. 4316.
final decree on mandate in admiralty, p. 4319.
final decree in proceedings for limitation of liability in admiralty, p. 4326.
interlocutory decree in admiralty, p. 4313.
interlocutory decree and default in admiralty, p. 4312.
libel
libel in rem, p. 4295.
interrogatories annexed to libel, p. 4298.
libel in personam with clause of foreign attachment, p. 4299.
exceptions to libel, p. 4309.
libel of petition for limitation of liability, p. 4319.
mandate in admiralty, p. 4318.
order for mandate in admiralty, p. 4318.
monition, p. 4325.
order for monition, p. 4324.
order for transfer to trustee, p. 4322.
petition to bring in vessel under admiralty rule 56, p. 4311.
stipulation for claimant's costs, p. 4305.
stipulation for libelant's costs, p. 4303.
stipulation for value, p. 4306.
transfer to trustee, p. 4323.
Certiorari forms
answer to petition for writ of certiorari, p. 4498.
answer to petition for writ of certiorari with cross petition, p. 4503.
application to District Court for stay of proceedings under mandate of Circuit Court of Appeals pending application to Supreme Court for certiorari, p. 4497.
diminution of the record
notice of motion for writ of certiorari for diminution of the record, p. 4489.
motion for writ of certiorari for diminution of the record, p. 4490.
petition for writ of certiorari for diminution of the record, p. 4491.
order upon petition for writ of certiorari for diminution of the record, p. 4493.
motion for cross writ of certiorari, p. 4447.
motion for writ of certiorari, p. 4446.
notice of motion of petition from Supreme Court for certiorari to Circuit Court of Appeals, p. 4445.
notice of presentment to Supreme Court of petition for certiorari to State court, p. 4444.
notice of submission of answer and cross petition, p. 4447.
order of State court granting stay of proceedings pending application for writ of certiorari, p. 4496.
petition for writ of certiorari to Supreme Court to review proceedings of State court, p. 4448.

Vol. II begins at § 197, page 1125; Vol. III begins at § 453, page 2201; Vol. IV begins at § 670, page 3597.

FORMS (continued)—
petition for writ of certiorari to Circuit Court of Appeals in admiralty case, p. 4461.
petition to State court for stay of proceedings pending application for writ of certiorari, p. 4495.
petition to Supreme Court for writ of certiorari to review decision of Circuit Court of Appeals in case involving legitimacy of child, p. 4474.
petition to Supreme Court to review decision of Circuit Court of Appeals in case of promise to leave legacy, p. 4483.
petition to Supreme Court for writ of certiorari to reveiw decision of Circuit Court of Appeals in trade-mark case, p. 4468.
petition to Supreme Court for writ of certiorari to review decision of Circuit Court of Appeals in case involving questions of international importance, p. 4452.
return by clerk of Circuit Court of Appeals, p. 4510.
return by clerk of State Court, p. 4509.
stipulation of dismissal of appeals annexed to petition, p. 4488.
stipulation that transcript of proceedings in State court previously filed stand as return, p. 4508.
writ of certiorari to accompany writ of habeas corpus, p. 4442.
writ of certiorari in District of Columbia, p. 4443.
writ of certiorari for removal of criminal prosecution from State to Federal Court, p. 4443.
writ of certiorari from Supreme Court to Circuit Court of Appeals, p. 4507.
writ of certiorari from Supreme Court to State Court, p. 4507.
Common law
affidavit of defense under Pennsylvania practice act of 1915, p. 4260.
affidavit in support of such notice, p. 4275.
answer under code practice, p. 4257.
appearance under code practice, p. 4222.
bill of particulars, p. 4264.
certificate by notary to deposition de bene esse, p. 4282.
certificate by notary to deposition de bene esse containing extracts from books and papers, p. 4283.
complaint at common law under anti-monopoly law, p. 4237.
complaint upon contract under code practice, p. 4231.
complaint to enforce liability of withdrawing stockholder, p. 4245.
dedimus potestatem, p. 4280.
execution against property or fieri facias, p. 2492.
extract minutes of trial and verdict inserted in judgment roll under code practice, p. 4290.
judgment under code practice, p. 4292.
letters rogatory, p. 4287.
notice of deposition under revised statutes, p. 4281.
notice of filing and petition against United States under Tucker Act of March 3, 1887, p. 4250.
notice of motion transferring cause of action from equity to common law docket, p. 4277.
notice of motion to transfer part of case to equity side of the court, p. 4274.
notice of motion for leave to reframe common law pleading into bill in equity, p. 4268.
notice of trial, p. 4278.
order appointing referee to try action at common law, p. 4289.
order for dedimus potestatem, p. 4278.

Vol. II begins at § 197, page 1125; Vol. III begins at § 453, page 2201; Vol. IV begins at § 670, page 3597.

FORMS (continued)—
order granting leave to reframe common law pleading into bill in equity, p. 4273.
order sending part of cause to equity side of court, p. 4276.
order for trial by court without a jury, p. 4288.
petition for leave to reframe common law pleading into bill in equity, p. 4269.
plaint or declaration in action in New Jersey district for dower, p. 4247.
pleas where common law practice prevails, p. 4252.
praecipe for summons in Districts of Pennsylvania, p. 4220.
reply for the plaintiff under code practice, p. 4263.
return by marshal of service thereof, p. 4221.
return of service of subpoena ad testificandum, p. 4286.
return of service of summons, p. 4220.
similiter, p. 4262.
statement of claim under Pennsylvania, p. 4243.
stipulation to proceed with eleven jurors, p. 4290.
stipulation for reference of action at common law, p. 4289.
stipulation waiving trial by jury, p. 4288.
subpoena duces tecum upon trial, p. 4286.
subpoena duces tecum in aid deposition de bene esse, p. 4284.
summons under code practice, p. 4219.
summons in Districts of Pennsylvania and return of marshal, p. 4221.
verdict in districts of Pennsylvania, p. 4290.
writ of dower, p. 4249.
writ of scire facias, p. 4294.
writ of vendi exponas, p. 4293.
Contempt proceedings
attachment for contempt, p. 4353.
information for criminal contempt, p. 4336.
notice of motion for an order committing the defendants and other parties for a civil contempt, p. 4331.
order adjudging party guilty of contempt, p. 4352.
order fining defendant for contempt, p. 4352.
petition for rule to show cause why defendants and their attorneys should not be committed for civil contempt, p. 4331.
return to attachment, p. 4353.
rule to show cause why defendants and their attorneys should not be committed for civil contempt, p. 4330.
writ of attachment against witness for disobedience of subpoena, p. 4354.
Court of Claims
findings and judgment, p. 4593.
petition, p. 4591.
Criminal procedure
appearance bond on writ of error in criminal cases, p. 4590.
application of poor convict for discharge, proceedings upon, p. 4552.
mandate to jailer for the production of poor convict, p. 4553.
oath of poor convict, p. 4553.
certificate of discharge of poor convict, p. 4554.
bench warrant or capias, p. 4554.
return to bench warrant or capias, p. 4555.
capias pro fine, p. 4556.
return to capias pro fine, p. 4556.
certificate of proceedings, p. 4550.

Vol. II begins at § 197, page 1125; Vol. III begins at § 453, page 2201; Vol. IV begins at § 670, page 3597.

FORMS (continued)—
criminal information, p. 4559.
extradition warrant, p. 4551.
complaint for extradition warrant, p. 4550.
certificate of extradition proceedings, p. 4552.
mittimus pending examination, p. 4546.
final mittimus, p. 4546.
indictment, general form, p. 4559.
indictment for offense on the high seas, p. 4560.
indictment for offense committed at a place within exclusive jurisdiction of the United States, p. 4561.
consolidated indictment for violation of national banking laws, p. 4561.
count in indictment for violation of national banking laws, p. 4588.
penitentiary, commitment to, p. 4558.
marshal's return to commitment to penitentiary, p. 4559.
receipt of marshal for prisoner, p. 4557.
recognizance of accused pending examination, p. 4547.
final recognizance of accused, p. 4548.
recognizance of witnesses, p. 4549.
warrant of arrest, p. 4545.
complaint for warrant, p. 4545.
search warrant under prohibition law, p. 4555.
warrant for removal of prisoner to another district, p. 4556.
return to warrant for removal of prisoner, p. 4557.
venire facias, p. 4557.
Equity
amendments to bill in equity, p. 4159.
answer in suit against directors, p. 4144.
bill for accounting by syndicate managers, p. 4018.
bill of complaint against cabinet officer, p. 3953.
bill of foreclosure of railway mortgage, p. 4106.
bill to perpetuate testimony, p. 4122.
bill to prevent unfair competition, p. 4060.
bill of review for errors apparent, p. 4125.
bill of review for new matter, p. 4126.
bill of revivor, p. 4119.
bill to set aside conveyances with allegations excusing laches, p. 4023.
bond in place of injunction, p. 4172.
copyright cases
bill in equity in copyright case, p. 4050.
answer in copyright suit in equity, p. 4131.
writ of injunction against infringement of copyright, p. 4168.
decree, p. 4202.
decree for injunction and accounting in patent case, p. 4207.
decree for injunction and accounting in copyright case, p. 4208.
decree for injunction and accounting in trademark case, p. 4210.
decree of injunctions against monopoly, p. 4212.
final record in equity, p. 4201.
injunctions
answer to bill for injunction, p. 4129.
bill for injunction against District Attorney to restrain enforcement of unconstitutional act of Congress, p. 3928

Vol. II begins at § 197, page 1125; Vol. III begins at § 453, page 2201; Vol. IV begins at § 670, page 3597.

FORMS (continued)—
bill for injunction against District Attorney, and Collector of Internal Revenue, p. 3937.
order denying injunction upon bond filed by defendant, p. 4171.
notice of injunction, p. 4167.
order of Supreme Court for intervention, injunction, and receiver, p. 4163.
master's warrant or summons, p. 4193.
motion for leave to file bill in Supreme Court, p. 3925.
notice accompanying draft of master's report, p. 4195.
notice of lis pendens, p. 4128.
notice of motion to dismiss bill, p. 4165.
order appointing master to supervise stockholders' meeting, p. 4198.
order of intervention as defendants, p. 4164.
order of Supreme Court consolidating causes for the purpose of taking testimony and appointing commissioner, p. 4197.
original bill in equity in Supreme Court, p. 3926.
patent cases
account of infringements of patent, p. 4196.
bill in equity in patent case, p. 4039.
bill in equity in patent case with allegations to support interlocutory injunction, p. 4045.
master's warrant or summons in patent case, p. 4194.
petition under anti-monopoly law, p. 4064.
petition for leave to file a bill of review for new matter, p. 4126.
petition for rehearing, p. 4213.
petition for subpoena duces tecum in aid of deposition de bene esse, p. 4187.
receivers and receiverships
answer to friendly bill for receiver, p. 4158.
bill in equity for appointment of receiver, p. 4074.
bill in equity for the appointment of ancillary receiver, p. 4093.
friendly bill for appointment of receiver, p. 4085.
order appointing ancillary receiver, p. 4178.
order appointing receivers of street railway company, p. 4175.
order appointing receiver at foot of decree, p. 4174.
order to show cause against appointment of receiver at foot of decree, p. 4173.
order for examination of third party by receivers, p. 4181.
order extending receivership, p. 4180.
order of Supreme Court for intervention, injunction and receiver, p. 4163.
petition for appointment of receiver at foot of decree, p. 4099.
petition by lessor corporation for extension of receivership for its protection, p. 4182.
restraining order against strike, p. 4165.
stockholder's suits
stockholders' bill to regulate distribution of stock in other companies held as assets, p. 3988.
stockholder's bill for injunction against transfer of assets and discovery with interrogatories, p. 3972.
stockholder's bill for injunction against payment of income tax, p. 3961.
stockholders' bill for injunction against consolidation of railroad companies, p. 4001.

Vol. II begins at § 197, page 1125; Vol. III begins at § 453, page 2201; Vol. IV begins at § 670, page 3597.

FORMS (continued)—
petition for intervention in stockholder's suit with allowance thereof, p. 4160.
supplemental bill, p. 4122.
trademark cases
bill to protect trademark, p. 4056.
injunction order against infringement of trademark, p. 4167.
writ of ne exeat, p. 4187.
writ of injunction against strikers, p. 4170.
Habeas corpus forms
order discharging prisoner, p. 4389.
order quashing writ of habeas corpus ad testificandum, p. 4388.
petition for writ of habeas corpus to prevent extradition, p. 4385.
writ of habeas corpus ad testificandum, p. 4338.
writ of habeas corpus to marshal, p. 4389.
Interstate Commerce Commission
answer, p. 4602.
complaint, p. 4600.
form of reparation statement under Rule V, p. 4603.
form of original complaint in reparation cases against the agent appointed by the president, p. 4605.
petition for leave to intervene, p. 4602.
petition for rehearing or re-argument, p. 4603.
Mandamus forms
motion for leave to file petition for mandamus, p. 4391.
motion for leave to file petition for mandamus to set aside receivership, p. 3297.
motion for leave to file petition for prohibition or mandamus to prevent proceedings in equity, p. 4431.
order in obedience to decision granting mandamus, p. 4418.
petition to Supreme Court, p. 4392.
petition to Supreme Court of District of Columbia for mandamus, p. 4405.
petition to Supreme Court for mandamus to set aside receivership, p. 4397.
petition for writ of prohibition or mandamus to prevent proceedings in equity, p. 4433.
return to order to show cause against issue of mandamus, p. 4410.
return to order to show cause against issue of mandamus to set aside receivership, p. 4413.
rule to show cause why mandamus should not issue, p. 4409.
writ of mandamus, p. 4416.
Prohibition forms
motion for leave to file petition for prohibition or mandamus to prevent proceedings in equity, p. 4431.
petition for writ of prohibition or mandamus to prevent proceedings in equity, p. 4433.
return to order to show cause against issue of writ of prohibition, p. 4439.
rule to show cause why writ of prohibition should not issue against admiralty proceedings, p. 4431.
suggestion for writ of prohibition against admiralty proceedings, pp. 4420, 4422, 4428.
writ of prohibition, p. 4439.
Removal of causes
bond on removal, p. 4377.
certificate to the record by the clerk of the State court, p. 4381.
notice of application for removal; p. 4355.

Vol. II begins at § 197, page 1125; Vol. III begins at § 453, page 2201; Vol. IV begins at § 670, page 3597.

FORMS (continued)—
notice of application for removal because of prejudice or local influence, p. 4371.
notice and petition for removal because of fraudulent misjoinder as well as for a separable controversy and a difference of citizenship by a realignment of the parties, p. 4364.
order for repleader after removal, p. 4383.
petition by an officer, civil or criminal, or a soldier of the United States, for removal of a civil case from a State court, p. 4376.
petition for removal of criminal case from State court under section 643, United States Revised Statutes, Judicial Code, § 33, p. 4375.
petition for removal because case arises under constitution of the United States, p. 4357.
petition for removal because of prejudice and local influence, p. 4372.
petition for removal for difference of citizenship, p. 4355.
petition for removal for a separate controversy, p. 4359.
remand
motion for remand, p. 4381.
order for remand, p. 4382.
order denying remand, p. 4382.
Writ of error or appeal, review by
appeal and allowance, p. 4511.
assignment of errors, p. 4523.
certificate by clerk to transcript, p. 4536.
certificate of question of jurisdiction, p. 4521.
citation on appeal on writ of error, p. 4511.
exceptions
bill of exceptions, pp. 4528, 4533.
order extending time to serve bill of exceptions, p. 4527.
mandate, p. 4542.
judgment upon mandate, p. 4544.
memorandum to be inserted in a common law case as provided by section 7 of rule 14 of the Circuit Court of Appeals for the Fourth Circuit, p. 4536.
motions to dismiss and affirm, p. 4541.
motion to dismiss appeal, p. 4538.
notice of submission of motions to dismiss and to affirm, p. 4541.
notice and petition for review of order in bankruptcy, p. 4524.
notice to join in writ of error, p. 4520.
order of appearance in Supreme Court, p. 4537.
order of affirmance, p. 4542.
order as to contents of return to writ of error, p. 4535.
petition for writ of error to State court, p. 4515.
petition for review of order of Federal Trade Commission, p. 4526.
praecipe indicating portions of the record to be incorporated into the transcript upon appeal, p. 4533.
prayer for reversal, p. 4520.
stipulation authorizing certificate to return, p. 4535.
supersedeas bond, p. 4522.
writ of error from Circuit Court of Appeals to District Court, p. 4513.
writ of error to State Court, p. 4514.
writ of error from Supreme Court to Circuit Court of Appeals, p. 4512.
writ of error from Supreme Court to District Court, p. 4512.

Vol. II begins at § 197, page 1125; Vol. III begins at § 453, page 2201; Vol. IV begins at § 670, page 3597.

FRAUD—
Allegations as to, in bill, § 144, p. 808.
Bills impeaching decrees for, § 132, p. 751.
Bill filed by United States to vacate patent for public lands on account of, § 153, p. 912.
Bills to impeach decrees on account of, § 451, pp. 2195-2198.
Charge of, defendant in certain cases obliged to answer, which might subject him to a criminal prosecution, § 348, pp. 1759, 1760.
Contract, ground for bill to cancel, § 79, p. 547, n. 11.
Cross-bill, fraud set up in, § 198, p. 1140.
Joint fraud, absence of one party will not prevent the court from taking jurisdiction, § 119, p. 722.
Persons sometimes allowed to be made parties for the purpose of being mulcted in costs, § 111, p. 679.
Receiver
removal of, because original appointment was obtained by, § 323, pp. 1624, 1625.
making out case of, to secure appointment of receiver, § 303, p. 1500.
Relief
as subject of relief in equity, § 79, p. 547, n. 11; § 81, p. 563.
alternative relief in actions for, § 138, p. 779.
Special charges of
when to be specifically charged in bill, § 137, p. 771.
when bill specially charges, the plea to such part must be accompanied by answer, § 175, p. 1005.
specific acts of, must be alleged; general charge of, in bill, insufficient, § 137, p. 768.
Special prayer
when payment of costs by defendant must form a special prayer, § 154, p. 917.
FRAUDS, STATUTE OF—
State statute of frauds in actions at common law followed by Federal courts, § 477c, p. 2468.
FRIVOLOUSNESS—
Motions to dismiss appeals or writs of error for, § 705, p. 3838.
FUNDS—
Petition for payment out of the hands of an officer of the court, § 253, p. 1266.
Costs out of, § 421, p. 2066.
Bill to determine right of claimant to, in hands of a Federal marshal, § 132, p. 752.

G.

GARNISHMENT—
Interference by, with receiver, § 314, p. 1592.
GENERAL APPEARANCE—
Defined, § 168, p. 976.
GENERAL AVERAGE—
Account, § 79, p. 549.
see ADMIRALTY.
GENERAL RELIEF—
Prayer for, § 154, p. 913.
GEORGIA—
Divided into districts, § 66, p. 287.
counties and times and places of holding court therein enumerated, § 66, pp. 287, 288.
Districts of, included within Fifth Circuit, § 4, p. 10.

Vol. II begins at § 197, page 1125; Vol. III begins at § 453, page 2201; Vol. IV begins at § 670, page 3597.

GOVERNOR OF STATE—
Service of process on, § 3a, p. 8.
Jurisdiction of Federal courts over writ of *quo warranto* affecting, § 468b, p. 2377.
GRANTS—
Of different States, suits where parties claim under, § 50, pp. 178, 179.
Jurisdiction of Federal courts in cases of conflicting, by different States, § 50, p. 179.
Allegations in bill to impeach grant or patent when action is not brought by Attorney-General, § 131, p. 750; § 144, p. 808.
Practice on removal of suits containing controversies between citizens of the same State claiming land under grants of different States, § 550, p. 3024.
GRATIS—
Appearance defined, § 168, p. 976.
when can be made, § 169, p. 982.
GUARDIAN AD LITEM—
Bill not to be taken *pro confesso* before appointment of, § 171, p. 990.
Citizenship of, does not affect jurisdiction, § 44, p. 154.
Expenses from infant's property, § 106, p. 674.
Infant, when and how to be appointed, § 106, pp. 673, 674.
Liability of, § 106, p. 674.
Lunatic, § 91, p. 588; § 107, p. 675.
Petition for appointment of, § 106, p. 674; § 253, p. 1267.
Removal of, § 106, p. 674.
GUARDIAN IN SOCAGE—
Accounting by, § 151d, p. 894.

H.

HABEAS CORPUS—
Alien enemies, § 462, pp. 2310-2311.
duties of marshal, § 462a, p. 2311.
removal, § 462a, p. 2311.
time for removal, § 462a, p. 2311.
jurisdiction of U. S. courts, § 462a, p. 2311.
Appeals in habeas corpus proceedings
review, § 467, pp. 2361-2363, 2365.
time within which appeal must be taken, § 467, p. 2363.
certiorari to Court of Appeals, § 467, p. 2364.
when writ of error or appeal, cannot be taken, § 467, p. 2364.
objections to form, § 467, p. 2365.
new evidence, § 467, p. 2365.
custody of prisoners, § 467, p. 2365; § 493, p. 2616.
appeals pending from final decision, § 467, pp. 2365 2366.
summary hearing, disposition of party, § 467, p. 2367.
certificate of probable cause, § 467, p. 2367.
stay upon, § 467, p. 2360.
Application for, practice on, § 466, pp. 2345-2360.
parties who may apply, § 466, pp. 2347, 2348.
jurisdiction of the court, § 466, pp. 2349, 2351, 2352, 2354.
determination of rights of petitioner, § 466, p. 2351.
refusal of Supreme court to issue writ, § 466, pp. 2351-2353.
issuance in cases of alien prisoners, § 466, p. 2354.
return, § 466, pp. 2354, 2355, 2356.
order for discharge, § 466, p. 2357.
Bail, remedy for excessive, § 493, p. 2610.

Vol. II begins at § 197, page 1125; Vol. III begins at § 453, page 2201; Vol. IV begins at § 670, page 3597.

HABEAS CORPUS (continued)—
Cum causa, when issued by clerk on removal of cause in certain cases, § 551, pp. 3029-3031.
Custody of prisoners on, §§ 467, 493, p. 2616; § 703, p. 3819.
Deportation, orders for, see IMMIGRANTS.
Discharge of soldiers from the army by the writ of, § 464, pp. 2340-2342.
discharge of minors, by means of, § 464, pp. 2340, 2341.
when minor cannot be discharged by means of, § 464, p. 2341.
Extradition, to review proceedings for, § 462, pp. 2306-2310.
to a foreign country, § 462, p. 2306.
from one State to another, § 462, p. 2307.
from a foreign country, § 462, p. 2307.
prima facie evidence, § 426, p. 2308.
extradition not set aside, § 462, p. 2309.
discharge of fugitive, § 462, p. 2309.
appeal, § 462, p. 2310.
Immigrants, habeas corpus for, and to review order for deportation, § 463, pp. 2312-2340.
boards of special inquiry, appointment of, § 463, pp. 2312, 2313.
aliens excluded, § 463, pp. 2314, 2315.
persons once deported again seeking admission to U. S., § 463, pp. 2316, 2317, 2318.
arrest and removal of Chinese unlawfully in U. S., § 463, p. 2319.
appeals, § 463, pp. 2320, 2321, 2322.
deportation of objectionable aliens, § 463, p. 2323, 2324, 2325, 2329.
removal of alien enemies, § 463, pp. § 2325, 2326, 2327, 2328, 2329.
aliens represented by counsel, § 463, pp. 2334, 2335.
discharge of aliens, § 463, pp. 2336, 2339, 2340.
proceedings before administrative officer set forth by petition, § 463, p. 2337.
ports to which aliens to be deported, § 463, p. 2337.
Removal, application for
heard with or without aid of writ of, § 489, p. 2589.
in criminal cases may be reviewed by, § 489, p. 2585.
proceeding under, cannot be removed from a State to a Federal court, § 538c, p. 2910.
Review by
proceedings when void for want of jurisdiction may be reviewed by, § 491, p. 2607.
proceedings of commissioner may be reviewed by writ of habeas corpus if he commits the prisoner, § 490, p. 2595.
Writs of habeas corpus
in general, § 461, pp. 2291-2293.
jurisdiction to grant because of difference of citizenship, § 461a, pp. 2293, 2294.
when District Courts may take jurisdiction by, § 461a, p. 2293.
writs of habeas corpus issued by State courts, § 461b, p. 2294.
writ of habeas corpus ad subjiciendum, § 461c, p. 2294.
writ of habeas corpus ad testificandum, § 461d, p. 2295.
habeas corpus to protect officers of the United States, § 461e, pp. 2295-2298.
when Supreme Court and District Court have power to issue, § 461e, p. 2295.
when prisoner is in jail, § 461e, p. 2296; § 461f, p. 2298.
release, § 461e, p. 2296; § 461g, p. 2303.
jurisdiction in Federal Court, § 461e, pp. 2297, 2298.

Vol. II begins at § 197, page 1125; Vol. III begins at § 453, page 2201; Vol. IV begins at § 670, page 3597.

HABEAS CORPUS (continued)—
habeas corpus to protect those acting under authority of foreign states, § 461f, pp. 2298-2300.
when prisoner is in jail, § 461e, p. 2296; § 461f, p. 2298.
cases involving law of nations, § 461f, p. 2300.
errors which may be corrected by habeas corpus, § 461g, pp. 2300-2306.
when writ cannot be used, § 461g, p. 2300.
when writ can review, § 461g, p. 2302.
no discharge for imprisonment for contempt, § 461j, p. 2305.
suspension of, § 465, pp. 2242-2245.
constitutional provisions, for writ, § 465, p. 2242.
bill of rights and restrictions, § 465, p. 2242.
writ not barred by suspension, § 465, p. 2344.
see IMMIGRANTS.
HAWAII—
Jurisdiction of District Court of, § 71, p. 354.
Included in Ninth District, § 4, p. 10.
Appeal from courts of, § 693, p. 3722.
Bankruptcy proceedings in, § 608, p. 3254.
HEARING—
Dissolution of interlocutory injunction for delay in bringing cause to a, § 296, p. 1450.
Bringing suit to a, § 369, p. 1841.
Manner of hearing a cause, § 374, pp. 1852, 1853.
Rules of decision upon a hearing, § 375, pp. 1853-1858.
Objections which cannot be made at the hearing, § 376, p. 1858.
Action of the court upon a hearing, § 377, pp. 1859-1862.
Writs of error in criminal prosecutions advanced to speedy hearing, § 707, p. 3861.
Preferences among appeals on calendar of Supreme Court, § 707, p. 3860.
see also DISMISSAL OF BILLS BEFORE A HEARING.
HEIR—
Suit to establish will, § 123, p. 736; § 332, p. 1652.
Suit against, for performance of ancestor's covenants, necessary parties to, § 110, p. 678.
Party to suit for specific performance, § 112, p. 685.
Not represented by the executor in suit concerning real estate, § 113, pp. 692.
Suit by, for contracts for land, § 119, p. 715.
Suit to quiet title, § 138, pp. 775-776.
When necessary parties, § 120, p. 730.
HEPBURN ACT—
Indictments under, § 506m, p. 2711.
Limitation by residence in prosecutions, § 61, p. 239.
Offenses against Pure Food and Drugs Act, § 525g, p. 2822.
Proceedings under § 506m, p. 2711.
Provisions under, § 607, p. 3250.
Respective rights of shippers and carriers, § 593, p. 3211.
Review by Supreme Court of decree affirming dismissal of libel under, § 691, p. 3696.
HUSBAND—
When to be united with wife as plaintiff, § 89, p. 583.
When to be made co-defendant with wife, § 108, p. 675.
When may be omitted as a party in certain suits by wife, § 118, p 713.

Vol. II begins at § 197, page 1125; Vol. III begins at § 453, page 2201; Vol. IV begins at § 670, page 3597.

I.

IDAHO—
Constitutes one judicial district, § 66, p. 288.
Terms and places of holding court, § 66, p. 289.
Belongs to Ninth Circuit, § 4, p. 10.
Time within which cause to be docketed in United States Supreme Court in case of appeals and writs of error from, § 704, p. 3834.
IDIOTS—
Incapable of filing bills in their own right, § 85, p. 580.
Capacity to file bills in equity, § 85, p. 580; § 91, pp. 587-589.
Practice in suits on behalf of, § 91, p. 587.
Suits against, § 107, p. 675.
Suing alone, cause of demurrer, § 367, p. 1833.
Liberal amendments in favor of, § 206, p. 1162.
Appointing receiver of property of, § 302, pp. 1479, 1480.
Time of, to bring appeal or writ of error, § 698, p. 3778.
ILLINOIS—
Divided into three districts, § 66, p. 289.
counties and times and places of holding court therein enumerated, § 66, pp. 289-290.
Districts of, included within Seventh Circuit, § 4, p. 10.
IMMATERIALITY—
When can be raised by demurrer, § 348, p. 1759.
IMMIGRANTS—
Right to writ of *habeas corpus* to obtain permission to land, § 463, p. 2312.
Immigration rules, § 463, pp. 2320-2322.
see HABEAS CORPUS.
IMMIGRATION ACT—
Habeas corpus for, § 463, pp. 2312-2340.
IMMUNITY ACT—
District courts have jurisdiction to compel attendance of witnesses in cases of investigation under, § 5, p. 26.
Self-incriminating testimony, § 339b, p. 1730.
IMPERTINENCE—
Exception to bill for, the proper remedy if it contains irrelevant matter, § 367, p. 1836.
In answers, § 237, p. 1236.
Bill improperly amended within the rule as to, § 210, p. 1166; § 213, p. 1179.
In bills in the nature of supplemental bills, § 235, p. 1234.
Petition for intervention to be free from, § 254, p. 1268.
In bills, § 237, pp. 1236-1239.
In answer to bill of revivor, § 224, p. 1208.
IMPLIED TRUSTS—
As subject of equity jurisprudence, § 79, pp. 544, 545.
IMPORTERS—
Suit by one on behalf of himself and others similarly situated for seizure of imports, § 114, p. 704.
IMPORTS—
Jurisdiction of suits to collect, § 5, p. 15.
For illegal seizure of, § 114, p. 704.
INADEQUACY—
Of remedy at law, defined, § 79, p. 555.
see also REMEDY AT LAW.
Of consideration, § 151f, p. 903, n. 5.

Vol. II begins at § 197, page 1125; Vol. III begins at § 453, page 2201; Vol. IV begins at § 670, page 3597.

INCONSISTENCY—
In bills, § 138, pp. 775-780.
Objection for, cannot be raised first on appeal, § 138, p. 780.
INCONSISTENT TITLES—
Persons claiming property under, should not be joined as defendants, § 112, p. 683.
INDEMNITY—
Required on applying for *supersedeas*, § 703, p. 3810.
see also SECURITY.
INDIANA—
Constitutes one judicial district, § 66, p. 291.
times and places of holding court therein enumerated, § 66, pp. 291-293.
Districts of, included within Seventh Circuit, § 4, p. 10.
INDIAN DEPREDATION ACT—
Government claims, § 180f, p. 1024.
Jurisdiction of court of claims, § 671, p. 3602.
New trial in court of claims in cases coming under, § 683, p. 3642.
INDIANS—
Suits by, for land, § 5, p. 13, n. 2; § 99, pp. 637, 638.
INDICTMENTS—
In general, § 495, pp. 2631, 2632.
what an indictment is, § 495, p. 2631.
when motion to quash indictment is proper, § 495, p. 2631.
advantage of formal defects may be taken by plea in abatement, § 495, p. 2632.
Allegations
time, § 497c, p. 2643.
place, § 497d, p. 2644.
intent, § 497e, pp. 2645-2647.
Amendment of, § 505b, p. 2666.
Anti-Narcotic Law, § 506p, pp. 2716, 2717.
Bad grammar and spelling in, § 497g, p. 2648.
Bankruptcy cases, § 506t, pp. 2726-2731.
embezzlement of property, § 506t, p. 2726.
documents belonging to bankrupt estate coming into his charge as trustee, § 506t, pp. 2726, 2731.
concealing while a bankrupt, part of property to estate in bankruptcy, § 506t, pp. 2726, 2731.
false oath or account in proceedings, § 506t, pp. 2726, 2731.
false claim for proof against estate of bankrupt, § 506t, p. 2726.
attempt to extort money or property, § 506t, p. 2727.
interested party as referee, § 506t, p. 2727.
purchase by referee of property, § 506t, p. 2727.
refusal by referee to permit inspection of accounts, § 506t, p. 2727.
sufficiency of indictment for concealment, § 506t, pp. 2728, 2731.
demurrer sustained when proceeds of sale concealed, § 506t, p. 2730.
Body of, § 497, pp. 2633-2641.
caption of indictment, § 496, p. 2632.
what caption of indictment is, § 496, p. 2632.
body of indictment, § 497, pp. 2633-2651.
indictment must allege every essential element of crime charged, § 497, p. 2633.
allegations of time in indictments, § 497c, p. 2643.
only substance of voluminous documents necessary, § 497f, p. 2648.

Vol. II begins at § 197, page 1125; Vol. III begins at § 453, page 2201; Vol. IV begins at § 670, page 3597.

INDICTMENTS (continued)—
Caption of, § 496, pp. 2632, 2633.
Conspiracy
to commit offense against United States, § 506c, p. 2685.
seditious conspiracy, § 506c, p. 2686.
sufficiency, § 506c, pp. 2687, 2688.
under land laws, § 505s, p. 2724.
under civil rights laws, § 506d, pp. 2690-2697.
to injure persons in exercise of civil rights, § 506d, p. 2690.
depriving citizens of civil rights under color of State laws, § 506d, p. 2690.
to prevent officers from performing duties, § 506d, p. 2691.
to intimidate party, witness or juror, or obstruct justice, § 506d, p. 2691.
to deprive citizens of rights or privileges, § 506d, pp. 2692-2696.
depriving negroes of vote, § 506d, p. 2693.
to restrain or monopolize interstate or international commerce, § 506e, pp. 2697-2700.
bill of particulars no part of indictment, § 506e, p. 2697; § 522, p. 2780.
time of formation of, to be within three-year statute of limitation, § 506e, p. 2698.
Consolidation of, § 505, pp. 2663-2665.
Counterfeiting, § 506j, p. 2708.
Counts
joinder of, § 501, pp. 2657-2661.
in bankruptcy cases, § 506t, p. 2728.
joinder of charges, § 501, p. 2657.
conspiracy to restrain or monopolize interstate or international commerce, § 506e, p. 2699.
violation of national banking laws, § 506p, pp. 2674, 2675.
counts which may be joined in same indictment, § 501, p. 2658.
counts which cannot be joined in same indictment, § 501, p. 2659.
separate offenses united in separate counts under Prohibition Act, § 501, p. 2660.
misjoinder of, § 502, pp. 2661, 2662.
election between, § 503, p. 2662.
joinder of defendants to, § 504, pp. 2662, 2663.
Demurrers, § 516, pp. 2757-2759.
what objections can be raised by, § 516, p. 2557.
judgment on, § 516, p. 2759.
see PLEAS IN ABATEMENT.
Duplicity in, § 500, pp. 2653-2657.
count charging monopoly and attempt to monopolize, § 506e, p. 2699.
count charging transportation of two women at same time for same purpose, § 506g, p. 2704.
charge of false certificate by notary, § 506r, p. 2724.
joinder of charges, § 500, p. 2654; § 501, p. 2657.
when not duplicitous to charge in single count, § 50, p. 2654.
when count bad for duplicity, § 500, p. 2655.
when count not bad for duplicity, § 500, p. 2656.
duplicity in indictment no ground for motion in arrest of judgment, § 500, p. 2657.
Embezzlement, § 506i, pp. 2707, 2708.
Indorsements of, § 499, p. 2652.

Vol. II begins at § 197, page 1125; Vol. III begins at § 453, page 2201; Vol. IV begins at § 670, page 3597.

INDICTMENTS (continued)—
Interstate Commerce Law, § 506f, pp 2700-2703.
special rates and rebates prohibited, § 506f, p. 2700.
illegal concessions, § 506f, p. 2702.
violation of regulations of transportation rates, § 506f, p. 2702
Land laws, § 506s, pp. 2724-2726.
Larceny and receiving stolen goods, § 506h, pp. 2705-2707.
failure to describe property stolen fatal defect, § 506h, p. 2705.
fraudulently taking or receiving stolen baggage, § 506h, p. 2706.
Mails
fraudulent use of, § 506a, pp. 2679-2682.
mailing or expressing obscene matter, § 506b, pp. 2682-2685.
Margin of, § 499a, p. 2653.
National banking laws, violation of, § 506, pp. 2666-2679.
issuing circulating notes to unauthorized associations, § 506, p. 2666.
mutilating national bank notes, § 506, p. 2667.
embezzlement, § 506, p. 2667.
falsely certifying checks, § 506, pp. 2667, 2668.
crimes for violation thereof are infamous and must be prosecuted by indictment, § 506, p. 2668.
false entries in books by bank officers, § 506, pp. 2672-2674.
act of aiding and abetting need not be set out, § 506, p. 2676.
what counts are held sufficient, § 506, pp. 2670-2679.
joinder of counts, § 506, pp. 2674, 2675; § 501, p. 2657.
Oleomargarine laws, § 5061, pp. 2710, 2711.
Perjury, § 506r, pp. 2722-2724; § 506s, pp. 2724, 2726.
subornation, § 506r, p. 2723.
prosecutions before naval court-martial, § 506r, p. 2723.
false notarial certificates, § 506r, p. 2724.
false registration, § 506r, p. 2724.
Personation of officers of U. S., § 506u, pp. 2731, 2732.
see INFORMATIONS.
Pleading matters of inducement and collateral matters, § 497a, p. 2641.
Pleading negatives in, § 497b, p. 2642.
Pleading documents in, § 497f, p. 2647.
Prohibition law and other liquor laws, § 506q, pp. 2717-2722.
when delivery made by common or other carrier, § 506q, p. 2718.
separate offenses may be united in separate counts for violation of Volstead Law, § 506q, p. 2717.
removing or concealing articles with intent to defraud U. S. § 506q, p. 2719.
registry of stills and apparatus, § 506q, p. 2719.
signs put up by distillers and rectifiers, § 506q, p. 2719.
carrying on distillery without giving bond or to defraud, § 506q, pp. 2719, 2720.
removal or concealment of spirits contrary to law, § 506q, pp. 2719, 2720, 2721.
transportation of intoxicating liquors into prohibition States, § 506q, p. 2721.
Proper names in, § 497h, pp. 2648-2650.
Pure Food and Drugs Act, § 506m, pp. 2711-2714.
manufacture of adulterated or misbranded foods or drugs in Territories or District of Columbia, § 506m, p. 2711.
interstate or foreign commerce in adulterated or misbranded foods or drugs, § 506m, p. 2711.
regulations for carrying out provisions of, § 506m, p. 2712.

Vol. II begins at § 197, page 1125; Vol. III begins at § 453, page 2201; Vol. IV begins at § 670, page 3597.

INDICTMENTS (continued)—
examination of specimens of food and drugs, § 506m, p. 2712.
duty of District Attorney to prosecute, § 506m, p. 2713.
Receiving smuggled opium, § 506o, pp. 2715, 2716.
Repugnancy in, § 497i, p. 2650.
Severance, § 505a, p. 2665.
Signature of, § 498, p. 2651.
Smuggling, § 506n, pp. 2714, 2715.
Surplusage in, § 497j, p. 2651.
Tobacco laws, § 506k, pp. 2709, 2710.
White Slave Traffic Act, § 506g, pp. 2703-2705.
INDIVIDUAL LIABILITY—
Of stockholders in corporations, § 82, pp. 572, 574.
INDORSEES—
Jurisdiction of Federal courts in actions by, § 63, p. 263.
INDORSEMENT—
Of writ of injunction, § 295, p. 1446.
see ENDORSEMENT.
INDORSEMENT OF NOTES—
Injunctions to restrain, § 267, p. 1334.
INDORSER—
In suit by one, others not necessary parties, § 119, p. 722.
INFAMOUS CRIME—
Defined, § 461, p. 2302, n. 2.
INFANTS—
Amendments, liberal, in favor of, § 206, p. 1162.
Answers
answer of, § 190, p. 1118.
no exception for insufficiency may be filed to answer of, § 194, p. 1122.
in what case admissions in an answer made on behalf of infant can be used against him, § 330, p. 1648.
Bills
capacity to file bills in equity in their own right, § 85, p. 580; § 90, pp. 584-587.
effect of becoming of age after a bill is filed, § 90, p. 586.
whether bill can be taken *pro confesso* against, § 171, p. 990.
Citizenship of, as affecting jurisdiction, § 90, p. 587.
Co-plaintiff, when infant made as, § 90, p. 586.
Costs, when chargeable with, § 90, p. 587.
Decree
by consent in suit against, § 106, p. 674.
impeaching a decree improperly obtained against, § 451, p. 2196.
Defendant, infant as, § 106, pp. 673, 674.
Demurrer, infant suing alone, cause of, § 367, p. 1833.
Domicile being a separate one from parent, § 46, p. 164.
Guardian, appointment of
appearance entered before appointment of guardian *ad litem*, § 106, p. 674.
petition for appointment of guardian for, and to maintain infant out of his property, § 253, p. 1267.
In forma pauperis
may defend *in forma pauperis*, § 106, p. 674.
suing or defending *in forma pauperis*, § 413, p. 2016.
Receiver
when receiver of property of, will be appointed, § 302, p. 1479.
payment of expenses out of a fund in the hands of a receiver, § 106, p. 674.

Vol. II begins at § 197, page 1125; Vol. III begins at § 453, page 2201; Vol. IV begins at § 670, page 3597.

INFANTS (continued)—
next friend of, should not be appointed receiver of the property of, § 318, p. 1604, n. 1.
Relief granted to, without regard to allegations in bill, § 154, pp. 917, 918.
Representatives of the inheritance, § 113, p. 697.
Service of process, must be personally served, § 106, p. 674.
Suit by next friend or guardian, § 90, p. 584.
Time of, to take appeal or bring writ of error, § 698, p. 3778.
INFORMATION—
Affidavit on information and belief, § 494, pp. 2629, 2630.
Averments of false statements, § 494, p. 2629.
Bankruptcy Act, prosecution under, § 506t, p. 2727.
Cases not punishable by imprisonment, § 494, p. 2628.
Civil in their nature, § 131, pp. 744-750.
Criminal in their nature, § 494, pp. 2627-2631.
Defective when effect of material document recited without contents of same, § 494, p. 2630.
Filing
under English practice, § 131, p. 744.
in United States and State courts, § 131, pp. 745-750.
cannot be filed without leave of court, § 494, p. 2629.
Motion under an, upon whose behalf can be made, § 251, pp. 1261, 1262.
Non-capital offenses only can be prosecuted by information, § 494, p. 2628.
Offenses against elective franchise, § 494, p. 2629.
Public nuisance, to enjoin, § 131, p. 749; § 274, p. 1360.
see INDICTMENTS; BILLS; PLEAS IN ABATEMENT.
INFORMATION AND BELIEF—
Affidavit stating facts upon, in bill, § 136, p. 764.
INFRINGEMENT—
Patents, bills to enjoin, § 146, pp. 830-847.
see PATENTS.
Copyright, bills to restrain, § 150, pp. 861-870; § 278, pp. 1399-1406.
see COPYRIGHT.
Trade-marks and unfair competition, bills to restrain, § 148, p. 852.
see TRADE-MARK.
INHABITANT—
Definition of, § 61c, p. 246.
INJUNCTION—
Action at law, injunctions against, § 79, p. 551.
Alienation of property, to restrain, § 272, p. 1356.
Amendment of bill, when does not dissolve, § 210, p. 1170.
Anti-Trust Law, against strikers, § 267b, p. 1378.
Appeals from orders granting or continuing injunction, § 255, p. 1277; § 291, p. 1431; § 300, p. 1464; § 695, p. 3740.
Application for
time and place of application for interlocutory injunctions, § 289, p. 1428.
notice of application for interlocutory injunction, § 292, pp. 1433-1436.
affidavits upon application for an injunction, § 293, pp. 1436-1438.
rules of decision upon applications for interlocutory injunctions, § 294, pp. 1438-1442.
Bill, injunctions not prayed for in, § 290, pp. 1429, 1430.
Clayton Act, restriction upon, against strikers, § 276a, p. 1373.

Vol. II begins at § 197, page 1125; Vol. III begins at § 453, page 2201; Vol. IV begins at § 670, page 3597.

INJUNCTION (continued)—
Coal mining or operation of coal mines, regulation of, § 283d, p. 1415.
Comptroller of currency, injunctions to restrain, § 283b, p. 1414.
Conservation of supply and control of distribution of necessaries, injunctions under Act for, § 276d, p. 1383.
Continuance of, § 297, pp. 1452-1457.
Continuance of a nuisance, § 274, pp. 1359, 1360.
Contracts affecting land, see LAND.
Copyrights, infringement of, § 150, pp. 861-870; § 278, pp. 1399-1406.
Corporate franchises, injunctions to protect, § 264a, p. 1326.
Criminal proceedings, injunctions against, § 271, p. 1349.
distinguished from writs of prohibition, § 268, p. 1335.
Definition, classification and objects of, § 262, p. 1321.
Denial of, § 291, pp. 1452-1457.
Distinction between
judicial writ and writ remedial, § 285, p. 1424.
mandatory and prohibitory injunctions, § 286, pp. 1424-1426.
provisional and perpetual injunctions, § 287, pp. 1426, 1427.
common and special injunctions, § 288, p. 1427.
Federal courts
injunctions to protect jurisdiction of, § 270a, p. 1346.
special practice and regulations of the Federal courts in the issue of injunctions, § 291, pp. 1430-1433.
Federal Trade Commission, injunctions against, § 100d, p. 651.
Granting of, § 79, p. 320; § 270, pp. 1342, 1343.
when granted of course, § 250, p. 1257.
when not granted against judgment at law, § 79, p. 546, n. 8; § 270, p. 1345.
perpetual injunctions, when granted, what must be shown, § 299, pp. 1463, 1464.
In forma pauperis, § 413, pp. 2013-2018.
Interstate Commerce injunctions to prevent obstructions to, § 276c, p. 1379.
Interstate Commerce Commission, injunctions against, § 100b, p. 648.
Irreparable injury, injunctions to prevent, for which remedy at law is inadequate, in general, § 267, pp. 1333, 1334.
Issue of, § 297, pp. 1452-1457.
Land
to enforce the specific performance of covenants and other contracts affecting land, § 265, pp. 1331, 1332.
to compel the performance or prevent the breach of contracts not affecting land, § 281, pp. 1409-1411.
Libels, injunctions against, § 204a, p. 1421.
against libels rarely granted, § 79, p. 552, n. 35.
License, injunctions to prevent revocation or refusal of a permit or, § 281a, p. 1411.
Motion for receiver can be made upon motion for an, § 251, p. 1260, n. 27.
Multiplicity of suits, injunctions to restrain, § 266, pp. 1332, 1333.
Municipal ordinances, injunctions against enforcement of, § 271a, p. 1351.
Municipal property under execution, injunctions against sale of, § 79, p. 544, n. 1.
Opening of letters, § 280, p. 1409.
Patents
infringement of patents, § 146, pp. 830-845; § 277, pp. 1385-1399.

Vol. II begins at § 197, page 1125; Vol. III begins at § 453, page 2201; Vol. IV begins at § 670, page 3597.

INJUNCTION (continued)—
to restrain infringement of patents, allegations in bills, § 146, pp. 830-847.
against patent litigation, § 269a, p. 1338.
Person against whom sought, not a formal party, § 118, p. 714.
Political rights, injunctions to protect, § 293e, p. 1416.
Prohibition of use of intoxicating liquors, injunctions to enforce, § 274a, p. 1361.
Relief, prayer for, in cases of, § 154, p. 913.
Removal
injunctions remain in force after, § 555f, p. 3070.
injunctions against removal of State or municipal officer, § 79, p. 551, n. 35.
injunctions obtained in a cause prior to removal to Federal court, effect of removal on same, § 555, p. 3052.
Seizures of personal property, § 79, p. 553, n. 39.
Slanders, injunctions against, § 284a, p. 1421.
slanders rarely if ever enjoined, § 284a, pp. 1421-1423.
State statute
forbidding against collection of illegal taxes, § 83, p. 575.
practice in granting, how far influenced by, § 82, p. 570.
regulating security for, § 83, p. 575.
authorized by, § 82, p. 570.
requiring a bond upon, § 83, p. 575.
State officers, injunctions against, § 105c, p. 664.
Stay proceedings, injunctions to
in other courts authorized by law relating to proceedings in bankruptcy, § 268, p. 1334.
in Federal courts, § 269, pp. 1336-1340.
in State courts, § 270, pp. 1340-1349.
in State court after a removal, § 555j, p. 3073.
Suit by stranger, injunctions against act by corporation *ultra vires*, § 264, p. 1324.
Strikers, injunctions against, § 276, pp. 1366-1373.
labor not a commodity, § 276, p. 1366.
anti-trust laws not to forbid labor or agricultural organizations, § 276, p. 1366.
compulsory labor not permitted, § 276, p. 1367.
alignment of parties, § 276, p. 1371.
intimidation by strikers, § 276, p. 1372.
capacity to sue, § 276, p. 1372.
Taxes
against collection of Federal tax, § 10a, p. 645.
against assessments and collection of taxes, § 271b, p. 1352.
Trademarks
unlawful use of, § 148, pp. 852-860; § 279, pp. 1406-1409.
Trusts and other purely equitable rights, injunctions to enforce, § 263, pp. 1321, 1322.
preventing disclosure of secret proceedings, restraining publication of letters, manuscripts, etc., § 263, pp. 1321, 1322.
United States officers, injunctions against, § 36, p. 121.
United States Shipping Board, injunctions against, § 100c, p. 651.
to enforce orders of, § 283c, p. 1414.
Value of matter in dispute for, § 13, p. 50.
what to be regarded as, § 13, pp. 50-55; § 696, p. 3764.
Warrants of distress, injunctions to restrain enforcement of, § 283a, p. 1413.
Waste, injunctions to prevent, § 273, p. 1357.

Vol. II begins at § 197, page 1125; Vol. III begins at § 453, page 2201; Vol. IV begins at § 670, page 3597.

INJUNCTION (continued)—
Writs
judicial writs, writs remedial, mandatory, prohibitory, provisional, perpetual, common and special, § 262, p. 1321.
the writ of injunction requisites, § 295, pp. 1442-1446.
INJUNCTION BOND, § 297, pp. 1452-1457.
Modifying during appeal, § 703, p. 3809.
INJURY—
Injunctions to prevent irreparable, § 267, pp. 1333, 1334.
IN PERSONAM—
Decrees in, see DECREES.
IN REM—
Property as conferring jurisdiction in equity, § 78, p. 543.
Suits by United States, § 95, p. 595.
Decrees in, see DECREES.
INSANITY—
When to be specially charged in bill, § 137, p 774, n. 34.
INSOLVENCY—
Of corporation, appointing a receiver in cases of, § 302a, pp. 1483-1489.
Suits by assignee in, § 63, p. 264.
INSOLVENT DEBTOR—
When necessary party to suit brought by or against assignee, § 113, pp. 692, 693.
INSPECTION—
How obtained, § 332, p. 1654.
see EXAMINATION BEFORE TRIAL.
INSTRUCTIONS—
Receiver's duty to apply for, § 312, p. 1580.
Certification for, § 689f, pp. 3688-3693.
see also ADVICE; CHARGE.
INSUFFICIENCY—
Exceptions to answer for, § 194, pp. 1121, 1122.
INSUFFICIENCY OF FORM—
Demurrers for, § 367, pp. 1835, 1836.
INSURANCE—
Specific performance of contract for, § 79, p. 547, n. 11; § 63, p. 257, n. 1.
INSURANCE LAW—
Principles of, which are applicable in Federal courts, § 477, p. 2449.
INSURANCE POLICY—
Not cancelled by bill in equity after loss, § 79, p. 547, n. 11.
Not collected by bill in equity, § 79, p. 552, n. 36.
Suit to reform, by assignee, § 63, p. 257, n. 1.
A bill for discovery of and performance of contract to issue is multifarious, § 142, p. 799.
INTEREST—
Which is not considered as adding to the value of matter in dispute, § 19, p. 68.
Interest reipublicae ut sit finis litium, maxim of applied, § 110, p. 678.
Persons with no, whether to be made parties, § 112, p. 683.
In question of law involved, does not entitle person to be made party to suit, § 112, p. 690.
General rules as to making persons parties who have no, § 112, pp. 690, 691.
Failure to have interest in subject-matter of bill a ground of demurrer, § 367, p. 1833.

Vol. II begins at § 197, page 1125; Vol. III begins at § 453, page 2201; Vol. IV begins at § 670, page 3597.

INTEREST (continued)—
On judgments, § 427e, p. 2092.
As included in value of matter in dispute, § 19, p. 68.
Plaintiffs united in, what to be regarded as value of matter in controversy, § 17, p. 60.
On judgment against the United States, § 95, pp. 594, 595.
Plaintiff with conflicting, cannot unite in a bill, § 140, p. 783.
Of complainants, need not be co-extensive, § 140, p. 784.
Defendant cannot be joined unless he has an interest in opposing the relief, § 141, p. 788.
INTERESTED PARTY—
Not excluded from testifying, § 339, p. 1714, n. 1.
INTERFERENCE—
With duties of receiver, § 311, p. 1573, 1574.
INTERLINEATIONS—
In answer, § 192, p. 1121.
INTERLOCUTORY APPLICATIONS—
Definition and classification, § 247, p. 1255.
How interlocutory applications are made to the court, § 247, p. 1255.
Motions, definition and classification of, § 248, p. 1255.
of course, § 249, p. 1255.
special, without notice, § 250, pp. 1256, 1257.
orders grantable of course, § 249, pp. 1255, 1256.
notices of, requisites, who may make, § 251, pp. 1257, 1262.
argument of, § 252, pp. 1262-1265.
Order, requisites and characteristics of, § 255, pp. 1269-1271.
appeals from interlocutory, § 255, pp. 1274-1277; § 693, p. 3723.
judges who may grant, § 256, pp. 1277, 1278.
in case of disability of other judges, § 256, p. 1277.
Petitions, in general, distinctions between, and motions, § 253, pp. 1265-1267.
for leave to sue *in forma pauperis*, § 413, pp. 2013-2018.
of intervention, when may be interposed, requisites, § 258, pp. 1283-1304.
form of, and practice thereupon, § 254, pp. 1267-1269.
Practice upon interventions, § 259, pp. 1305-1315.
INTERLOCUTORY DECREE (see DECREES).
INTERLOCUTORY DISMISSAL OF BILLS (see DISMISSAL OF BILLS BEFORE A HEARING).
INTERLOCUTORY INJUNCTION—
Notice of applications for, § 292, pp. 1433-1436.
Rules of decision upon applications for, § 294, pp. 1438-1442.
Dissolution of, § 296, pp. 1446-1451.
see also INJUNCTIONS.
INTERLOCUTORY ORDERS (see INTERLOCUTORY APPLICATIONS).
INTERMEDIATE—
Dismissal of bills, see DISMISSAL OF BILLS BEFORE A HEARING.
INTERMEDIATE APPLICATIONS (see INTERLOCUTORY APPLICATIONS).
INTERNAL REVENUE—
Cases, § 5, p. 15.
Suits to enforce lien for, § 5, p. 15.
see PRACTICE IN CRIMINAL CASES.
INTERNAL REVENUE LAW—
Compromises and prosecutions under, § 522b, pp. 2782, 2783.
INTERPLEADER—
Who may file bills of, contents of bills and practice, § 157, pp. 920-926.
Bills in the nature of, § 158, pp. 926, 927.

Vol. II begins at § 197, page 1125; Vol. III begins at § 453, page 2201; Vol. IV begins at § 670, page 3597.

INTERPLEADER (continued)—
How far State practice as to granting order of, is followed, § 453, p. 2207.
Nature of bill of, § 132, pp. 751, 752.
Bill of, must have an affidavit, § 156, p. 920.
INTERROGATORIES—
In admiralty, § 581, p. 3174.
Answers to, § 174, p. 998.
Failure to answer, bill taken *pro confesso*, § 171, p. 989.
see EVIDENCE.
INTERROGATORY CLAUSE—
In bills, rules pertaining to, § 133, p. 753, n. 5; § 152, pp. 906, 907.
INTERSTATE COMMERCE ACT—
Bills to enjoin railroad company from filing with Interstate Commerce Commission, unreasonable increase in charges, § 151, pp. 871, 872.
Cases arising under, § 32a, p. 111.
Complaints under, § 32a, p. 114; § 77b, p. 472; § 454k, p. 2230.
Compliance with, in certain cases compellable by injunction, § 283d, p. 1416.
Place of trial of offenses under, § 525c, pp. 2819-2820.
Practice and rules, § 77b, p. 466.
Service of subpœna under, § 163, p. 936.
Suits against railroad under, § 119, p. 721.
Suits under, where brought, § 61, p. 187.
INTERSTATE COMMERCE COMMISSION—
Evidence and depositions before the, § 77c, p. 493; § 339b, p. 1730.
Enforcement of orders of, § 77d, p. 502.
Injunctions against, § 100b, p. 648.
INTERVENOR—
Appeals by, § 259 l, p. 1315.
Rights of United States, § 3, p. 5.
May remove a cause, § 542, p. 2953.
In admiralty, § 588, p. 3189.
Petition of, § 253, p. 1266; § 258, pp. 1283-1304.
see also INTERLOCUTORY APPLICATIONS.
INTERVENTIONS—
In general, § 258, p. 1283.
Appeal from orders upon, § 259e, p. 1314.
Applications for
notice of, § 259a, p. 1309.
hearing upon, § 259c, p. 1311.
Bondholders, interventions by, § 258b, p. 1287.
Class suits, interventions in, § 258a, p. 1285.
Complainants, rights of intervening, § 260, p. 1316.
Contractor's bonds, interventions in suits on, § 258 l, p. 1300.
Defendants, rights of intervening, § 261, p. 1318.
General creditors, interventions by, § 258d, p. 1294.
Interstate Commerce Law, interventions in suits under, § 258k, p. 1300.
Laches, § 259, p. 1306.
as bar to, § 258m, p. 1301.
Notice of, § 259a, p. 1309.
Opposition to, § 259b, p. 1310.
Patent litigations, interventions under, § 258j, p. 1299.
Persons entitled to share in fund held by court, by, § 258e, p. 1296.
Petition for, § 259, pp. 1305, 1306.
contents of, § 259, pp. 1306, 1307.
when filed, § 259, p. 1305.

Vol. II begins at § 197, page 1125; Vol. III begins at § 453, page 2201; Vol. IV begins at § 670, page 3597.

INTERVENTIONS (continued)—
of, may be taken as cross-bills, § 259, p. 1308.
parties to, § 259a, pp. 1309, 1310.
demurrer to, § 259b, p. 1310.
plea to, § 259 l, p. 1315.
substituted service of process upon a petition of, § 165, p. 951.
constitutes an appearance, § 169, p. 978.
Practice upon, § 259d, p. 1313.
Pro interesse suo, § 258h, p. 1299.
Property subject of litigation, interventions by persons interested in, or with a lien upon, § 258g, p. 1297.
Pure Food and Drugs Act, interventions under, § 258i, p. 1299.
Receiver, intervention as remedy against a, § 314, p. 1592.
Stockholders, intervention by, § 258c, p. 1291.
State statutes, effect of, upon, § 258o, p. 1304.
Stay pending hearing, § 259c, p. 1311.
Title in dispute, intervention by persons interested in property when, § 258f, p. 1296.
United States and cities, interventions by, § 258n, p. 1302.
INTOXICATION—
Ground of relief from contract, § 79, p. 151f; p. 903, n. 5.
INTRODUCTION—
In bills, rules relative to, and form of, § 135, p. 756.
INTRUSION—
Information for an, in the case of purprestures, § 274, p. 1359.
IOWA—
Divided into two judicial districts, § 66, p. 291.
times and places of holding court enumerated, § 66, pp. 292, 293.
Districts of, included within Eighth Circuit, § 4, p. 10.
Introducing in evidence transcripts from certain books of the District courts in, § 333o, p. 1691.
ISSUES—
Bringing matter to distinct, § 136, p. 762.
Testimony taken before cause is at issue, § 351, p. 1771.
after cause is at issue, § 352, pp. 1772-1779.
Testimony taken after a cause is at issue and beyond the jurisdiction of the court, § 353, p. 1779.
When court may direct a feigned issue, § 377, p. 1862.
ISSUES AT LAW—
Distinguished from issues in equity, § 136, p. 762.
Power of courts to direct, § 378, p. 1863.
Matters concerning which an issue is directed, § 379, p. 1865.
In patent cases, § 378, p. 1863.
Time when an issue is directed, § 380, p. 1865.
Manner of trying, § 381, pp. 1866-1868.
Effect of the finding of a jury upon an issue, § 382, pp. 1868-1870.
Proceedings after the trial of, § 383, p. 1870.

J.

JOINDER—
Of parties upon a motion, § 251, p. 1261.
Objection for, of improper parties, § 130, p. 742.
Of plaintiffs, § 140, pp. 782-788.
Of defendants, § 141, pp. 788-798.
Of distinct grounds of relief, § 142, pp. 798-801.
Of causes of action at common law, § 454c, p. 2214.
how far State practice respecting followed, § 453, p. 2207.
amendments to pleadings, § 206, p. 1160; § 454d, p. 2214.
joinder of counts, § 454c, pp. 2214, 2215.

Vol. II begins at § 197, page 1125; Vol. III begins at § 453, page 2201; Vol. IV begins at § 670, page 3597.

JOINDER OF PARTIES IN EQUITY (see BILLS; PARTIES).
JOINT DEFENDANTS—
Removability of cause in cases of, § 541, pp. 2938, 2939.
Value of matter in dispute when, § 18, p. 64.
JOINT PARTIES—
What to be regarded as value of matter in dispute where one party sues on behalf of others, § 17a, p. 63; § 696, p. 3765.
Where they assert distinct and separate rights, § 17a, p. 63; § 696, p. 3765.
When must join in writ of error or appeal, § 697, p. 2448.
JOINT-STOCK COMPANIES—
Citizenship of, § 48, p. 177.
JOINT TENANT—
Jurisdiction of suits by, when the United States is one tenant, § 98, p. 636.
JOURNAL—
Introducing in evidence extracts from the journals of the Senate or House of Representatives, § 333j, p. 1683.
JUDGES—
Of circuits, § 256, p. 1277.
Who may sit in C. C. A., § 693, p. 3734.
Designation of other, when disabled, § 256, p. 1277.
Whether relative of, can be appointed receiver, § 318, p. 1605.
Relative weight of decisions by, § 375, pp. 1853, 1854.
JUDGMENT—
At law, when proceedings under, not enjoined, § 79, p. 549.
Common-law procedure respecting, also correction of, § 453, p. 2204; § 480, pp. 2502-2506.
state practice when followed, § 480, pp. 2503, 2506.
joint actions against railroad companies, § 480, p. 2503.
separate actions against several parties, § 480, p. 2503.
entry of, § 480, pp. 2503, 2504.
interest allowed in civil cases, § 480, p. 2505.
Correction of judgments by courts that rendered them, § 481, pp. 2508-2513.
Execution of, despite *supersedeas*, § 697, p. 3771.
Federal courts
foreign judgment held valid, § 186a, pp. 1065, 1066.
suit to make judgment of State court that of, § 51, p. 188.
cause improperly removed to, may be remanded even after judgment, § 556, p. 3075.
how far State practice relative to, is applicable in, § 480, p. 2503.
judgments of State court respected by, § 186d, pp. 1069, 1070.
of Federal court, jurisdiction of the, to restrain, regulate, set aside, construe, or enforce, § 51, pp. 180, 181; § 79, p. 549.
Jurisdiction in suits upon, § 39, p. 124; § 61, p. 229.
in limits of United States, § 39, pp. 124, 125.
Lien and docket of judgments, § 480a, pp. 2506-2508.
when judgments cease to be liens, § 480a, p. 2506.
indices of judgment records, § 480a, p. 2507.
Non prosequitur, judgments of, § 551, pp. 3026, 3027.
Opening judgment entered by default, how far State practice respecting followed, § 453, p. 2208.
Property cannot be reached by execution, judgments satisfied in equity when, § 79, pp. 549, 550.
Proving judgments, § 333n, p. 1689.

Vol. II begins at § 197, page 1125; Vol. III begins at § 453, page 2201; Vol. IV begins at § 670, page 3597.

JUDGMENT (continued)—
State courts
how far State practice relative to, is applicable in Federal courts, § 480, p. 2503.
of State court respected by Federal courts, § 186d, pp. 1069, 1070.
suit by State to collect, recovered in State court, § 86, p. 580.
suit to make judgment of, that of Federal courts, § 51, p. 188.
opening judgment entered by default, how far State practice respecting followed, § 453, p. 2208.
Suspension of, pending writ of error, § 453, p. 2208.
see APPEAL AND ERROR; FINAL JUDGMENTS; PRACTICE IN CRIMINAL CASES.
JUDGMENT CREDITORS—
Of corporations, appointment of receivers in suits of, § 302a, p. 1484.
JUDICIAL BONDS—
Suits arising on, § 33, p. 118.
JUDICIAL CIRCUITS (see CIRCUITS).
JUDICIAL DISTRICTS (see DISTRICT COURTS).
JUDICIAL NOTICE, § 237, p. 1237; § 329a, pp. 1640-1647.
JUDICIAL POWER—
Of the United States, § 1, p. 1.
JUDICIAL PROCEEDINGS—
How proved, § 333, p. 1689.
JUDICIAL SALE—
Claims and liens against the purchaser and property sold at, § 394g, p. 1958.
Collection of purchase money at, § 394f, p. 1957.
Effect of confirmation of, § 394c, p. 1949.
Effect upon, of reversal of decree, § 394i, p. 1964.
Master and other officers, sale by, § 394, p. 1931.
Practice upon confirmation of, § 394b, p. 1946.
Proceedings after, and before confirmation, § 394a, p. 1945.
Remedies of purchaser at, § 394h, p. 1962.
Setting aside, after confirmation, § 394d, p. 1950.
Setting aside, because of fraud, in reorganization, § 394e, p. 1953.
JUDICIAL WRITS—
As distinguished from other forms of injunctions, § 262, p. 1321.
see also INJUNCTIONS.
JURAT—
Of affidavit, see EVIDENCE.
JURISDICTION—
Accused, effect of custody of, in criminal proceedings, by another court, § 58, pp. 218-220.
Federal courts refuse to discharge by habeas corpus before trial, § 58, p. 219.
State court cannot release prisoner held under process of United States courts, § 58, p. 219.
Admiralty, § 1, p. 1; §§ 560-560j, pp. 3099-3129.
Ancillary, § 51, pp. 180-189.
Appeal or writ of error taken to Supreme Court of the United States on question involving the jurisdiction, § 688, pp. 3667, 3668.
Appellate, § 4, pp. 9-13; §§ 688-692, pp. 3657-3709.
Assignees, in suits by, § 63, pp. 256-257.
Bankruptcy, §§ 608-614, pp. 3254-3285.
Board of General Appraisers, § 76, p. 385.
Ceded territory, § 66a, p. 338.
Certiorari, when reviewed by jurisdiction, § 159, p. 927.
Circuit Courts of Appeals, § 4, pp. 9-13; § 693, pp. 3722-3736.

Vol. II begins at § 197, page 1125; Vol. III begins at § 453, page 2201; Vol. IV begins at § 670, page 3597.

JURISDICTION (continued)—
Citizenship, § 46, pp. 159-168.
not affected by change of, after jurisdiction has attached, § 46, p. 167.
controversy between citizens of different States, § 40, pp. 125-130.
when jurisdiction depends on diversity of, § 61c, p. 244.
Commerce Court, § 75, p. 385.
Common law and equity, distinction between, § 78, p. 543.
in Federal courts, § 80, p. 560.
of the Federal courts in bankruptcy and equity, § 60a, p. 225.
of Federal courts of admiralty and equity, § 60b, p. 225.
of Federal courts in bankruptcy and in admiralty, § 60c, p. 225.
Constitutional provisions affecting, § 1, p. 1.
ambassadors, § 1, p. 1.
ministers, § 1, p. 1.
consuls, § 1, p. 1.
Constitution or laws of the United States, suits arising under, § 24, pp. 73-84; § 61b, p. 242.
Consular courts, § 74, p. 364.
Contractors' bonds, of suits on, § 5a, p. 28.
Corporations, when jurisdiction depends upon diversity of, § 61d, p. 247.
Costs, in Supreme Court of United States, upon reversal of judgment or decree for want of jurisdiction, § 407, p. 1992.
Costs, on dismissal for want of jurisdiction, § 407, p 1992.
Court of Appeals of District of Columbia, § 69, p. 347.
Court of Claims, §§ 671-671b, pp. 3598-3610.
Court of Customs Appeals, § 77, p. 393.
Criminal cases, §§ 483-483f, pp. 2528-2546.
Decree as against parties not within the, § 117, p. 710.
Demurrers to, § 365, p. 1827.
Denial of justice at common law, the foundation of, originally, § 78, p. 543.
Dismissal of bill for want of, § 363, pp. 1817-1824.
District Courts, § 5, pp. 13-34.
of Alaska, § 67, p. 342.
of Porto Rico, § 70, p. 349.
of Canal Zone, § 70a, p. 351.
of Hawaii, § 71, p. 354.
Effect of jurisdiction of another court over same cause of action, § 57, pp. 215-218.
practice is to stay proceedings, § 57, p. 216.
Equitable
in general, § 78, pp. 542-544.
definition of, § 78, p. 542.
complete relief to complainant within, § 78, p. 543.
illustration of equitable jurisdiction in Federal court, § 78, pp. 542, 543.
cases where Federal courts declined to assume equitable jurisdiction, § 78, pp. 542, 543.
equitable, of person, § 78, p. 543.
common law, of property, § 78, p. 543.
rise and history of, § 78, p. 542.
foundations of, § 78, p. 542.
prevention and redress of wrongs for which common law has no remedy, § 79, p. 544.
protects rights not recognized by common law, § 79, p. 544.

Vol. II begins at § 197, page 1125; Vol. III begins at § 453, page 2201; Vol. IV begins at § 670, page 3597.

JURISDICTION (continued)—
dependent on fact that there is no adequate remedy at law, § 81, pp. 562, 563.
Federal courts, § 2, pp. 2-4.
which have jurisdiction in equity enumerated, § 2, pp. 2, 3.
rules affecting, generally stated, § 81, pp. 561-567.
cannot entertain bill to set aside probate of will, § 54, p. 200.
may entertain bill for accounting against testamentary trustees, § 54, p. 202.
for want of jurisdiction, cause improperly removed to Federal court may be remanded, § 556, pp. 3075, 3076.
conditions necessary to give jurisdiction over a foreign corporation, § 164, pp. 939-942.
substantially the same as English High Court of Chancery, § 81, p. 561.
Federal equity practice sources of, § 84, pp. 577-579.
statutes, § 84, p. 577.
rules of United States Supreme Court, § 84, pp. 577-579.
Federal question raised by the defendant, § 24, p. 78.
Federal Trade Commission, § 77h, p. 524.
Indorsees, § 63, pp. 263, 264.
Interstate Commerce Commission, § 77a, p. 398.
practice and rules of, § 77b, p. 466.
evidence and depositions before the, § 77c, p. 493.
enforcement of orders of, § 77d, p. 502.
Interstate commerce law, cases arising under, § 32a, p. 111.
Laws and treaties of the United States, suits under, § 1, p. 1.
Limitation, § 51, p. 187.
Limitations upon, by residence, § 61, pp. 226-249.
by residence, in suits by the United States, § 61a, p. 242.
in suits arising under the constitution or laws of the United States, § 61b, p. 242.
where jurisdiction depends upon diversity of citizenship, § 61c, p. 244.
Master taking testimony beyond, § 391, p. 1924.
Matter in dispute, value, § 6, pp. 34-42.
Objections to, waived by appearance, § 170, pp. 982, 983.
Omission from bills of defendant not within the, § 117, pp. 710-711.
Original equitable jurisdiction of United States Supreme Court, § 3, pp. 4-9.
Original jurisdiction of Supreme Court of the United States, § 1, p. 1.
relation to original, § 51, p. 180.
Outside of district where suit is brought, § 61, pp. 239-242.
Parties
formal parties as affecting, § 42, p. 140.
suits where the United States shall be a party, § 1, p. 1.
by striking out parties who are not indispensable, § 40, p. 127.
cannot be conferred by striking out a necessary party plaintiff, § 40, p. 127.
omission of parties, § 117, pp. 710-713.
Patent cases, when jurisdiction depends upon diversity in, § 62, p. 249.
Political questions, no jurisdiction of, § 104, p. 654.
Private persons, suits by, § 105, p. 657.
Property, or absence of, as affecting, § 78, p. 543.
Property in custody of a State court, § 52, p. 189.
when property deemed to be in custody of court, § 52, p. 194.
when Federal court will decline to interfere, § 52, p. 191.

Vol. II begins at § 197, page 1125; Vol. III begins at § 453, page 2201; Vol. IV begins at § 670, page 3597.

JURISDICTION (continued)—
concurrent jurisdiction of property, § 52, p. 190.
effect of custody of property by State court when Federal courts exercise jurisdiction, § 59, pp. 220-223.
where Federal courts exercise superior jurisdiction, § 59, pp. 220, 221.
in bankruptcy, § 59, p. 221.
in admiralty, § 59, p. 222.
Property in custody of State Courts of Probate, § 54, pp. 199-205.
when Federal court cannot direct distribution of all assets held by representative, § 54, p. 199.
Property in custody of a Federal court, § 60, p. 223.
Property in custody of receivers, § 55, pp. 206-211.
after receiver appointed, no court can interfere with property, § 55, p. 209.
State receiver cannot be sued without permission of his court, § 55, p. 209.
Federal receiver can be sued without permission of his court, § 55, p. 209.
property held by statutory receiver, not in court's custody, § 55, p. 210.
when authority of a State receiver superseded, § 55, p. 211.
Property covered by insolvent assignments, § 53, pp. 198, 199.
possession by assignee in voluntary assignment in possession of a State court, § 53, p. 198.
Railroad Boards of Labor Adjustment, § 77e, p. 508.
Railroad Labor Board, § 77f, p. 510.
Relief cannot be had in another ground when there is no Federal question, § 24, pp. 83, 84.
Remedy inadequate, § 79, p. 544; § 81, pp. 563, 564.
Receiver in certain cases, authorizing appointment of, § 82, p. 569.
Removal of causes, § 544, pp. 2976-2980.
Residence
of corporations, § 61d, p. 247.
in patent cases, § 62, p. 249.
waiver of objections as to, § 62a, p. 254.
States
suits between States and citizens of, § 1, p. 1.
suits between citizens of different, § 1, p. 1.
under grants of different, § 50, p. 178.
as to controversies between, § 104, pp. 654-672.
State court
want of jurisdiction, whether available in Federal court after removal, § 554, p. 3048.
authorizing State court to enforce order of State Railroad Commissioners, § 82, p. 571.
State sheriffs and United States marshals, controversies between, § 56, pp. 211-215.
when court retains exclusive custody of property, § 56, p. 212.
when State sheriff may seize property, § 56, p. 212.
Federal court may entertain suit against State sheriff, § 56, p. 212.
remedy when dispute between State sheriff and United States marshal, § 56, p. 214.
State statutes
except by statute, no *parens patriæ* power, § 81, p. 562.
authorizing bill for partition of land, title to which is in the United States, § 82, p. 569.

Vol. II begins at § 197, page 1125; Vol. III begins at § 453, page 2201; Vol. IV begins at § 670, page 3597.

JURISDICTION (continued)—
providing for enforcement of mechanic's lien, § 82, p. 570.
authorizing a court of equity to confirm a title, § 82, p. 571.
concerning assignees of insolvents, § 82, p. 571.
vendor's lien, § 82, p. 571.
creating new rights enforceable in Federal courts, § 82, p. 567.
as to mortgagor's right to redeem, § 82, p. 567; § 83, p. 574.
as to setting aside probate of will, § 82, pp. 567, 568.
as to quieting title to land, § 82, pp. 568, 569.
assessments upon streets, § 82, p. 569.
authorizing filing of creditor's bills, § 82, p. 567.
authorizing dissolution of corporation, § 82, p. 569.
authorizing creditor to return or cancel securities for usurious loan, § 82, p. 570.
cannot impair, § 83, pp. 574-576.
by giving a State court exclusive jurisdiction, § 83, p. 574.
by enlarging common-law jurisdiction of State courts, § 83, p. 574.
by abolishing or diminishing an equitable remedy, § 83, p. 574.
creating new rights are enforced by Federal courts at law and in equity, § 82, pp. 567-574.
Subjects of, § 79, pp. 544-560.
trusts, § 79, p. 544.
accident, § 79, p. 546.
penalty, § 79, p. 546.
forfeiture, § 79, p. 546.
loss of documents, § 79, p. 546.
mistake, § 79, p. 546.
of law, § 79, pp. 546, 547.
fraud, § 79, p. 547.
duress, § 79, p. 548.
election under a will, § 79, p. 548.
adjustment of liabilities, § 79, p. 548.
subrogation, § 79, p. 548.
set-off, § 79, p. 548.
contribution, § 79, p. 548.
exoneration, § 79, p. 548.
marshaling of securities, § 79, p. 548.
compelling discovery, § 79, p. 549.
perpetuation of testimony, § 79, p. 549.
examination of witnesses abroad, § 79, p. 549.
granting of new trial, § 79, p. 549.
equitable assets, § 79, p. 551.
preventing threatened breaches of right, § 79, p. 551.
specific performance, § 79, p. 551.
preventing multiplicity of suits, § 79, pp. 553, 554.
cancellation of instruments, § 79, pp. 554, 555.
when equitable relief not barred, § 79, p. 555.
Supreme Courts
Supreme Court, original, § 3, p. 4.
practice in, § 3a, p. 7.
Supreme Court of District of Columbia, § 68, p. 345.
Supreme Court and other courts of the Philippines, § 72, p. 355.
Testimony taken after a cause is at issue and beyond the jurisdiction of the court, § 353, p. 1779.
Trials, granting new, § 79, p. 549.

Vol. II begins at § 197, page 1125; Vol. III begins at § 453, page 2201; Vol. IV begins at § 670, page 3597.

JURISDICTION (continued)—
Territorial jurisdiction and terms of District Courts of the United States, § 64, pp. 267-274.
Territorial jurisdiction and terms of Supreme Court, Circuit Courts of Appeals, § 66, pp. 276-342.
United States, jurisdiction of suits against the, § 95, pp. 593-598.
United States Board of Mediation and Conciliation, § 77g, p. 517.
United States Court for China, § 73, p. 363.
United States Supreme Court, rules of, § 84, pp. 577-579, appendix IV.
Verification to avoid suspicion of collusive, in suit affecting rights assertable by corporation, § 145, p. 816.
Ward's estate, authorizing guardian to mortgage, § 82, p. 570.
see EVIDENCE; APPEAL AND ERROR; PRACTICE IN CRIMINAL CASES; ADMIRALTY.
JURISDICTION CLAUSE—
form of, § 133, p. 753.
no longer considered necessary, § 133, pp. 753, 754.
in bills, see BILLS.
JURISDICTIONAL FACTS—
Evidence to contradict averments of, when admissible, § 363, p. 1818.
JURY—
Arguments of counsel, § 473i, pp. 2423-2425.
withdrawal of statement of fact, § 473i, p. 2423.
reversal of judgment, § 473i, pp. 2424, 2425.
Charge to jury, § 473j, pp. 2425-2431.
refusal of C. C. A. to direct new trial because of charge, § 473j, pp. 2425, 2426.
State practice when followed, § 473j, p. 2426.
jury recalled even under extraordinary circumstances, § 473j, p. 2427.
exceptions or refusals thereto, § 473j, pp. 2428, 2429, 2430.
instructions to jurors, § 473j, pp. 2429, 2430, 2431.
Continuances and adjournments, § 473a, pp. 2406-2409.
judgment in equity on bonds, § 473a, p. 2406.
delinquents for public money, § 473a, pp. 2406, 2407.
suits under postal laws, § 473a, p. 2407.
suits brought on bond for recovery, § 473a, p. 2407.
applications for, § 473a, p. 2408.
Direction of verdict, § 473h, pp. 2419-2423.
when judgment not reversed, § 473h, p. 2420.
sufficiency of evidence not reviewed on writ of error, § 473h, p. 2421.
no ground for new trial, § 473h, p. 2422.
Discharge of jury and withdrawal of juror, § 473e, pp. 2417, 2418.
Effect of State statutes on procedure at a jury trial, § 473c, pp. 2412, 2413.
Election by plaintiff, § 473f, p. 2418.
Introduction of evidence before jury, § 473d, pp. 2413-2417.
see CHAPTER XXI.
cross-examination, § 473d, p. 2413.
competency of witnesses, § 473d, p. 2415.
rejection of competent evidence, § 473d, p. 2416.
Non-suits and dismissals, § 473g, pp. 2418, 2419.
Qualifications and mode of selection, § 473b, p. 2409.

Vol. II begins at § 197, page 1125; Vol. III begins at § 453, page 2201; Vol. IV begins at § 670, page 3597.

JURY (continued)—
Right to trial by jury, § 473, pp. 2404-2406.
trial of issues of facts in actions at common law, § 473, p. 2405.
review in cases tried without jury, § 473, p. 2405.
waiver, § 473, p. 2405; § 473j, p. 2431.
default by defendant, § 473, p. 2406.
Selection of jury, § 473b, pp. 2409-2413.
qualifications and exemptions of jury, § 473b, p. 2409.
special juries, § 473b, p. 2409.
drawing of jurors, § 473b, pp. 2409, 2410.
talesmen for petit juries, § 473b, p. 2410.
challenges, § 473b, p. 2411.
Tucker Act, cases under, tried without, § 96, pp. 604, 605.
Verdicts, § 473k, p. 2431.
see COMMON LAW; ISSUES AT LAW; PRACTICE IN CRIMINAL CASES.

K.

KANSAS—
Constitutes one judicial district, § 66, p. 293.
times and places of holding court therein enumerated, § 66, pp. 293, 294.
Districts of, included within Eighth Circuit, § 4, p. 10.
Introducing in evidence transcripts from certain books of the District Courts in, § 333o, p. 1691.
KENTUCKY—
Constitutes two districts, § 66, p. 294.
times and places of holding court therein enumerated, § 66, pp. 294-296.
District of, included within Sixth Circuit, § 4, p. 10.
KIN (see NEXT OF KIN).
KING'S BENCH—
Practice in the court of, affords outline for practice at common law, § 3a, p. 7; § 453, p. 2201.
KONTA, GEOFFREY—
On injunctions against strikers, § 276, p. 1369, n. 17.

L.

LACHES—
Demurrer, as constituting a ground of, § 367, p. 1834.
Excuses for, pleaded in bill, § 144, p. 808.
Hearing, which may be taken advantage of at, § 183, p. 1055.
Injunction refused because of, § 294, pp. 1441, 1442.
Municipal corporation and counties may estop, § 81, pp. 1048, 1049.
Reason for denying motion, § 277, p. 1395.
Subrogation of state may estop one claiming by, § 181, pp. 1048, 1049.
see DELAY; LIMITATION; ADMIRALTY.
LAND—
Alternative relief in action to quiet title to, § 138, pp. 775, 776.
Bills
to obtain a transfer, joinder of defendants, § 141, pp. 792, 793.
misjoinder in, to set aside a fraudulent conveyance, § 140, p. 784.
to quiet title to, § 151f, p. 903.
Condemnation proceedings by United States, § 5, pp. 15, 27.
Grants from different States, controversies concerning, § 50, pp. 178, 179.

Vol. II begins at § 197, page 1125; Vol. III begins at § 453, page 2201; Vol. IV begins at § 670, page 3597.

LAND (continued)—
Injunctions
to prevent alienations of, § 272, p. 1356.
to compel the performance, or prevent the breach of contracts not affecting land, § 281, pp. 1409-1412.
to restrain sale of, § 265, p. 1331.
to enforce specific performance of covenants and contracts affecting, § 262, p. 1321.
Jurisdiction over land cases, § 31, p. 107.
Parties
to suit against joint tenant for specific performance of contract for purchase of, § 119, p. 718.
owners of partial interests in contracts for, as parties to suits, § 119, p. 718.
joinder of owners having common interest, § 140, p. 785.
to bill to restrain the illegal issue of warrants, § 119, p. 724.
to a bill to set aside a deed of sale, § 119, p. 719.
Removal of suits containing controversies between citizens of the same State claiming land under grants of different States, practice on, § 5, pp. 13, 14; § 550, pp. 3024, 3025.
Specific performance of contract for entitling his ancestor to purchase, parties to suit by heir for, § 119, p. 718.
Suit to recover
land in another district, § 61, p. 227.
purchase-price paid upon void entries of, § 96, p. 598.
Unlawful inclosure of public, suits to prevent, § 5, p. 21.
Unlawful occupancy of, proceeding to prevent, § 81a, p. 567.
Value of matter in dispute in suit to quiet title to, § 12, pp. 49, 50.
LAND OFFICE—
Introducing in evidence copies of papers in, § 333d, pp. 1667-1673.
LAND PATENT—
Bill to quiet possession under, § 79, p. 554, n. 41.
Bill to set aside, when maintainable by a private citizen, § 79, p. 554, n. 41.
Multifariousness in suits for, § 142, p. 801.
Statute of limitations, § 99a, p. 638; § 180c, p. 1018.
Suits to establish rights of bona fida purchasers of lands erroneously patented, § 99a, p. 638.
see PATENTS.
LAW—
Bills
to set aside proceedings at, § 79, p. 546.
dismissal of for plaintiff's failure to elect whether he will proceed at law or in equity, § 368, p. 1839.
to obtain stay of proceedings at, § 132, p. 752.
Common law, rules of decision applicable in actions at, § 477, pp. 2448-2472.
Conclusions of, not to be stated in bills, § 137, p. 767.
Consolidation at law and in equity, § 472, p. 2401.
Costs at law and in equity, distinction between, §§ 408, 409, pp. 1992-2003.
Court of, and of equity, distinction between, in that the latter affords complete relief, § 78, p. 543.
Equity and, distinctions between, in Federal courts, § 80, p. 560.
Mistake of, cannot ordinarily be cured by amendment, § 214, p. 1181.
Parties
interest in question of, involved does not entitle person to be made a party, § 112, p. 690.

Vol. II begins at § 197, page 1125; Vol. III begins at § 453, page 2201; Vol. IV begins at § 670, page 3597.

LAW (continued)—
Relief against mistakes of, § 79, p. 546.
State and territorial legislatures, passed by, introducing in evidence, § 333m, p. 1688.
see ISSUES AT LAW; PRACTICE AT COMMON LAW; REMEDY AT LAW; STATUTES.
LAWS OF NATIONS—
Suits under, for torts, § 5, p. 19.
LAWS OF THE UNITED STATES—
Suits arising under, § 5, pp. 14-17.
Suits arising under Constitution and, § 24, pp. 73-84; § 95, p. 595.
see also WRITS OF ERROR AND APPEALS.
LECTURES—
Injunction to restrain publication of, § 263, p. 1322.
LEGAL CAPACITY TO SUE—
Demurrer for want of, § 365, p. 1827.
LEGATEES—
Bill by, against executor, § 79, p. 544, n. 1.
Necessary parties to suits by, on behalf of themselves and others similarly situated, § 113, pp. 691, 692.
Not necessary to join in suits against administrators and executors, § 113, p. 692.
Parties to bill claiming a legacy, § 120, p. 724.
Necessary parties in suits by, § 119, p. 715; § 120, pp. 724, 725.
LEGISLATURE—
Suits to remove members of, § 5, p. 18.
Suits to recover offices, § 5, p. 18.
Execution against officer of legislature, § 427, pp. 2094, 2095.
Removal of suit against officer of legislature, § 551, p. 3025.
LESSEES—
As parties to foreclosure suit, § 112, pp. 683, 684.
LETTERS—
Injunction to restrain publication of, § 263, p. 1322.
opening of, § 267, p. 1334; § 280, p. 1409.
LETTERS OF ADMINISTRATION—
Averments as to, in bill, § 144, pp. 806, 807.
LETTERS ROGATORY—
Taking testimony under, § 353, p. 1779.
Defined, practice, § 358, pp. 1803-1807.
LEVER ACT—
Injunctions under, for conservation of supply and control of distribution of necessaries, § 276d, p. 1383.
LIABILITIES—
Adjustment of, as a subject of jurisdiction in equity, § 79, p. 549, n. 20.
of receiver, § 313, pp. 1584-1590.
In different characters, parties to be joined, § 112, p. 691.
For tort, § 454b, p. 2213.
LIBEL IN ADMIRALTY (see ADMIRALTY).
LIBELS—
Rarely enjoined, § 79, p. 552, n. 35.
Whether injunction will be granted against publication of, § 284a, p. 1421.
LIBELLUS—
The term from which the word "bill" is derived, § 132, p. 750.
LIBERTY—
Principle that no question affecting a person's, to be decided without his presence, applicable to equity, § 110, p. 677.

Vol. II begins at § 197, page 1125; Vol. III begins at § 453, page 2201; Vol. IV begins at § 670, page 3597.

LICENSE—
To use patented invention reached by creditor's bill, § 151c, p. 890.
State officer enjoined from revocation of, of foreign corporations, § 105c, p. 666.
Licensee of patents, parties to suit by, § 112, pp. 686, 689.
LIEN—
Bankruptcy proceedings, § 649, pp. 3489-3503.
Federal courts, when enforceable in, § 51, p. 183.
Judgments recovered in Federal courts, how far are a, § 480a, p. 2507.
Parties
to suit against a receiver of a corporation to enforce a, § 113, pp. 693, 694.
to suit to enforce, § 120, p. 732.
State statute
concerning mechanic's, § 82, p. 570.
concerning vendor's, § 82, p. 571.
see ATTORNEYS; BANKRUPTCY.
LIENORS—
Appointing receiver at suit of, § 302a, p. 1483.
When necessary parties to foreclosure, § 112, p. 683; § 119, p. 716.
LIFE—
Principle that no question affecting a person's, to be decided without his presence, applicable to equity, § 110, p. 677.
LIMITATION—
Admiralty, § 180p, p. 1044.
limitation of liability in, § 596, pp. 3219, 3220.
Causes of action arising while carriers were under Federal control, § 180b, p. 1026.
Claims against the United States, § 180f, p. 1022.
Common law, Federal courts follow statutes of, in actions at, § 477c, pp. 2467, 2468.
Contractors' bonds, to suits on, § 180e, p. 1020.
Copyright suits, § 180b, p. 1017.
Court of Claims, § 672, p. 3610.
Criminal prosecutions, § 180u, p. 1034.
Demurrer as constituting ground of, § 366, p. 1828.
Employers' liability suits, § 180j, p. 1027.
Internal Revenue Laws, § 180k, p. 1027.
Interstate commerce cases, § 180g, p. 1025.
Official bonds to suits upon, § 180d, p. 1019.
Penalties or forfeitures, to suits for, § 180m, p. 1030.
Patents
to applications for, § 180a, p. 1016.
vacation of, for lands, § 180c, p. 1018.
Plea of, § 183, p. 1055.
Residence
jurisdiction by, § 61, p. 226.
upon jurisdiction of Federal courts by, § 61, pp. 226-249.
Statutes
suspension of statute of, § 181a, p. 1052.
statute may not be allowed to be set up in answer by amendment, § 214, p. 1181.
exemption of State from statute of, cannot aid creditor of State, § 181, p. 1048.
State statutes of, as affecting jurisdiction of Federal courts, § 181, p. 1045.
Federal statutes of, § 180, pp. 1015-1045.

Vol. II begins at § 197, page 1125; Vol. III begins at § 453, page 2201; Vol IV begins at § 670, page 3597.

LIMITATION (continued)—
Time to appeal or bring error, § 698, p. 3778.
Trading with the enemy, in act to prevent, § 180o, p. 1040.
United States Shipping Board, to suits to enforce orders of, § 180i, p. 1027.
Usury, suits to recover, § 180 l, p. 1028.
see LACHES; COURT OF CLAIMS.
LIS PENDENS—
Notice of, § 477d, pp. 2471, 2472.
State practice, when followed, § 477d, p. 2471.
filing creditor's bill is constructive notice of, § 477d, p. 2471.
bona fide holder of negotiable paper not subject to general doctrine, § 477d, p. 2472.
plea of, § 177, p. 1013.
State statutes providing for filing of, how far binding upon Federal tribunals, § 477d, p. 2471.
LITTLE AND BROWN—
Edition of the laws and treaties of the United States by, competent evidence, § 333k, p. 1683.
LIVE STOCK TRANSPORTATION ACT—
Forbidding cattle to be left in cars for a longer period than twenty-eight hours without unloading, § 454o, p. 2240.
LOCAL INFLUENCE—
Definition of prejudice or local influence, § 549, p. 3013, n. 1.
Hearing upon application for removal because of prejudice or local influence, § 549, p. 3022.
Notice of application for removal because of prejudice or local influence, § 549, p. 3022.
Order upon removal for prejudice or local influence, § 549, p. 3023.
Petition and affidavit
as to prejudice or local influence, § 549, pp. 3020, 3021.
filing of, § 549, p. 3020.
Removal for local influence or prejudice, § 549, p. 3012.
Time of removal for prejudice or local influence, § 549, p. 3020.
LOCAL NATURE—
Jurisdiction in suits of, § 61, p. 226.
LORD OF MANOR—
Suits against, by one or more persons on behalf of others, § 116, p. 708.
LOST DOCUMENTS—
As a subject of relief in equity, § 79, p. 546.
Introducing copies in evidence, § 333o, p. 1692.
LOUISIANA—
Divided into two judicial districts, § 66, p. 296.
counties and times and places of holding court therein enumerated, § 66, pp. 296, 297.
Districts of, included within Fifth Circuit, § 4, p. 10.
LUNATICS—
Capacity to file bill in equity, § 91, pp. 587, 589.
When plaintiffs become, after bill filed, § 91, p. 588.
Suit by a volunteer on behalf of, § 91, p. 588.
Information filed on behalf of, § 131, p. 749.
Suits against, § 107, p. 675.
Suing alone, ground of demurrer, § 367, p. 1833.
Liberal amendments in favor of, § 206, p. 1162.
Appointing receiver of property of, § 302, pp. 1479, 1480.

Vol. II begins at § 197, page 1125; Vol. III begins at § 453, page 2201; Vol. IV begins at § 670, page 3597.

M.

MAINE—
Constitutes one judicial district, § 66, p. 297.
Times and places of holding court therein enumerated, § 66, pp. 297-300.
First circuit, § 4, p. 10.
MANAGING DIRECTORS (see CORPORATION; DIRECTOR; STOCKHOLDER).
MANDAMUS—
Admiralty, § 457, p. 2252.
Bonds, to prevent illegal issue of, § 105, p. 666.
Corporations violating their charters, when to be applied for by attory-general instead of injunction against, § 264, p. 1324.
Injunction
no defense to, § 271, p. 1351; § 459, p. 2283.
no injunction against, § 457, p. 2259.
Jurisdiction of Supreme Court of Columbia in regard to, § 458, pp. 2270-2275.
Issued by Supreme Court, § 3, p. 9.
Levy of tax, or issue of bonds, to compel, § 79, pp. 551, 552, n. 36.
Principals regulating issuance of, § 457, pp. 2252-2270.
Public officers preventing sale of patents to land owned by the petitioner, § 105c, p. 666.
Writ of
in general, § 457, pp. 2252-2259.
applications, removal of, § 538b, p. 2910.
application for, § 457, p. 2252.
executive and administrative officers of U. S., in general, § 457e, pp. 2268-2270.
under the Interstate Commerce Laws, § 457d, pp. 2266-2268.
jurisdiction of courts to compel compliance with law of, § 457d, p. 2266.
to compel equal facilities to shippers, § 457d, p. 2267.
to compel compliance with law, § 457d, p. 2267.
when writ denied, § 457d, p. 2268.
jurisdiction of District courts to issue, § 457c, pp. 2261-2266.
State statutes, authorization of, § 457c, pp. 2264, 2265.
jurisdiction of C. C. A. to issue, § 457b, pp. 2260, 2261.
jurisdiction of Supreme Court to issue, § 457a, pp. 2259, 2260.
practice on application for, § 459, pp. 2276-2285.
applications to Secretary of the Interior, § 458, p. 2272.
applications to Secretary of the Navy, § 458, p. 2271.
applications to Secretary of the Treasury, § 458, pp. 2271, 2275.
applications to Commissioner of Patents, § 458, pp. 2272, 2274.
State practice, when followed, § 459, pp. 2276, 2277, 2279.
remedy for, § 459, p. 2277.
peremptory or alternative writs, § 459, p. 2278.
objections, how raised, § 459, p. 2279.
return, § 459, p. 2280.
death or expiration of term of officer sued in official capacity, § 459, p. 2281.
application denied for laches, § 459, p. 2282.
application to enforce a judgment, § 459, pp. 2282, 2283.

Vol. II begins at § 197, page 1125; Vol. III begins at § 453, page 2201; Vol. IV begins at § 670, page 3597.

MANDAMUS (continued)—
when relief is granted, § 459, p. 2284.
disobedience to writ, § 459, p. 2285.
see APPEAL AND ERROR.
MANDATES (see ENFORC. MENT OF DECREES AND ORDERS).
MANDATORY INJUNCTIONS—
Distinguished from other forms, § 286, pp. 1424-1426.
see also INJUNCTIONS.
MANN ACT—
Count not bad for duplicity under, § 500, p. 2656.
Indictments under, § 506g, pp. 2703-2705.
MANUFACTURE—
Injunction to prevent disclosure of the secrets of a, § 263, p. 1322.
MANUSCRIPTS—
Injunction to restrain publication of, § 263, p. 1322.
MARRIAGE CONTRACT—
Bill to cancel, § 151f, p. 903, n. 5.
Value of matter in dispute in suit to cancel, § 12, p. 49.
Abatement by, § 216, p. 1187.
MARRIED WOMEN—
Bills
formerly incapable of filing bills in equity in their own right, § 85, p. 580; § 89, p. 583.
concerning separate estate, § 89, pp. 583, 584.
amendments to, § 211, p. 1175.
bill by, alone, may be amended by addition of next friends, § 108, p. 676.
District Courts of districts of New York, suit in, § 89, p. 584.
Districts of California, § 89, p. 584.
Parties
to suit to set aside marriage settlement, § 120, p. 730.
when not necessary, § 108, p. 675.
when husband should be joined as party, § 108, p. 675.
when husband is formal party in suit by, § 118, p. 713.
Suing alone, formerly cause of demurrer, § 367, p. 1833.
Suits against, § 108, p. 675.
MARSHAL—
Bond
in admiralty, § 572, pp. 3158, 3159.
suit on marshal's bond, § 33, p. 118.
Bill to obtain a determination of rights of a claimant to fund in hands of, § 132, p. 752.
Controversies between marshals and state sheriffs, § 56, pp. 211-215.
Death, removal or expiration of term of, after taking property in execution, § 427a, p. 2089.
Fees of, see ADMIRALTY; COSTS.
Powers of, § 427a, p. 2087.
Power to deputize in blank, § 455a, p. 2246.
Suit against, for levy, § 34, pp. 119, 120.
MARSHALING SECURITIES—
As a subject of jurisdiction in equity, § 79, p. 548.
MARYLAND—
Constitutes one judicial district, § 66, p. 300.
times and places of holding court therein enumerated, § 66, p. 300.
Districts of, included within the Fourth Circuit, § 4, p. 10.

Vol. II begins at § 197, page 1125; Vol. III begins at § 453, page 2201; Vol. IV begins at § 670, page 3597.

MASSACHUSETTS—
Constitutes one judicial district, § 66, p. 300.
times and places of holding court enumerated, § 66, p. 300.
The districts of, included within the First Circuit, § 4, p. 10.
MASTER—
Accounting before, in copyright cases, § 389g, p. 1911.
assessment of damages, § 389h, p. 1913.
Accountings before, in patent cases, § 389a, p. 1885.
computation of profits, § 389b, p. 1889.
deductions from profits, § 389c, p. 1897.
interest upon profits, § 389d, p. 1900.
damages for infringement, § 389e, p. 1900.
Accounting before, in trademark cases, § 389i, p. 1919.
Appointment of
who may be appointed master, § 385, p. 1873.
master appointing day, form of memorandum, § 386, p. 1875.
Duties of master, § 386, p. 1875.
Evidence before, § 391, pp. 1923, 1924.
Execution of deed or other written instrument in the name of party who refuses to do so, under Lord St. Leonard's Act, § 441, p. 2162, n. 1.
Instructions to, § 388a, p. 1880.
Proceedings before master in general, § 388, pp. 1878-1880.
Receiver
when may be appointed, § 318, p. 1604, n. 1.
appointment of, usually no longer referred to, § 317, p. 1602.
fixing compensation of, § 322, p. 1620.
passing accounts of, § 317, p. 1602; § 321, p. 1616.
Reference
references to, in general, § 384, p. 1871.
bringing on a reference before, § 386, p. 1875.
reference to, to hear testimony and state facts where the latter are voluminous, on application for an injunction, § 278, p. 1403.
reference to, to take accounts or assess damages, § 377, p. 1862.
parties entitled to attend a reference, § 387, pp. 1876-1878.
Reports, § 392, p. 1925.
exceptions to, § 393, pp. 1926-1931.
Sales by, § 394, pp. 1931-1964.
State courts, how far decisions in, upon the law of master and servant are binding in Federal tribunals, § 477, p. 2449.
State of facts, § 390, pp. 1921-1923.
MATTER IN DISPUTE—
Value of, necessary to confer jurisdiction, § 6, p. 34.
Burden of proving value too small on defendant, § 6, p. 41.
how set up, § 6, p. 41.
how waived, § 6, p. 41.
Value of matter in action for damages, § 7, pp. 42-46.
to obtain possession of land, § 8, p. 46.
to recover possession of personal property, § 9, p. 47.
in suits of foreclosure, § 10, p. 48.
to redeem, § 11, p. 49.
to quiet title, § 12, pp. 49, 50.
for injunction, § 13, pp. 50-55.
upon taxpayers' bills, § 14, pp. 55-57.
upon creditors' bills, § 15, p. 57.
upon stockholders' bills, § 16, pp. 57, 58.

Vol. II begins at § 197, page 1125; Vol. III begins at § 453, page 2201; Vol. IV begins at § 670, page 3597.

MATTER IN DISPUTE (continued)—
when joint plaintiffs, § 17, pp. 59-64.
when joint defendants, § 18, pp. 64-68.
Consideration of interest in estimating value, § 19, pp. 68, 69.
costs in estimating value, § 20, pp. 69, 70.
counterclaims, § 21, pp. 70, 71.
when there is an admission, § 22, pp. 71, 72.
When plaintiff's pleadings show sufficient defense to part of claim, § 23, pp. 72, 73.
That court has no jurisdiction for lack of value of, a ground of demurrer, § 367, p. 1833.
Value of, as affecting removal of cause, § 545c, p. 2995.
Value of, as affecting removal of suits containing controversies between citizens of the same State, claiming land under grants of different States, § 550, pp. 3024, 3025.
Value of, as affected by subsequent events in relation to right to remove cause to Federal court, § 554, p. 3043, n. 9.
Value immaterial, on writ of error, from Supreme Court to State court on account of Federal question, § 692, p. 3709.
As regulating right to appeal or bring error, § 696, pp. 3757-3767.
MATTER SUBSEQUENT—
Bill to avoid decree for, § 132, p. 752.
MAXIMS—
Interest reipublicae ut sit finis litium, § 110, p. 678.
Maxima pars eorum quae scimus est minima eorum quae ignoramus, § 176, p. 1007, n. 1.
Utile per inutile non vitiatur, § 239, p. 1244.
He who seeks equity must do equity, as applied to pleadings, § 153, p. 908; § 79a, p. 556.
Victus victori in expensis condemnatus est, § 409, p. 1998.
MECHANIC'S LIEN—
Enforced by Federal courts of equity, § 82, p. 570.
When enforceable in Federal court, § 51, p. 183.
MEDIATION AND CONCILIATION, UNITED STATES BOARD OF—
Jurisdiction of, § 77g, p. 517.
MEMBER—
Of corporation, when a proper party to suit against corporation under English practice, § 111, p. 679.
Parties to suits by members of unincorporated association on behalf of themselves and others similarly situated, § 114, p. 703.
see also CORPORATION; STOCKHOLDER.
MERCHANT'S SHIPPING ACT—
Limitation of liability of shipowners, § 593, p. 3207.
MICHIGAN—
Divided into two districts, § 66, p. 300.
districts enumerated and described, § 66, pp. 300-302.
Districts of, included within Sixth Circuit, § 4, p. 10.
MINING CASES—
Jurisdiction of, § 31, pp. 107-110.
MINISTERS—
Jurisdiction of cases affecting, § 1, p. 1.
Original jurisdiction of United States Supreme Court in controversies affecting, § 3, p. 4.
Writ of *ne exeat republica* against, or servant of, § 327, p. 1635.
see also AMBASSADORS.

Vol. II begins at § 197, page 1125; Vol. III begins at § 453, page 2201; Vol. IV begins at § 670, page 3597.

MINNESOTA—
Constitutes one judicial district, § 66, p. 302.
times and places of holding same enumerated, § 66, pp. 302, 303.
Districts of, included within Eighth Circuit, § 4, p. 10.
Introducing in evidence transcripts from certain books of the District Courts in, § 333o, p. 1691.
MINORS (see INFANTS).
MISCONDUCT—
Removal of receiver for, § 323, p. 1624.
MISCONDUCT IN OFFICE—
When to be specifically charged in bill, § 137, p. 774, n. 34.
MISJOINDER—
Of parties plaintiff, a ground of demurrer, § 130, p. 742.
Objection on account of, will not prevent appointment of receiver, § 315, p. 1599.
see also BILLS; MULTIFARIOUSNESS.
MISREPRESENTATION—
Not ground for bill in equity to recover damages alone, § 79, p. 547.
MISSISSIPPI—
Divided into two judicial districts, § 66, p. 303.
subdivisions and counties of same enumerated, § 66, pp. 303, 304.
Districts of, included within Fifth Circuit, § 4, p. 10.
MISSOURI—
Divided into two judicial districts, § 66, p. 304.
times and places of holding court in, enumerated, § 66, pp. 304-306.
Districts of, included within Eighth Circuit, § 4, p. 10.
MISTAKE—
As subject of relief in equity, § 79, pp. 546, 547.
Essentials of, § 79, p. 546.
Not ground for bill in equity to recover damages alone, § 79, p. 546.
In writs of error, § 699, p. 3789.
Bill alleging, § 138, p. 776.
see also CORRECTION OF DECREE OTHERWISE THAN BY APPEAL.
MISTAKE OF LAW—
When relieved in equity, § 79, pp. 546, 547.
Omission due to a, cannot ordinarily be cured by amendment, § 214, p. 1180.
see LAW.
MODELS—
Used as exhibits in court below, § 704, p. 3832.
MODIFICATION—
Of judgment by courts that rendered them, § 481, p. 2508.
By Supreme Court of judgment appealed from, § 711, p. 3873.
MONEY—
When interest awarded on affirmance of judgment or decree for the payment of, § 427 l, p. 2092.
MONOPOLIES—
Injunctions to restrain, § 264, p. 1323.
When injunction will not be issued to assist in maintaining, § 284, p. 1421.
Act to protect trade and commerce against, § 5, p. 21; § 61, p. 233; § 115, p. 706.
see STATUTE AGAINST MONOPOLIES.
MONTANA—
Constitutes one district, § 66, p. 306.
Times and places of holding court in, § 66, pp. 306-309.
Districts of, included within Ninth Circuit, § 4, p. 10.

Vol. II begins at § 197, page 1125; Vol. III begins at § 453, page 2201; Vol. IV begins at § 670, page 3597.

MONTANA (continued)—
Time within which causes to be docketed in United States Supreme Court, in case of appeals and writs of error from, § 704, p. 3824.
MORTGAGE—
Cancellation of, § 60, p. 223.
Execution of mortgage, whether prior incumbrances are necessary parties to suit to compel, § 120, p. 730.
Foreclosure suit
value of matter in dispute in, § 10, p. 48.
jurisdiction of bill to foreclose, § 51, p. 183.
who necessary parties to bill for foreclosure, § 112, pp. 683, 684; § 120, pp. 729, 730.
suits by bondholders to foreclose when mortgage is held in trust, § 113, p. 699.
Redemption of, bill for, what to contain, § 153, p. 909.
State statutes concerning, § 83, p. 574; § 82, pp 571-573.
Ward's estate by guardian, mortgage of, § 82, p. 570.
see EQUITY OF REDEMPTION; FORECLOSURE.
MORTGAGEE—
Citizenship of, as affecting jurisdiction, § 41, p. 133; § 42, p. 145.
Corporations
of corporation, suit by, to prevent the destruction of assets, § 145, p. 813.
of corporations, appointing receivers at suit of, § 302, pp. 1480-1483.
Foreclosure suit
mortgagee cannot join with mortgagor, in a suit for foreclosure, a party whose title is inconsistent with that of mortgagee and mortgagor, § 112, p. 690.
Infringement of patent, when necessary party to suit for, § 112, p. 689.
Misjoinder of defendants in suit by, § 141, p. 791.
Mortgagee should sue in law or equity to enforce covenant, assuming mortgage made by purchaser with mortgagor depends on *lex fori*, § 82, p. 573.
Parties to foreclosure by executor, § 113, p. 692.
Relief
when first and second, must seek relief in same suit, § 60, p. 223.
Rights of, § 83, pp. 574, 575.
right of mortgagee of patent, § 112, p. 686.
Suit by, in behalf of general creditors, § 114, p. 702.
Value of matter in dispute in suit by, § 10, p. 48.
MORTGAGOR—
Rights of, § 83, pp. 574, 575.
State statute giving right to redeem enforceable in equity, § 82, p. 567.
Who has sold equity of redemption, when necessary party to bill of foreclosure, § 112, p. 683.
When not indispensable party, § 119, p. 715.
Whether necessary party in suits affecting property, § 120, p. 729.
see PARTIES.
MOTIONS—
In general, § 248, p. 1255.
Affirm, § 705f, p. 3853.
Correction of judgment, § 481, p. 2508.
Definition, § 248, p. 1255.
To dismiss, see DISMISSAL.
Dismiss appeals and writs of error
in general, § 705, pp. 3836-3840.
dismissal because of default, § 705a, p. 3840.
dismissal upon consent, § 705b, p. 3843.

Vol. II begins at § 197, page 1125; Vol. III begins at § 453, page 2201; Vol. IV begins at § 670, page 3597.

MOTIONS (continued)—
dismissal because of waiver or estoppel, § 705c, p. 3845.
dismissal of appeals and writs of error in moot cases, § 705d, p. 3847.
practice upon motion to dismiss, § 705e, p. 3850.
motions to affirm, § 705f, p. 3853.
New trial, § 478, p. 2472.
Of course, § 249, p. 1255.
Renewing, after removal to Federal court, § 555f, p. 3070.
Special, § 250, p. 1256.
see INTERLOCUTORY APPLICATIONS AND PETITIONS; APPEAL AND ERROR.
MULTIFARIOUSNESS—
Of bill, §§ 139-143, pp. 780-804.
objection to bill for, how raised, § 143, pp. 801-804; § 146, p. 834.
cannot be raised for the first time at the hearing or on appeal, § 143, p. 802.
does not render a decree void, § 143, p. 803.
Congress may pass a law permitting, § 143, p. 803.
depends upon the discretion of the court, § 143, p. 803.
Objection of, when raised by plea, § 176, p. 1006 n. 1.
Objection on account of, not to prevent appointment, of receiver, § 315, p. 1599.
When raised by demurrer, § 367, p. 1835.
see BILLS; APPEAL AND ERROR.
MULTIPLICITY OF SUITS—
As a ground of equitable jurisdiction, § 79, pp. 553, 554.
Injunctions to prevent, § 266, p. 1332.
see also NUISANCE.
MUNICIPAL BONDS—
Bill by holder of, § 79, p. 549, n. 20.
How far decisions of State courts relative to, are binding upon Federal tribunals, § 477, p. 2450.
see TOWN BONDS.
MUNICIPAL CORPORATION—
Bill to enjoin sale of property in execution, § 79, p. 552, n. 36.
Bill to set aside ordinance of, § 79, p. 544.
Citizenship of, § 47, p. 169.
What are, § 63, pp. 259, 260.
MUNICIPAL PROPERTY—
When receiver cannot be appointed over, § 306, p. 1539.
MUNICIPAL WARRANT—
Jurisdiction of suit by assignee of, § 63, p. 260.

N.

NATIONAL BANK—
Abatement of suit by, § 216, p. 1193.
Cases affecting, § 5, pp. 18, 19.
Citizenship of, § 47, p. 171.
Directors, suits to compel general liability, § 81a, p. 566.
Injunction
when injunction will not issue against, § 284, p. 1421.
Plaintiff's money deposited in name of another, suits to recover, § 79, p. 544.
Proof of organization, § 333a, p. 1660.
Receiver
receiver of, necessary parties to suit against, § 113, p. 693.
appointing receivers of property of, § 302c, pp. 1491-1499.
Suits by or against, § 28, pp. 101-103.

Vol. II begins at § 197, page 1125; Vol. III begins at § 453, page 2201; Vol. IV begins at § 670, page 3597.

NATIONAL BANKING LAWS (see INDICTMENTS).
NATIONAL PROHIBITION ACT—
Compromises of prosecutions under, § 522b, pp. 2782, 2783.
Concurrent criminal jurisdiction, § 483b, pp. 2529-2533.
Contempt proceedings under, § 430e, pp. 2140, 2141.
Evidence in prohibition cases, § 523 l, pp. 2805, 2806.
Indictments for offenses against, § 506q, pp. 2717-2722.
Place of trial of offenses against, § 525*f*, pp. 2821, 2822.
Proceedings on seizures, § 606, pp. 3244-3250.
Removal of proceedings against officers having defenses under, § 551, pp. 3025-3032.
Search warrants under, § 487a, pp. 2570-2574.
NATURALIZATION—
Certificate of, when cancelled for fraud, § 5, p. 23, n. 40.
NATURALIZATION ACT—
District Courts have concurrent jurisdiction with State Courts of proceedings for the naturalization of aliens, § 5, p. 23.
Proceedings to cancel certificates of citizenship, § 156b, p. 965.
Suits and proceedings to cancel certificates of citizenship and to set aside naturalization, § 151b, pp. 885-890.
NAVIGABLE WATERS—
Cases arising under laws relating to, § 32, p. 110.
NEBRASKA—
Constitutes one judicial district, § 66, p. 309.
times and places of holding courts therein enumerated, § 66, pp. 309, 310.
District of, included within Eighth Circuit, § 4, p. 10.
NECESSARY PARTIES (see DEFENDANT; PARTIES; PLAINTIFF).
NE EXEAT REGNO (see NE EXEAT REPUBLICA).
NE EXEAT REPUBLICA—
Writs of, usually granted *ex parte*, § 250, p. 1257.
Writ of, defined, § 326, p. 1633.
when it will issue, § 326, pp. 1633, 1634.
by whom to be issued, § 326, p. 1633.
against whom to be issued, § 327, pp. 1634-1636.
practice in obtaining, § 328, pp. 1636-1639.
form, § 328, p. 1637.
NEGATIVE PROMISE—
Injunction to restrain violation of, § 281, p. 1409.
NEGLIGENCE—
Cannot be waived in suit against United States, § 96a, p. 602.
No relief against mistake when caused by, § 79.
Liability of receiver for, § 313, p. 1584.
Decisions upon law of, in State courts, how far binding in Federal courts, § 477, pp. 2449, 2450.
NEGOTIABLE PAPER—
How far decisions of State courts relative to, are binding upon Federal tribunals, § 477, p. 245.
Proof of indorsement, § 339, p. 1718.
NEGOTIATION OF NOTES—
Injunction to restrain, § 267, p. 1334.
NEVADA—
Constitutes one judicial district, § 66, p. 310.
times and places of holding court enumerated, § 66, p. 310.
Districts of, included within Ninth Circuit, § 4, p. 10.
Time within which cause to be docketed in United States Supreme Court, in case of appeals or writs of error from, § 704, p. 3832.

Vol. II begins at § 197, page 1125; Vol. III begins at § 453, page 2201; Vol. IV begins at § 670, page 3597.

NEW FACTS (see CORRECTION OF DECREE OTHERWISE THAN BY APPEAL; SUPPLEMENTAL BILL).
NEW HAMPSHIRE—
Constitutes one judicial district, § 66, p. 310.
times and places of holding court therein enumerated, § 66, p. 310.
The districts of, included within the First Circuit, § 4, p. 10.
NEW JERSEY—
Constitutes one judicial district, § 66, p. 310.
times and places of holding courts therein enumerated, § 66, pp. 310, 311.
Districts of, included with the Third Circuit, § 4, p. 10.
NEW MEXICO—
Time within which cause to be docketed in United States Supreme Court, in case of appeals or writs of error from, § 704, p. 3832.
NEW PARTIES—
When allowed to intervene, § 258, p. 1283.
NEW REMEDIES—
In equity, § 78, p. 542.
NEWSPAPERS—
When articles in, a ground for a new trial, § 478, p. 2478.
NEW TRIALS—
Ordered when rulings in relation to insufficient count prejudiced defendant, § 536a, p. 2880.
Motions for, common-law procedure respecting, § 453, p. 2204.
Principles regulating the granting of, § 478, p. 2472.
Stay of execution to file petition for, § 427b, p. 2089.
Effect of granting, on former judgment, § 427b, p. 2090.
Judgment ordering, cannot be reviewed by writ of error, § 692b, p. 3717.
see TRIALS; COURT OF CLAIMS; ADMIRALTY; PRACTICE IN CRIMINAL CASES.
NEW YORK—
Divided into four judicial districts, § 66, p. 311.
counties and times and places of holding court therein enumerated, § 66, pp. 312-313.
The districts of, included within the Second Circuit, § 4, p. 10.
Statutes concerning suits by or against consolidating corporations followed, § 83, p. 576.
Suits by married women in, § 89, p. 584.
NEXT FRIEND—
Appearing for infant, § 106, p. 673; § 90, p. 585.
Obligation to pay costs, § 90, p. 585.
Suits by, or married women, § 89, p. 583.
for infant, § 46, p. 164; § 90, p. 584.
Removal of, for cause, § 90, p. 585.
Of lunatics, suits by, § 91, p. 587.
Appointment by court of, § 91, p. 588.
Brought in by amendment, § 211, p. 1175.
Expenses of, how payable, § 106, p. 674.
Petition for appointment of, § 253, p. 1266.
NEXT OF KIN—
Bill against sureties of administrator, § 79, p. 544.
Necessary parties to suits by one of, and on behalf of others similarly situated, § 114, p. 704.
Necessary parties in suits by, § 119, pp. 714, 715.
Not necessary to join, in suit against an administrator or executor, § 113, pp. 691, 692.
Bill against an administrator and his sureties, § 141, pp. 794, 795.

Vol. II begins at § 197, page 1125; Vol. III begins at § 453, page 2201; Vol. IV begins at § 670, page 3597.

NISI—
Order defined, § 252, pp. 1263, 1264.
Decrees, see DECREES.
NOLO CONTENDERE—
Plea of, § 518, p. 2765.
NOMINAL DAMAGES—
Costs where master reports in favor of plaintiff for nominal damages, § 410, p. 2004.
NON PROSEQUITUR—
Judgment of, § 551, p. 3027.
NON-RESIDENTS—
Jurisdiction over, § 61 a b c d, pp. 242, 243, 245; § 82, p. 571.
When may be compelled to give security for costs, § 425, p. 2080.
NONSUIT—
Plaintiff may consent to, § 473g, p. 2418.
Trial judge has no power to order compulsory, § 473g, p. 2418.
When not conclusive, § 186, pp. 1077, 1078.
NORTH CAROLINA—
Divided into two judicial districts, § 66, p. 313.
counties and times and places of holding court therein enumerated, § 66, pp. 313-315.
Districts of, included within Fourth Circuit, § 4, p. 10.
Introducing in evidence transcripts from certain books of the Circuit and District Courts in, § 333, p. 1692.
NORTH DAKOTA—
Constitutes one district, § 66, p. 315.
Times and places of holding court in, § 66, pp. 315, 316.
District of, included within Eighth Circuit, § 4, p. 10.
NOTARY—
Certificate of, § 339, p. 1718.
Fees of, held to be costs and not to be added to value of matter in dispute when jurisdiction is to be determined, § 20, pp. 69, 70.
NOTE—
Not collected by bill in equity, § 79, p. 552, n. 36.
Suits to recover value of, § 5, p. 14.
Suits by assignees of, § 63, p. 256.
When payable to bearer, § 63, p. 258.
Accommodation, suits on, § 63, p. 263.
Suit for money paid on several, multifariousness, § 140, p. 782.
Injunctions to restrain negotiation or indorsement of, § 267, p. 1334.
prevent transfer of, § 272, p. 1356.
NOTICE—
State statute requiring notice to comptroller of city before bringing suit, § 83, p. 575.
State statute determining what shall constitute, of pending suit, § 83, p. 575.
When to be specifically charged in bill, § 137, p. 774.
Of motions, §§ 249-251, pp. 1255-1262.
Of application for interlocutory injunction, § 292, pp. 1433-1436.
Usually required, on appointment of receiver, § 315, p. 1600.
Of decree, § 428d, p. 2116.
Of application for attachment for contempt, § 428, p. 2117.
Of trial or argument, how far State practice respecting, followed, § 453, p. 2207.
For production of books and papers at trial, § 333, p. 1658.
To creditors in bankruptcy proceedings, § 629, p. 3339.
Of appeal in prize causes, § 698, p. 3778.
Of motion to dismiss appeal or writ of error, § 705e, p. 3850.

Vol. II begins at § 197, page 1125; Vol. III begins at § 453, page 2201; Vol. IV begins at § 670, page 3597.

NUISANCE—
Necessary parties in suit to enjoin, § 119, p. 722.
Owners of adjacent property uniting to enjoin, § 140, pp. 786, 787.
Injunctions to suppress, § 267, p. 1334; § 274, p. 1359
Injunctions to prevent continuance of, § 274, pp. 1359-1363.
Value of matter in dispute in a suit to abate a, § 13, p. 54.
Informations to abate public, § 131, p. 749.
NUMBER—
Rules where parties are very numerous, § 115, p. 705.
NUMEROUS PARTIES—
Rule in case of, § 115, pp. 705-707.
Who necessary in case of, § 114, p. 705.
NUNC PRO TUNC—
Allowing bond to be filed, on removal of cause to Federal court, § 547, p. 3001.
Order, § 481, p. 2511.

O.

OATH—
To answer, § 192, pp. 1119-1121.
form of oath to answer, § 192, p. 1120.
before whom may be taken, § 192, p. 1120.
form of, § 192, p. 1120.
to be attached to answer denying facts stated in petition for intervention, § 254, p. 1268.
Master required to take, § 388, p. 1879.
Affirmation in lieu of, § 335, p. 1709.
When must be made to the truth of proposed amendments, § 215, p. 1182.
Waiver of answer under, § 153, p. 907; § 174, p. 997.
OBJECTIONS—
Which cannot be made at the hearing, § 376, p. 1858.
To parties, how and when made, § 129, p. 739; § 130, p. 742.
OBSTRUCTING—
Receiver, § 311, p. 1578.
OFFER OF EQUITY—
A failure by plaintiff to make an, demurrable, § 367, p. 1836.
OFFERS—
In bills, § 153, pp. 907-913.
Omission of, when ground for demurrer, § 153, p. 912.
General, sufficient, § 153, p. 913.
OFFICE—
Removal from, § 5, p. 18.
Suits to recover possession of, § 5, p. 18.
Misconduct in, when to be specifically charged in bill, § 137, p. 774.
OFFICER—
Not compelled by bill in equity to perform ministerial duty, § 79, p. 552, n. 36.
Of a corporation, when proper party to suit against corporation, § 111, p. 680.
Parties to bill against, of State, § 120, p. 725.
When injunctions will not be issued to stay the removal of, § 270, pp. 1341.
Of corporation, not usually appointed receiver, § 318, p. 1605.
Of House of Congress, removal of suit against, § 537, pp. 2885, 2886; § 551, pp. 3025, 3026.
see OFFICER OF UNITED STATES; REVENUE OFFICERS; ACCOUNTS.

Vol. II begins at § 197, page 1125; Vol. III begins at § 453, page 2201; Vol. IV begins at § 670, page 3597.

OFFICER OF UNITED STATES—
Jurisdiction of actions at common law by, § 5, p. 13.
Right to sue United States, § 95, pp. 593-598.
Suits by and against, § 34, pp. 119, 120.
Statutes of limitation to actions against, § 181, p. 1048.
Cannot issue injunction against, § 284, p. 1419.
see also OFFICER; REVENUE OFFICERS; ACCOUNTS; MANDAMUS.
OHIO—
Divided into two districts, § 66, p. 316.
counties and times and places of holding court therein enumerated, § 66, pp. 316, 317.
Districts of, included within Sixth Circuit, § 4, p. 10.
OKLAHOMA—
Divided into two districts, § 66, p. 317.
Counties, times and places for holding court, § 66, pp. 317, 318.
Districts of, included within Eighth Circuit, § 4, p. 10.
see WRITS OF ERROR AND APPEALS.
OLEOMARGARINE ACT (see INDICTMENTS).
OMISSION—
From bills, of defendants not within jurisdiction of the court, § 117, pp. 710-713.
In introductory clause of bills, how taken advantage of, § 135, p. 759.
Of proper parties, reasons for, to be averred, § 117, p. 711.
Objection for, of proper parties, § 129, pp. 739-741.
see PARTIES.
OPEN COURT—
Agreements made in, using as admissions, § 330, p. 1649.
OPENING—
On hearing, § 374, p. 1852.
OPENING OF LETTERS—
Injunctions to prevent, § 280, p. 1409.
OPINION—
Copies of, filed in the case to be annexed to and transmitted with record on appeal, § 704, p. 3828.
OPIUM (see INDICTMENTS).
ORAL TESTIMONY (see EVIDENCE; PRACTICE AT COMMON LAW).
ORDER—
Of State court on removal of cause, § 545, pp. 2985, 2986.
In cause prior to removal to Federal court, effect of removal on same, § 555d, p. 3067.
In general, § 255, p. 1269.
Who may make, § 255, p. 1270.
see also CORRECTION OF DECREE OTHERWISE THAN BY APPEAL; DECREES; ENFORCEMENT OF DECREES AND ORDERS; INTERLOCUTORY APPLICATIONS.
ORDER BOOK—
Entering order in, that bill be taken *pro confesso*, § 171, p. 988.
Motions to be entered in order book, § 249, pp. 1255, 1256.
OREGON—
Constitutes one judicial district, § 66, p. 318.
times and places of holding court enumerated, § 66, pp. 318, 319.
Districts of, included within Ninth Circuit, § 4, p. 10.
Time within which cause to be docketed in United States Supreme Court, in case of appeals or writs of error from, § 704, p. 3834.
ORIGIN—
Of jurisdiction in equity, § 78, p. 542.
ORIGINAL BILLS (see BILLS).

Vol. II begins at § 197, page 1125; Vol. III begins at § 453, page 2201; Vol. IV begins at § 670, page 3597.

ORIGINAL JURISDICTION—
Of Federal Supreme Court, § 1, p. 1; § 3, pp. 4-9.
Practice in, of Supreme Court, § 3a, p. 7.
see JURISDICTION.
ORIGINAL PAPERS—
When required for examination in Supreme Court, § 704, p. 3832.
OTHER SUITS—
That defendant is in danger of being harassed by, a ground of demurrer, § 367, p. 1835.

P.

PAPERS—
Loss of, as a subject of relief in equity, § 79, p. 546.
Introduction of, in evidence, § 333, pp. 1657-1709.
Production of, on trial, § 333, pp. 1657-1658.
Of government, cannot be obtained by replevin, § 102, p. 652.
PARENS PATRIAE—
Jurisdiction of Federal courts not like the Lord Chancellor's prerogative as, § 81, pp. 561, 562.
PARISHIONERS—
Suits by one or more on behalf of others, § 116, pp. 707, 708.
Joinder with tenants in a bill of peace, § 140, pp. 785, 786.
PARSON—
Scandal against, § 238, p. 1240.
PARTIES—
(See § 128, pp. 737-738, for summarized statement of the rules relating to this subject.)
Absent persons
when unknown, § 125, p. 736.
when interest of absent party is evidently very small, § 124, p. 736.
Admiralty, § 563, p. 3136; § 574, p. 3160.
Amendments, by striking out and bringing in, § 211, p. 1174; § 213, p. 1178.
Bankruptcy, § 616, p. 3293.
Bills
dismissing bill with costs, where a disclaimer is made and it appears that defendant was made a party without reason, § 196, p. 1124.
supplemental bills, § 232, pp. 1226-1228.
to bills in equity, who may be, § 85, p. 580.
to bills of revivor, § 216, p. 1188; § 222, p. 1204.
Class suits
suits against one or more of a class, § 115, pp. 705-707.
numerous parties, § 115, p. 705.
committee representing other litigants, § 115, p. 706.
members of clubs and unincorporated associations, § 115, p. 706.
stockholders of corporations, § 115, p. 706.
voluntary association with numerous members, § 115, p. 706.
modification of English law by this rule, § 115, p. 706.
absent parties of the class, to what extent bound by the decree against the representatives, § 115, p. 707.
suits by a complainant on behalf of himself and others similarly situated, § 114, pp. 701-705.
illustrations of, § 114, pp. 701, 702.
stockholders of corporations, § 114, p. 703.
creditors, § 114, p. 704.
members of unincorporated associations, § 114, p. 703.
bondholders, § 114, p. 703.

Vol. II begins at § 197, page 1125; Vol. III begins at § 453, page 2201; Vol. IV begins at § 670, page 3597.

PARTIES (continued)—
legatees, § 114, p. 704.
next of kin, § 114, p. 704.
partners, § 114, p. 704.
one of a class for whom a charity was founded, § 114, p. 704.
one of crew of privateer seeking prize money, § 114, p. 704.
Common law, parties at
in general, § 454b, p. 2213.
actions in tort, §§ 119, 454b, p. 2213.
necessary parties, § 110, p. 679; § 119, p. 719; § 454b, p. 2212.
parties beyond jurisdiction, § 117, pp. 710-713; § 120, p. 727; § 454b, p. 2212.
parties without interest, § 111, p. 681; § 454b, p. 2213.
state practice, when followed, § 454b, p. 2214.
unnecessary parties, § 110, p. 679; § 119, p. 719; § 454b, pp. 2212, 2213.
Controversy, parties to a, § 41, pp. 130-139.
formal, § 42, pp. 139-149.
Corporations, suits against officers, book-keepers, members, § 111, p. 679.
Costs
attorney's costs belong to, and not to attorney, § 416, p. 2019.
between party and party, what they consist of, § 415, p. 2018.
cases of fraud, making parties to, pay costs, § 111, p. 682.
to whom costs will be awarded, § 407, p. 1992.
Court of Claims, § 673.
Death of
before time allowed for taking appeal or bringing writ of error has expired, § 697, pp. 3776, 3777.
pending appeal or writ of error, § 697, p. 3776.
Decree
who bound by a, § 110, p. 677.
parties indispensable to a, § 120, pp. 724-734.
all who will be directly affected by the decree sought, § 120, p. 724.
or whose obedience is necessary to enforcement of a decree, § 120, p. 724.
when a person is affected, § 120, p. 724.
if decree would cast cloud upon another's title, § 120, p. 724.
when State is a necessary party, § 120, p. 725.
when not, § 105b, pp. 662-664; § 120, p. 725.
trustee of an active trust, § 120, p. 725.
when city indispensable party, § 120, p. 728.
in action between partners for accounting, § 120, p. 728.
tenants in common in partition suit, § 120, p. 729.
person claiming title or interest in property, § 120, p. 729.
mortgagor, in suit by mortgagee against third party to remove cloud upon title, § 120, p. 729.
in suits for specific performance of contract affecting lands, § 120, p. 730.
suits by stockholders to set aside foreclosure of railroad mortgage, § 120, p. 730.
corporation, in suits against third person, § 120, p. 731.
assignee of debtor, in suits against surety, § 120, pp. 731, 732.
bills by legatees, § 120, pp. 724, 725.
prior incumbrancers, in suits to compel execution of mortgage, § 120, p. 734.
staying proceedings in ejectment, § 120, p. 734.

Vol. II begins at § 197, page 1125; Vol. III begins at § 453, page 2201; Vol. IV begins at § 670, page 3597.

PARTIES (continued)—
Defendants
omission of, not within jurisdiction of the court, § 117, pp. 710-713.
whether decree binding against, § 117, p. 711.
equity will seek to have before the court all interested, § 117, p. 712.
rule relaxed when it will prevent justice, § 117, p. 712.
three kinds of parties, § 117, p. 712.
parties may be made defendants if they refuse to join as, § 110, p. 678.
parties who may be, § 85, p. 580; § 91, p. 588; § 94, p. 592.
Formal parties
citizenship of formal parties does not affect jurisdiction, § 40, p. 125.
formal parties who may be omitted when without the jurisdiction, § 118, pp. 713, 714.
husband, in suit by wife in certain cases, § 118, p. 713.
trustees of railroad mortgage not opposing bondholder's suits, § 118, p. 713.
person against whom injunction is sought is not, § 118, p. 714.
person with naked legal right and no equitable right, § 118, p. 714.
when suit is brought for the possession of real or personal property, person in possession is not, § 118, p. 714.
to a controversy, formal, § 42, pp. 139-149.
Indispensable parties, § 117, p. 712.
what may be omitted, § 117, p. 712.
by or against one or more as representatives of a class claiming a common right, § 116, pp. 707-710.
general rule, § 116, p. 707.
estimates coming from a common source, § 116, p. 707.
against executor and some of the heirs, § 116, p. 708.
tenants, § 116, p. 707.
parishioners, § 116, p. 707.
lord of the manor, § 116, pp. 707, 708.
holders of certificates of indebtedness, § 116, p. 708.
purchasers of lands, § 116, p. 708.
city to levy duty, § 116, p. 709.
see also DECREE under Parties.
Interested parties
all persons to be, who are directly interested, § 110, p. 677.
parties whose interest is separable, § 119, pp. 714-724.
trustee or director, in suit against colleagues for breach of trust, § 119, p. 714.
next of kin, in suits against administrator and sureties, § 119, p. 714.
suits by legatees to recover share of decedent's estate, § 119, p. 715.
subsequent lienor in foreclosure suit, § 119, p. 716.
when mortgaged land conveyed to sovereign, § 119 p 716
partner beyond jurisdiction, in suit by strangers, § 119, p 717.
in suits by other partner, § 119, pp. 717, 718.
contractors owning joint interest, § 119, p. 719.
suit by heir, § 119, p. 718.
specific performance for sale of lands, § 119, p. 718.
assignor of claim, in suit by assignee, § 119, p. 719.
stockholders' suits, § 119, p. 720.

Vol. II begins at § 197, page 1125; Vol. III begins at § 453, page 2201; Vol. IV begins at § 670, page 3597.

PARTIES (continued)—
to foreclose lien upon corporate property, § 119, p. 720.
suit by indorsers, § 119, p. 722.
by creditors to reach lands of debtor, § 119, p. 722.
suits to enjoin execution of judgment, § 119, p. 723.
maintenance of public nuisance, § 119, p. 722.
by parties against State to restrain illegal tax, § 119, p. 724.
against infringers of patents, § 119, p. 723.
against sub-contractor, § 119, p. 718.
for parties who on account of lack of interest need not be parties see below "Non-interested parties."
Intervening, § 258, pp. 1283-1304.
Joinder of, how far State practice concerning, is followed, § 453, p. 2207.
Misjoinder of, §§ 140, 141, pp. 782, 798.
Motions and petitions, parties to, § 251, p. 1261.
New parties
cannot be brought in by cross-bill, § 199, p. 1145.
Non-interested
persons who on account (of lack) of interest need not be made parties, § 112, pp. 683-691.
who are not interested, § 112, p. 683.
who claim under inconsistent titles, § 112, p. 683.
prior incumbrances on a bill for foreclosure, § 112, p. 683.
suits for specific performance, § 112, p. 685.
suits by assignee, § 112, pp. 685-690.
mortgagor who has sold equity of redemption, § 112, p. 683.
who has a mere interest in question of law involved, § 112. p. 690.
parties with no interest in the subject-matter of the suit, § 111, pp. 679-682.
English practice, § 111, p. 679.
Oath of, to petition for intervention, § 259, p. 1307.
Objection for want of parties, how taken, § 129, pp. 739-741.
joinder of improper parties, § 130, p. 742.
who may demur, § 130, p. 742.
demurrer cannot be raised for first time on appeal, § 130, p. 743.
objections as to, whether can be raised at hearing, § 376, p. 1858.
Patents
mortgagor of, § 112, pp. 683-690.
mortgagee of, § 112, pp. 683-690.
Petition
parties to, § 251, p. 126.
who may make, § 253, p. 1266.
Plaintiffs having a joint and several demand, § 112, p. 691.
Plea of want of, § 176, p. 1008.
Principals
agents, auctioneers, arbitrators, and attorneys, when to be made parties in suits against, § 111, p. 682.
illustration of, joining surety with principal liable for money, § 110, p. 678.
heir with personal representative in suit to enforce covenant against ancestor, § 110, p. 678.

Vol. II begins at § 197, page 1125; Vol. III begins at § 453, page 2201; Vol. IV begins at § 670, page 3597.

PARTIES (continued)—
Principle
of *interest reipublicæ ut sit finis litium*, § 110, p. 678.
that no proceedings to take place affecting a person's rights except in his presence applied, § 110, pp. 677, 678.
Proper parties
want of, former ground of demurrer, § 365, p. 1827.
Receivers
parties not usually appointed, § 318, p. 1604.
nor the son or brother of, § 318, p. 1604, n. 1.
Reference before a master
who are entitled to attend, § 387, pp. 1876-1878.
Relief
distinction between court of law and equity, in that the latter affords complete relief, § 110, p. 678.
when numerous interests have been created for the purpose of preventing the plaintiff from obtaining equitable relief, § 121, pp. 734, 735.
when a person consents to relief sought, § 122, p. 735.
or disclaims all interest in subject-matter, § 122, p. 735.
agreements between persons to represent each other as plaintiffs, not sanctioned, § 122, p. 735.
Removal
order for examination of party before trial made prior to removal to Federal court, effect of removal upon, § 555b, p. 3072.
Representative
cases where the law has furnished, § 113, pp. 691-701.
cases of executors, administrators, § 113, p. 692.
bankrupts, insolvent debtor, creditors, in suits by assignee, § 113, p. 692.
creditor of an estate, in suit by receiver, § 113, p. 693.
surviving parties, in suits by or against strangers affecting partnerships, § 113, p. 696.
tenant in tail, § 113, p. 697.
tenant for life, § 113, p. 697.
trust property, § 113, pp. 697-701.
beneficiaries, § 113, pp. 697-701.
trustees, § 113, pp. 698-701.
under railroad mortgage, § 113, pp. 698, 699.
stockholders, upon suits for accounting against corporations, § 113, p. 694.
member of unincorporated associations, § 113, p. 695.
Residence of parties, § 61, pp. 226-249.
Rights of
decision to provide for all the rights which different persons have in the matters decided, § 110, pp. 677, 678.
when right of administration is in dispute, § 126, p. 736.
Rules
summarized statement of the, relating to parties, § 128, pp. 737, 738.
Shadwell's remarks on Rule 51 in chancery, § 112, p. 691.
Rule 51 in chancery only applicable where several persons are liable in different characters, § 112, p. 691.
relaxation of rule in special cases, § 127, p. 737.
largely in discretion of court, § 127, p. 737.
State as
suit against a State officer, § 105a, pp. 660-672.

Vol. II begins at § 197, page 1125; Vol. III begins at § 458, page 2201; Vol. IV begins at § 670, page 3597.

PARTIES (continued)—
Trades union, engaged in a strike, § 115, p. 706.
Unnecessary, § 43, pp. 150-152.
Waiver by plaintiff of right against a person, § 123, p. 735.
Writs of error and appeal, parties to, § 697, pp. 3767-3777.
by personal representatives of a party, § 697, p. 3776.
court may execute judgment despite a supersedeas, § 697, p. 3771.
defect of parties, § 697, p. 3772.
parties to a joint judgment, § 697, p. 3771.
purchaser at foreclosure sale may appeal, § 697, p. 3767.
respondents to an appeal, § 697, p. 3773.
right of intervenor to appeal, § 697, p. 3767.
when all parties are joined in writ the omission of some of them from petition immaterial, § 697, p. 3772.
upon the death of a party, § 697, p. 3776.
when receiver should be a party to an appeal, § 697, p. 3775.
see also ABATEMENT AND REVIVOR; PLAINTIFFS AND DEFENDANTS; REMOVAL OF CAUSES; MORTGAGOR; MORTGAGEE; BANKRUPTCY; ADMIRALTY.
PARTITION—
Effect of State statute authorizing suit for partition of equitable claim to land, § 79, p. 544; § 82, p. 569.
Suits for, § 5, p. 22.
Suits against the United States for, § 98, pp. 636, 637.
Joinder of defendants, § 141, p. 788.
Tenants in common, necessary parties to suit for, § 120, p. 725.
PARTNERS—
Accounting between, necessary parties to, § 120, p. 446.
Not necessary to join representatives of deceased in suits against surviving, § 113, p. 696.
One of several may be sued for infringement of a patent, § 119, p. 723.
Necessary parties to a suit to recover money due the firm, § 120, p. 728.
Necessary parties to suits brought by one of many, and on behalf of others similarly situated, § 114, p. 705.
Whether a necessary party to suit against firm, § 119, p. 717.
Whether necessary when sued to account by other partners, § 119, pp. 717, 718.
PARTNERSHIP—
Citizenship of, § 49, p. 178.
Necessary parties in suits affecting property of, § 113, p. 696.
Alternative relief in actions affecting, § 138, p. 776.
When receiver will be appointed in suits affecting, § 302, p. 1480.
see BANKRUPTCY.
PATENT CASES—
Abatement of, § 216, p. 1192; § 230, p. 1217; § 231, p. 1219.
Accounting in, proceedings upon, § 146, pp. 840-841; § 389, pp. 1880-1885.
accounting before master in, § 389a, p. 1885.
burden of proof in, § 389b, p. 1889.
computation of profits, rules for, § 389b, p. 1889.
deductions from profits in, § 389c, p. 1897.
interest upon profits in, § 389d, p. 1900.
assessment of damages for infringement, § 389e, p. 1900.
apportionment of liability, § 389f, p. 1910.
Actions against the United States, § 671, pp. 3598-3607.
Amendment upon a demurrer, § 146, p. 832.

Vol. II begins at § 197, page 1125; Vol. III begins at § 453, page 2201; Vol. IV begins at § 670, page 3597.

PATENT CASES (continued)—
Answers in patent cases, § 188, pp. 1106-1116.
defense of want of patentability not pleaded in answers, § 188, p. 1112.
Assignment and license, distinction between, § 112, p. 686, n. 34.
Bills
allegation in bill to impeach patent or grant by United States, not brought by attorney-general, § 144, p. 808.
to enjoin infringement of patent, § 146, pp. 830-847.
bill against infringer of patent, § 29, p. 103.
an officer of the United States for infringement of patent, § 100, p. 644.
bill to compel issue of patent, § 147, pp. 848-852.
bill asking for specific performance of a contract relating to patents and also for relief for infringement is multifarious, § 146, p. 844.
bill to set aside a contract for royalties and for an accounting, § 146, p. 846.
bill upon a re-issued patent, § 146, p. 843.
reached by creditor's bill, § 151c, p. 890.
frame of bills in, § 146, pp. 830-847.
supplemental bill in, § 228, p. 1214; § 231, p. 1218; § 234, p. 1232.
bills in the nature of, § 234, p. 1232.
Common law upon patents, § 454m, p. 2235.
Costs in, § 410, pp. 2003-2006.
Decree in, § 400, p. 1977.
Decree *pro confesso* in, effect of, § 172, pp. 993-994.
Defenses peculiar to, § 188, pp. 1106-1116.
Demurrer
for laches in applying for reissue, § 367, p. 1835.
objection to joinder of parties should be made by, § 146, p. 832.
what is admitted by, to bill for infringement, § 366b, p. 1831.
Discovery in cases of patents, § 174, p. 1002.
Evidence in, § 333, p. 1673; § 339, p. 1715; § 341, p. 1737.
introducing in evidence copies of foreign letters, § 333e, p. 1674.
Exceptions to master's report, § 389a, p. 1889.
Infringement of
action for, survives to representatives of the patentee, § 216, p. 1192.
allegations in bill for, § 146, pp. 833-847.
bill for, of several distinct patents is multifarious, § 146, p. 843.
by corporations
suit against receiver of a corporation for infringement of patent, § 113, p. 694.
joinder of parties who used a corporation as a means of infringement, § 141, p. 795.
joinder of employees and directors with corporation as defendants in suit for, § 141, p. 795; § 146, p. 843.
officers of a corporation enjoined from infringement where the corporation was not a party, § 119, p. 723, n. 70.
suit against one of several infringers of patent, § 119, p. 723.
joinder of causes if action in a bill for, § 146, p 844.
injunctions to restrain, § 266, p. 1333; § 269, pp. 1336-1340; § 277, pp. 1385-1399.
after the expiration of the patent, § 277, p. 1399.
burden of proof of anticipation upon defendant, § 277, p. 1394.

Vol. II begins at § 197, page 1125; Vol. III begins at § 453, page 2201; Vol. IV begins at § 670, page 3597.

PATENT CASES (continued)—
disclaimer, § 277, p. 1396.
dissolution of, because of false description, § 277, p. 1397.
effect of decree as adjudication sustaining a patent, § 277, p. 1390.
ex parte, application for, § 277, p. 1397.
inventions patentable, and those previously patented abroad, § 277, p. 1397.
laches reason for denying motion, § 277, p. 1395.
necessary allegations, § 278, p. 1400.
power to grant injunctions and estimate damages, § 277, p. 1386.
preliminary injunction not granted when no adjudication, § 277, p. 1392.
upon motion for preliminary injunction, § 277, p. 1394.
without notice, § 292, p. 1434.
suit for infringement of patent where brought, § 62, pp. 249-256.
Injunction
dissolution of, § 296, p. 1446.
fine for violating an injunction, § 431, p. 2145.
against commencement or prosecution of, § 269a, p. 1338.
in suit for, against an infringement, one or more wrongdoers may be omitted, § 119, p. 723.
notice of application for, § 292, p. 1434.
to restrain infringement by expending a patent, § 277, p. 1386.
perpetual injunctions, § 299, p. 1464.
undertaking upon an, § 297, p. 1452.
when injunction for infringement will be refused, § 277, pp. 1366, 1367; § 294, pp. 1441-1442; § 299, p. 1464.
Intervention in, § 258, p. 1299.
Jurisdiction in, § 29, pp. 103-106; § 671b, pp. 3609, 3610.
whether jurisdiction depends on value of subject-matter § 5, pp. 13-34; § 6, pp. 34, 35.
Lands, patents for
bill filed by United States to vacate patent for public lands, what to contain, § 153, p. 912.
patent for land, bill to cancel, § 31, p. 87; § 79, p. 554, n. 41.
patent for lands, suits to adjust conflicting claims to, § 81, pp. 565 566.
patent for lands, when set aside at suit of private citizen, § 151c, p. 890.
Laws
issue of law in, § 378, p. 1863.
suit to enjoin tax on patent does not arise under patent laws, § 5, p. 16.
when suit arises under laws of United States, § 29, p. 103.
License
difference between assignment and license, § 112, p. 686, n. 34.
license under patent, when recovered by creditors' bill, § 151c, p. 890.
Licensee cannot interplead third person, in action by licensor for royalties, § 157, p. 921.
Mortgage and mortgagor
right of mortgagor of patent to sue, § 112, pp. 686, 687.
effect of mortgage of patent, § 112, p. 688.
Multifariousness in, § 142, p. 801; § 146, pp. 845-847.
bills to enjoin violation of patent, § 146, pp. 845-847.
when not multifarious, § 146, p. 34.

Vol. II begins at § 197, page 1125; Vol. III begins at § 453, page 2201; Vol. IV begins at § 670, page 3597.

PATENT CASES (continued)—
Parties in, § 112, pp. 685-689.
assignors and assignees necessary parties, § 120, p. 727.
corporation not a party, § 119, p. 720.
necessary parties to suits by mortgagor of patent, § 112, pp. 683, 684.
mortgagee of patent, § 120, pp. 683, 684.
equitable assignees of patent, § 112, pp. 688, 689.
parties to suits by licensees of patent, § 112, pp. 685-689.
to suits by exclusive licensee of patent, § 112, pp. 688, 689.
where licensee is not exclusive, § 112, p. 689.
assignees of the whole of patent, § 112, p. 689.
to a bill to expunge, from the records of the patent office, § 120, p. 728.
Pleading at common-law, § 453, p. 2204; § 454a, p. 2210; § 455m, p. 2235. See PLEADINGS.
Process service of, by publication to remove cloud from right not allowed, § 166, p. 958.
Proof of proceedings affecting, § 333, p. 1674; § 339, p. 1715.
Receivers in, § 302, pp. 1481-1482; § 307, p. 1546.
Remedy in such a case, § 100, p. 644.
Right in patent, is incorporeal, § 112, pp. 686-689.
Statutes of limitation
effect of Federal patent statutes of limitation upon patents and, § 180a, pp. 1015, 1016.
must allege compliance with statutory requirements in bill by one claiming under, § 144, p. 808.
subpœna, service of, in infringement cases, § 163, p. 937.
Where suit should be brought, in what district, § 62, p. 249.
PAUPER—
Petitions for leave to sue as a poor person, § 413, pp. 2013-2018.
see also INTERLOCUTORY APPLICATIONS.
PEACE (see BILL OF PEACE).
PENALTY—
Action for, when removable, § 538a, pp. 2908, 2909.
Bond, on removal for grounds other than prejudice or local influence, or in controversies between citizens of the same State claiming land under grants of different States, penalty for, § 547, p. 3001.
Defendant may object to discovery if his answer would subject him to a, § 348, p. 1758; § 581, p. 581.
Disobeying writ of injunction, § 295, pp. 1443, 1444.
Importation of persons under contract to perform labor, § 5, p. 21.
Person not compelled to discover that which will expose him to a, § 153, p. 912.
Subject of relief in equity, § 79, p. 546.
Suit by State on judgment for, § 3, p. 6; § 86, p. 580.
Suits for, in District Courts, § 5, pp. 17, 27.
Survivability of action to recover, § 216, p. 1191.
PENDENCY OF ANOTHER SUIT—
Objection of, can be taken by demurrer, § 367, p. 1835.
Subject of, plea in defense, § 176, p. 1008; § 177, p. 1009.
PENNSYLVANIA—
Divided into three judicial districts, § 66, p. 319.
counties, times and places of holding court therein enumerated, § 66, pp. 319, 320.
Districts of, included within the Third Circuit, § 4, p. 10.

Vol. II begins at § 197, page 1125; Vol. III begins at § 453, page 2201; Vol. IV begins at § 670, page 3597.

PENSIONS—
No suits against United States to collect, § 96, p. 598.
PERFORMANCE—
Specific, as a ground of equitable jurisdiction, § 79, p. 551.
Offer of, in bill, § 153, p. 908.
see also SPECIFIC PERFORMANCE.
PERPETUAL INJUNCTIONS—
Distinguished from other forms, § 262, p. 1321; § 287, p. 1427.
when granted, what must be shown, § 299, pp. 1463, 1464.
PERPETUATING TESTIMONY—
As a subject of jurisdiction in equity, § 79, p. 549.
Bills for, § 132, p. 751; § 156, p. 920; § 345, pp. 1746-1750.
PERSON—
Causes of demurrers to the, § 367, p. 1833.
PERSONAL PROPERTY—
Bill for possession of, § 79, p. 553.
Value of matter in action for possession of, § 9, p. 47.
Suit for delivery of, § 63, p. 257, n. 1.
Person in possession is never a formal party to suit to recover, § 118, p. 714.
Injunctions to compel delivery of, § 282, p. 1412.
PERSONAL REPRESENTATIVES—
Necessary parties to suit against heir upon ancestor's covenants, § 110. p. 678.
Bills of revivor affecting, § 219, p. 1199.
Bills of revivor by, § 224, pp. 1206, 1207.
right of, to appeal or bring writ of error, § 697, p. 3776.
see ADMINISTRATORS; EXECUTORS.
PETITION—
For removal, § 545, p. 2982.
For writ of error, § 699, p. 3791.
In cases of removal of cause or criminal proceeding, see REMOVAL OF CAUSE.
Removal of, in ejectment suit to have damages allowed to plaintiff, § 51, p. 182.
In general, § 253, pp. 1265-1267.
Contents of, § 254, p. 1268.
Form of, and practice upon, § 254, p. 1267.
see INTERLOCUTORY APPLICATIONS; BANKRUPTCY; REMOVAL OF CAUSES.
PHILIPPINE ISLANDS—
Courts in the Philippine Islands, § 72, p. 355.
PHYSICIAN—
Testimony of, as to information acquired professionally, § 339, p. 1716.
PLAINTIFFS—
Alien enemies as, § 87, p. 580.
Bills
dismissal of bills by, § 361, pp. 1810-1815.
signature to bill when necessary, § 155, p. 918.
Capability of persons being, § 85, p. 580.
Foreign corporations as, § 88, p. 582.
Foreign executors and administrators, capacity of, § 92, pp. 589, 590.
Foreign receivers, capacity of, § 93, pp. 590-592.
Married women as, § 89, p. 583.
Misjoinder of, see BILLS.
Multifariousness by misjoinder of, § 140, pp. 782-788.

Vol. II begins at § 197, page 1125; Vol. III begins at § 453, page 2201; Vol. IV begins at § 670, page 3597.

PLAINTIFFS (continued)—
Parties to suit where plaintiff has a joint and several demand against several persons, § 112, p. 691.
Receiver usually appointed upon application of, § 316, p. 1602.
Relief prayed for, all persons should be made, who are interested in, § 110, pp. 677, 678.
Rules as to, alien enemies, §§ 85-87, pp. 580-582.
infants, § 85, p. 580; § 90, pp. 584-587.
idiots, § 85, p. 580; § 91, pp. 587-589.
lunatics, § 85, p. 580; § 91, pp. 587-589.
married women, § 85, p. 580; § 89, pp. 583, 584.
persons declared by State laws to be civilly dead, § 85, p. 580.
States as, § 86, p. 580.
Suits by one or more in behalf of a class similarly situated, § 114, pp. 701-705.
see also INTERVENTION; PARTIES; BILLS; COMMON-LAW PRACTICE.
PLEA—
Abolished in equity, § 173, p. 996; § 176, p. 1005.
Definition, § 176, p. 1005, n. 1.
Classification of, § 176, pp. 1007-1009.
Lord Redesdale's, § 176, p. 1005, n. 1.
How many grounds of defense can be presented by, § 176, pp. 1007-1009.
To the jurisdiction, § 176, p. 1007.
person, § 176, pp. 1007, 1008.
of pendency of another suit, § 177, pp. 1009-1014.
want of parties, § 129, pp. pp. 739-741.
statute, §§ 179-181, pp. 1015-1052; §§ 183, 184, pp. 1055-1058.
matter of record or res adjudicata, § 186a-zz, pp. 1064-1102; § 187, pp. 1102-1106.
in pais, § 185, p. 1058.
to the discovery, §§ 347, 348, pp. 1750-1766.
see also ABATEMENT; ANSWERS; DEFENSE; PRACTICE IN CRIMINAL CASES.
PLEADINGS—
Amendment of, after removal of cause to Federal court, § 555, p. 3058.
Common law, § 454, pp. 2209, 2210.
in civil causes, § 454, p. 2209.
anti-trust statutes, in actions under, § 454 l, pp. 2231-2235.
count not bad for duplicity, § 454 l, p. 2231.
action to recover damages bad for duplicity, § 454 l, p. 2234.
copyrights, in actions upon, § 454n, pp. 2238-2240.
defenses made to actions in copyright cases, § 454n, p. 2238.
recovery of damages for violations, § 454n, p. 2238.
allegations of plaintiff, § 454n, p. 2239, 2240.
counterclaims and set-offs, § 454h, pp. 2227-2228.
how pleaded, §§ 454g, 454h, p. 2227.
pleading of equitable set-off, § 454h, p. 2227.
amendment of plea of set-off, § 454h, p. 2228.
defendant's pleadings, § 454e, pp. 2217-2219.
joinder of defenses, § 454e, p. 2217.
Controversies to which aliens are parties, § 45, p. 155, § 454e, p. 2217.
pleading of general issues, § 454e, pp. 2218, 2219.
equitable defenses, § 454g, pp. 2221-2227.
amendments to pleadings, § 454g, p. 2221.
equitable relief in actions at law, § 454g-p, pp. 2221-2240.

Vol. II begins at § 197, page 1125; Vol. III begins at § 458, page 2201; Vol. IV begins at § 670, page 3597.

PLEADINGS (continued)—
defense of fraud, § 454g, pp. 2225, 2226.
defense of mistake, § 454g, p. 2225.
Federal Employers' Liability Act, in actions under, § 454j, pp. 2229, 2230.
liability for injuries to employees, § 454j, p. 2229.
recovery under common law, § 454j, p. 2229.
liability and recovery controlled by Federal law, § 454j, p. 2230.
Interstate Commerce Acts in actions under, § 454k, pp. 2230, 2231.
damages awarded for excessive rates, § 32a, p. 114; § 77b, p. 476; § 454k, p. 2230.
jurisdiction, facts affecting the
jurisdiction by special plea in abatement, § 454d, p. 2215.
State practice in the Second Circuit, § 454d, p. 2215.
difference of citizenship, § 454d, pp. 2216, 2217.
waiver of objections as to residence, § 62a, pp. 254-256; § 454d, pp. 2216, 2217.
negligence cases, § 454i, pp. 2228, 2229.
practice of State court, § 454d, p. 2214; § 454i, p. 2228.
allegations which show Federal jurisdiction, § 454a, p. 2212; § 454i, p. 2228.
patents, pleadings upon, § 454m, pp. 2235-2238.
suits for infringements, damages, § 454m, p. 2235.
conformity to practice in State courts, § 454m, p. 2235.
patented articles marked as such, § 146, p. 837; § 454m, p. 2235.
proof in actions for infringement, § 454m, p. 2237.
recovery of profits, § 454m, p. 2237.
penalties, in actions to recover, § 454o, pp. 2240, 2241.
violation of Safety Appliance Act, § 454o, p. 2240.
violation of law regulating transportation of animals, § 454o, pp. 2240, 2241.
importation of contract laborers, § 454o, p. 2241.
plaintiff's pleadings, § 454a, pp. 2210-2212.
right to reply governed by State practice, § 454a, pp. 2210, 2211.
right to object by defendant § 454a, p. 2211.
judgment of a State Court, § 454a, p. 2212; § 454b, p. 2214; § 454c, p. 2214.
allegations, § 454a, p. 2212.
taxes, in actions by the U. S. to recover, § 454p, pp. 2241, 2242.
Construing, doubt is against the pleader, § 144, p. 808.
Criminal cases
allegations as to time, § 497c, p. 2643.
place, § 497d, p. 2644.
of intent, § 497e, p. 2645.
internal revenue and prohibition laws, compromise under, § 522b, p. 2782.
guilty, § 520b, p. 2778.
indictments under
amendment of, § 505b, p. 2666.
bad grammar and spelling, § 497g, p. 2648.
collateral matters, § 497a, p. 2641.
documents in, § 497f, p. 2647.
negatives in, § 497b, p. 2642.
proper names, § 497h, p. 2648.

Vol. II begins at § 197, page 1125; Vol. III begins at § 453, page 2201; Vol. IV begins at § 670, page 3597.

PLEADINGS (continued)—
repugnancy, § 497i, p. 2650.
surplusage, § 497i, p. 2651.
matters of inducement, § 497a, p. 2641.
nolle prosequi, § 522a, p. 2781.
not guilty, § 520c, p. 2779.
right to confrontation, § 522c, p. 2783.
severance, § 505a, p. 2665.
Statute of Limitations, § 520a, p. 2777.
witnesses, compelling attendance of, § 522d, p. 2786; § 522e, p. 2788.
Filing constitutes an appearance, § 3a, p. 8.
Recital of, in decrees, § 404, p. 1982.
Rules relative to sufficiency and scope governing in Federal courts, § 473c, p. 2413.
State practice, how far respecting verification, time, service and amendment of, is followed, § 454, p. 2210.
see also BILL; REPLEADER.
POINTS (see BRIEFS).
POLITICAL RIGHT—
Injunction will not be issued to prevent a mere political right, § 284, p. 1418.
Federal court will not take cognizance of questions of, between States, § 104, p. 654.
Prayer for relief for invasion of, § 154, p. 917.
POOR PERSON—
Petitions for leave to sue as, § 413, p. 2013.
PORTO RICO—
Jurisdiction of District Court of, § 70, p. 349.
Constitutes one district, § 66, p. 321.
Times and places of holding terms, § 66, pp. 320-322.
Laws governing, § 70, p. 349.
Appeals from courts of, § 70, p. 349.
Jurisdiction of Supreme and District Courts of, § 70, p. 350.
Appeals from courts of, § 696, p. 3759.
POSSE COMITATUS (see EXECUTION OF DECREES AND ORDERS).
POSSESSION—
Injunctions to quiet, before hearing, practice respecting, in former times, § 266, p. 1333.
POSTAL LAWS—
Jurisdiction of suits under, § 5, p. 15.
Removal of suits arising under, § 537b, p. 2890.
POSTEA—
Proceedings after the trial of an issue and completion of the record by the addition of the *postea*, § 383, p. 1870.
POSTMASTERS—
Introducing in evidence copies of the quarterly return of, § 333b, p. 1664.
Proof of demand on, § 333, pp. 1664-1666.
POWERS—
Of receivers in general, § 307, pp. 1541-1546.
of railroads, § 308, pp. 1547-1551.
PRACTICE AT COMMON LAW—
In general, § 453, pp. 2201-2209.
how far practice of State courts is followed, § 453, pp. 2201, 2202, 2208.

Vol. II begins at § 197, page 1125; Vol. III begins at § 453, page 2201; Vol. IV begins at § 670, page 3597.

PRACTICE AT COMMON LAW (continued)—
Agreed statement of facts, § 476, pp. 2446-2448.
findings below considered, § 476, p. 2447.
sufficiency of facts agreed upon reviewed by writ of error, § 476, p. 2447.
Common law of the United States, § 477a, pp. 2455-2459.
Manner of revivor at, § 220, p. 1199.
New trials, § 478, pp. 2472-2483.
bill of exceptions, § 478, pp. 2475, 2476.
damages awarded, insufficient or excessive, § 478, p. 2478.
death of trial judge pending motion, § 478, p. 2476.
District Court, power to grant, § 478, p. 2472.
misconduct of members of the jury, § 478, p. 2478.
misconduct or interference, no grounds for, § 478, p. 2480.
motion for, upon exceptions argued before judge who tried case, § 478, p. 2475.
newly discovered evidence, § 478, p. 2481.
no new trial when evidence renders issue doubtful, § 478, p. 2477.
order granting, § 478, p. 2474.
State statute not followed authorizing motion for, § 478, p. 2472.
verdict for defendant set aside in action for slander, § 478, p. 2479.
waiver, § 478, p. 2482.
when motion must be made, § 478, p. 2473.
writ or error, cannot be received by, § 478, p. 2483; § 479, pp. 2484-2502.
Rules of decision at common law, § 477, pp. 2448-2455.
laws of State, § 477, p. 2448.
State practice, when followed, § 477, pp. 2448-2452, 2455.
conflict of laws as to effect given to statutes of another State or foreign country, § 477, pp. 2449-2451.
burden of proof, for negligence, § 477, pp. 2452, 2453.
Rules of property, State courts establishing, effect of decision of, § 477b, pp. 2459-2464.
State practice, when followed, § 466b, pp. 2459, 2461, 2462.
water rights, § 477b, pp. 2459, 2460.
questions of public policy, § 477b, p. 2463.
State statutes, effect of
creating or regulating rights upon the decision of the Federal courts, § 477c, pp. 2464-2471.
Trials by the court, § 474, pp. 2434-2442.
review in cases tried without jury, § 474, p. 2435.
stipulation in judgment roll, § 474, pp. 2435, 2436.
finding of the court, § 474, pp. 2436, 2441, 2442.
reversal, § 474, pp. 2439, 2441.
Writs of process in general, § 455, pp. 2242-2248.
of prohibition, § 456, pp. 2248-2252.
of mandamus, § 457, pp. 2252-2270.
practice on application for, § 459, pp. 2276-2285.
certiorari, § 460, pp. 2285-2291.
habeas corpus, in general, § 461, pp. 2291-2306.
suspension of writ of *habeas corpus*, § 465, pp. 2342-2344.
practice on application for, § 466, pp. 2342-2344.
appeals in, § 467, pp. 2360-2367.
quo warranto, § 468, pp. 2368-2379.
scire facias, § 469, pp. 2379-2384.

Vol. II begins at § 197, page 1125; Vol. III begins at § 453, page 2201; Vol. IV begins at § 670, page 3597.

PRACTICE AT COMMON LAW (continued)—
see INDICTMENTS, INFORMATIONS, MANDAMUS, PROHIBITION, CERTIORARI, HABEAS CORPUS, QUO WARRANTO, SCIRE FACIAS, ATTACHMENT, CONSOLIDATION, VERDICTS, JURY, TRIALS, EXCEPTIONS, JUDGMENTS, CONDEMNATION PROCEEDINGS, LIS PENDENS, PARTIES.
PRACTICE IN CRIMINAL CASES—
In general, § 483, pp. 2526, 2527; § 483e, pp. 2544-2546.
Arrests without warrants, § 484, p. 2550.
Bail, § 493, pp. 2608-2627.
excessive bail not required, § 493, p. 2609.
remedy of excessive bail by habeas corpus, §493, p. 2610.
arrest and removal for trial, § 493, p. 2610; § 489, p. 2583.
cases not capital, § 493, p. 2611.
capital cases, § 493, p. 2611.
cases removed from State court, § 493, p. 2612.
new bail, § 493, p. 2612.
defendant giving bail in one district, committed in another, § 493, p. 2612.
defendant held until judgment in first suit, § 493, p. 2613.
calling of, in Kentucky, § 493, p. 2613.
clerks may take bail *de bene esse*, § 493, p. 2613.
granting of writ of error stays execution of sentence of trial court, § 493, p. 2613.
jurisdiction given to Circuit courts over writs of error, § 493, p. 2615.
custody of prisoners on *habeas corpus*, § 467, p. 2365; § 493, p. 2616.
appeals and writs of error from District Court, § 493, p. 2617.
trial court may grant a *supersedeas*, § 493, p. 2618.
waiver of objection, § 493, p. 2623.
surrender by bail, § 493, p. 2624.
remission of penalty of recognizance, § 493, p. 2624.
upon what arrests in criminal cases, bail may be admitted, § 493, p. 2611.
who may take bail, § 493, pp. 2611, 2613.
what bail is, § 493, p. 2608.
who may be bailed, § 493, pp. 2617, 2618, 2619-2621.
bail not denied pending writ of error, § 493, pp. 2611, 2613.
what the bail bond should contain, § 493, p. 2621.
obligation of surety upon bail bond binds his estate after death, § 493, p. 2626.
party forfeiting bail may be subsequently arrested, § 493, p. 2625.
suits on bail bonds, § 493, p. 2625.
Bill of exceptions in criminal cases, § 535, pp. 2873-2875.
Charges in criminal cases, § 527b, pp. 2841-2846.
Civil rights laws, practice in prosecutions under, § 529, p. 2852.
see INDICTMENTS; CONSPIRACY.
Complaint, § 485, pp. 2552-2554.
complaint must be verified before magistrate, § 485, p. 2552.
proper practice is for commissioner to submit complaint to district attorney, § 485, p. 2554.
complaint of criminal offense cannot be amended, § 485, p. 2554.
Confrontation, right to, § 522c, pp. 2783-2786.
accused does not have right to be confronted with witnesses against him in proceedings before grand jury, § 522c, p. 2783.
statutory presumptions held to be unconstitutional, § 522c, p. 2785.
depositions inadmissible, § 522c, p. 2786.

Vol. II begins at § 197, page 1125; Vol. III begins at § 453, page 2201; Vol. IV begins at § 670, page 3597.

PRACTICE IN CRIMINAL CASES (continued)—
Evidence, § 523, pp. 2792, 2793.
same as in civil causes, § 523, p. 2792, 2793.
cross examination and impeachment of witnesses, § 523a, p. 2793.
documentary, § 523b, pp. 2794-2796.
competency of witnesses, § 523c, pp. 2796-2798.
testimony of accomplices, § 523d, p. 2798.
person charged shall, at his own request, be a competent witness, § 523e, pp. 2798, 2799.
testimony of defendant, § 523e, pp. 2798-2800.
cross-examination of defendant, § 523f, p. 2800.
confessions, § 523g, pp. 2801-2803.
other crimes, § 523h, p. 2803.
identity, § 523i, p. 2804.
presence of defendant in locality of crime, § 523j, p. 2805.
proof of handwriting, § 523k, p. 2805.
prohibition cases, § 523 l, pp. 2805, 2806; § 523m, pp. 2806, 2807.
conspiracy, prosecutions for, § 523m, pp. 2806, 2807.
Internal Revenue Laws and Prohibition Law
compromises of prosecutions under, § 522b, p. 2782.
Judgment
motion in arrest of, § 531, pp. 2854-2856.
what it must be based on, § 531, p. 2854.
when it will be granted, § 531, p. 2854.
Judgment and sentence in criminal cases, § 532, pp. 2856-2860.
who may pronounce sentence, § 532, p. 2856.
sentence must be imposed in presence of defendant, § 532, p. 2856.
judgment should be entered at trial term, § 532, p. 2856.
void judgment lawfully cancelled on motion after notice, § 532, p. 2857.
judgment in criminal cases when two defendants are jointly tried and jointly convicted, several and not joint, § 532, p. 2857.
single penalty when general verdict of guilty under indictment with two or more counts, § 532, p. 2858.
judgment should state crime of which defendant is guilty, § 532, p. 2860.
signature of judge unnecessary to the validity of judgment, § 532, p. 2860.
suspension of judgments, § 533, p. 2861.
court can sentence defendant on one count and suspend sentence upon others, § 533, p. 2861.
Juries and jurors
selection of grand and petit jurors, § 510, pp. 2739-2744.
proceedings of grand jury, § 511, pp. 2744-2750.
grand jurors when summoned, § 508, p. 2733, 2744.
indictments and presentments by twelve jurors, § 511, p. 2745.
proceedings are secret, § 511, p. 2746.
who may be present, § 511, pp. 2747, 2748.
conduct of legal proceedings, § 511, p. 2748.
subpoena of witnesses, § 511, p. 2749.
jurors not to serve more than once a year, § 511, p. 2750.
inspection of minutes of grand jury, § 511a, p. 2750.
challenges to grand jurors, § 512, pp. 2751, 2752.
challenges to petit jurors, § 526, pp. 2825-2833.
numbers of challenges allowed, § 526, p. 2825.
what are good grounds for challenge, § 526, p. 2827.
peremptory challenges exceeding number allowed, § 526, p. 2825.

Vol. II begins at § 197, page 1125; Vol. III begins at § 458, page 2201; Vol. IV begins at § 670, page 3597.

PRACTICE IN CRIMINAL CASES (continued)—
several defendants not entitled to more challenges than single defendant, § 526, p. 2826.
disqualifications for service in prosecutions for polygamy, § 526, p. 2829.
statutes of the United States followed by U. S. courts in empaneling jurors, § 526, p. 2832.
ordinance of constitution as to juries in criminal prosecutions, § 507, pp. 2732, 2733.
qualifications of grand and petit jurors, § 509, pp. 2736-2739.
list of jurors and witnesses, § 524, pp. 2812-2814.
accused entitled to copy of indictment and list of witnesses and jurors, § 524, p. 2812.
when not entitled to list of witnesses, § 524, p. 2813.
Jurisdiction
concurrent criminal, § 483a, p. 2528.
concurrent criminal, in prohibition cases, § 483b, pp. 2529-2533.
land ceded by States, § 483c, pp. 2533-2536.
cases arising in land or naval forces, § 483d, pp. 2536-2544.
court-martials, § 483d, pp. 2536-2538.
officers, how triable, § 483d, p. 2538.
relieving, corresponding with, or aiding the enemy, § 483d, p. 2539.
murder, § 483d, p. 2539.
process to obtain witnesses, § 483d, p. 2539.
refusal to appear or testify, § 483d, p. 2539.
compulsory self-incrimination prohibited, § 483d, p. 2540.
depositions, § 483d, pp. 2540, 2541.
courts of inquiry, records of, § 483d, p. 2541.
contempts, § 483d, p. 2541.
offenses committed on shore, § 483d, p. 2541.
how criminal proceedings begun, § 483e, p. 2545.
Nolle prosequi, § 522a, p. 2781.
Pleas and objections to indictment
abatement, § 517, pp. 2759-2765.
remedy for objections in indictment, § 517, p. 2759.
should be pleaded on or before arraignment, § 517, p. 2763.
how waived, § 517, p. 2763.
should be verified, § 517, p. 2764.
infringement of defendant's constitutional rights, § 517, p. 2761.
evidence secured from unlawful seizure held sufficient, § 517, p. 2762.
delay after return of indictment held to be waiver, § 417, p. 2763.
demurrer proper manner of objection, § 517, p. 2764.
manner of taking objections to indictment, § 513, p. 2752.
may be done by motion to quash, plea in abatement or by demurrer, § 513, p. 2752.
arraignment, § 514, pp. 2752-2754.
definition, § 514, p. 2752.
motion to quash indictment, § 515, pp. 2754-2757.
addressed to discretion of court, § 515, p. 2754.
what objections may be raised by such motion, § 515, p. 2754.
of pardon, § 519, pp. 2766-2769.
of former jeopardy or former acquittal or conviction, § 520, pp. 2769-2777.
previously put on trial upon issues of fact, § 520, p. 2769.

Vol. II begins at § 197, page 1125; Vol. III begins at § 453, page 2201; Vol. IV begins at § 670, page 3597.

PRACTICE IN CRIMINAL CASES (continued)—
when former jury has been discharged, § 520, p. 2770.
when there is no double jeopardy, § 520, p. 2771.
conviction of crime bar to civil action by U. S. to recover penalty, § 520, p. 2772.
judgment of acquittal bar to action for forfeiture of property, § 520, p. 2772.
acquittal upon indictment for counterfeiting no bar to second indictment, § 520, p. 2773.
no separate punishments for same act, § 520, p. 2775.
should be set up by special plea in bar, § 520, p. 2776.
Statutes of Limitations, § 520a, pp. 2777, 2778.
guilty, § 520b, p. 2778.
not guilty, § 520c, p. 2779.
proceedings upon, § 521, pp. 2779, 2780.
Preliminary examination, § 488, pp. 2578-2583.
hearing held in presence of magistrate, § 488, p. 2579.
commissioner issuing warrant, must make it returnable before him, § 488, p. 2579.
commissioner takes evidence in accordance with the practice of the State where he sits, § 488, p. 2579.
accused may be represented by counsel, § 488, p. 2581.
Punishments
crimes against the United States, § 534, p. 2861.
excessive fines and cruel and unusual punishment, § 534a, pp. 2861-2865.
capital, § 534b, pp. 2865-2867.
by imprisonment, § 534c, pp. 2867-2870.
juvenile offenders, § 534c, pp. 2869.
by fine, § 534d, p. 2870.
how judgment imposing payment of fine may be enforced, § 534d, pp. 2870.
commutation of term of, § 534e, p. 2871.
when deduction from term of sentence is allowed, § 534e, p. 2871.
release of poor convicts, § 534f, p. 2872.
Seizures
effect of unlawful, § 487b, pp. 2574-2576.
return of books, papers and property unlawfully seized, § 487c, pp. 2576-2578.
Statutory presumptions, § 522f, pp. 2789-2792.
forging, counterfeiting or fraudulently using or selling stamps, § 522f, p. 2789.
presumptions as to violations, § 522f, p. 2790.
receiving or having in possession or concealment on vessels or vehicle, smoking opium, punishable, § 522f, p. 2790.
possession or control of drugs by person not registered; § 522f, p. 2791.
presumption and burden of proof as to time of importation, § 522f, p. 2791.
unlawful importation, § 522f, p. 2792.
prima facie evidence, § 522f, p. 2792.
Summons in criminal cases, § 492, p. 2608.
original process against corporation in criminal prosecution is writ of summons, § 492, p. 2608.
upon whom summons to be served, § 492, p. 2608.

Vol. II begins at § 197, page 1125; Vol. III begins at § 453, page 2201; Vol. IV begins at § 670, page 3597.

PRACTICE IN CRIMINAL CASES (continued)—
Trials
for treason, § 523n, pp. 2807-2811.
right to speedy, § 523o, pp. 2811, 2812.
right to counsel, § 526a, p. 2832.
in criminal cases, § 527, pp. 2833-2837.
trial to be by jury, § 527, p. 2833.
record must show presence of defendant, § 527, p. 2834.
defendant has right to counsel, § 527, p. 2835.
place of, § 525, pp. 2814, 2815.
of offenses committed upon the high seas, § 525a, p. 2815.
of offenses begun in one district and completed in another, § 525b, p. 2818.
of offenses under the Interstate Commerce Law, § 525c, p. 2819.
for capital offenses, § 525d, p. 2820.
in county where offense committed, § 525, p. 2820.
this right may be waived, § 525d, p. 2820.
for conspiracies, § 525e, p. 2821.
of offenses against the Prohibition law, § 525f, p. 2821.
of offenses against the Pure Food and Drugs Act, § 525g, p. 2822.
right to a public trial, § 525h, p. 2823.
statements and arguments of counsel, § 527a, pp. 2837-2841.
summary trials of offense against navigation laws, § 528, p. 2850.
accused need not be indicted, § 528, p. 2851.
number of challenges allowed, § 528, p. 2851.
punishment, § 528, pp. 2851-2852.
new trials, § 530, p. 2853.
requests for instructions to jury, § 527d, p. 2849.
Verdicts, § 527c, pp. 2846-2849.
Warrant, § 486, pp. 2554-2555.
courts may issue bench warrants, § 486, p. 2555.
who must witness warrant of arrest, § 486, p. 2555.
how warrant must be returnable, § 486, p. 2555.
Warrants of removal, § 489, pp. 2583-2590.
arrest and removal for trial, § 489, p. 2583; § 493, p. 2610.
arrest and removal to or from Philippine Islands, § 489, p. 2684.
no removal if accused in custody of State court before Federal court obtained jurisdiction, § 489, p. 2587.
proceedings upon removal may be reviewed by *habeas corpus* and *certiorari*, § 489, p. 2585.
application for removal cannot be granted until after accused committed to jail, § 489, p. 2585.
indictment is *prima facie* evidence of probable cause for removal, § 489, p. 2586.
formal defects in indictment disregarded, § 489, p. 2587.
how probable cause proved, § 489, p. 2587.
application for removal may be heard with or without aid of writ of *habeas corpus*, § 489, p. 2589.
prisoner may be committed by one magistrate upon an affidavit made before another, § 489, p. 2590.
Witnesses
compelling attendance of.
for government, § 522d, p. 2786-2788.
subpoenas, may run into another district, § 522d, p. 2786.
recognizance, at hearing of charges in criminal cases, § 522d, p. 2787.
when required, § 522d, p. 2788.

Vol. II begins at § 197, page 1125; Vol. III begins at § 458, page 2201; Vol. IV begins at § 670, page 3597.

PRACTICE IN CRIMINAL CASES (continued)—
recognizance of witnesses in Vermont, § 522d, p. 2788.
for defendant, § 522e, pp. 2788, 2789.
indigent defendants, § 522e, p. 2788.
counsel and witness fees for persons indicted for capital crimes, § 522e, p. 2788.
cross-examination and impeachment of, § 523a, pp. 2793, 2794.
competency of, § 523c, pp. 2796-2798.
list of, § 525, p. 2812.
see BILLS OF PARTICULARS; PLEADING; APPEAL AND ERROR.
PRACTICE IN FEDERAL COURTS—
By what rules and statutes regulated, § 84, pp. 577-579.
Considers practice of courts of Chancery and King's Bench in England, § 3, p. 7.
PRAECIPE—
To clerk to enter an appearance, § 169, p. 976.
PRAYER FOR GENERAL RELIEF—
Embodied in notice of motion, § 251, p. 1260.
Forms of, § 154, p. 913.
PRAYER FOR RELIEF—
What to contain, § 133, pp. 754, 755; § 154, pp. 913-918.
That plaintiff is not entitled to, a ground of demurrer, § 367, p. 1833.
PRECEDENTS—
Force of, in equity, § 78, pp. 542, 543.
PREFERENCE—
On calendar, § 373, pp. 1851, 1852.
Among appeals on calendar of Supreme Court, § 707, pp. 3858-3868.
Of certain claims in railroad foreclosure suits, § 305, p. 1509.
see BANKRUPTCY.
PREJUDICE (see LOCAL INFLUENCES).
PRELIMINARY EXAMINATION (see PRACTICE IN CRIMINAL CASES).
PRELIMINARY INJUNCTIONS (see INJUNCTIONS).
PRESIDENT—
Of United States, when suable, § 94, p. 593.
Whether amenable to process of Federal courts, § 167, p. 966.
Writ of *quo warranto* to try title to office, § 468a, p. 2369.
PRESUMPTION—
As to citizenship of members of corporation, § 47, p. 169.
see EVIDENCE; PROHIBITION.
PRINTED ARGUMENTS—
In appellate courts, § 707, p. 3858.
see RULES.
PRINTING—
The record on appeals or writs of error, § 706, pp. 3854-3858.
PRIOR INCUMBRANCES—
When necessary parties to bill of foreclosure, § 112, p. 683.
Whether necessary parties to suit to compel execution of mortgages, § 120, p. 730.
PRIOR PROCEEDINGS—
In cause before removal to Federal court, effect of removal on same, § 555, p. 3054.
PRISONER—
Time of, to bring appeal or writ of error, § 698, p. 3779.
see HABEAS CORPUS.
PRIVATE LETTERS—
Injunction to restrain publication of, § 263, p. 1322.
Injunctions to prevent the unauthorized opening of, § 267, p. 1334; § 280, p. 1409.

Vol. II begins at § 197, page 1125; Vol. III begins at § 453, page 2201; Vol. IV begins at § 670, page 3597.

PRIVITY—
Necessary to entitle one to revive a suit, § 219, p. 1198.
Necessary to support bills in the nature of bill of revivor, § 225, p. 1209.
Necessary between parties joined in a bill, § 140, p. 785.
When plaintiff need not state his title if there is, between plaintiff and defendant, § 144, p. 805.
PRIZE CAUSES—
Jurisdiction in, § 5, pp. 15, 27.
State as plaintiff, § 105, p. 660.
Appeals in, § 688, p. 3664.
Time within which appeals in, must be taken, § 698, p. 3778.
see also CREW.
PRIZE MONEY—
Necessary parties to suit to recover, by one of crew on behalf of himself and others similarly situated, § 114, p. 704.
PROBATE—
State statute giving exclusive jurisdiction to court of, § 83, p. 574.
State statute authorizing setting aside of, enforceable in Federal court, § 82, pp. 567, 568.
Federal court may compel an accounting when will was probated in State court, § 54, p. 203.
Properly in custody of court of probate, § 54, pp. 199-205.
Value of right of appeal from, § 6, p. 36.
Not set aside by equity, § 79, p. 549, n. 26.
Proceedings, when removable, § 538e, p. 2911.
PROCEDURE—
State statutes regulating procedure in Federal courts, § 473c, p. 2412.
In admiralty, § 565, p. 3140; § 567, p. 3148.
PROCESS—
Common-law procedure, respecting, § 455, p. 2242.
in general, § 455, pp. 2242-2245.
amendment of writs and process, § 455b, pp. 2247, 2248.
defect of form, § 455b, p. 2247.
lawful additions, § 455b, p. 2247, 2248.
service of process, § 455a, pp. 2246, 2256.
conformity with State practice, § 455a, pp. 2245, 2246.
execution of precepts, § 455a, p. 2245.
service within the district, § 455a, p. 2246; § 340, p. 1733.
personal service of a subpoena, § 163, p. 933; § 167a, p. 970; § 455a, p. 2246.
in suits against states, § 3a, p. 8.
How far State practice respecting service of, followed, § 453, p. 2204.
see also SUBPOENAS TO APPEAR AND ANSWER; ADMIRALTY.
PRO CONFESSO—
Decrees taking bills, §§ 171, 172, pp. 987-995; § 189, p. 1116.
see also TAKING BILLS PRO CONFESSO; SUBPOENA TO APPEAR AND ANSWER.
PRODUCTION—
Of books and papers, affidavit for, § 332, p. 1651.
PROFERT—
Of patent, in bill to enjoin infringement, § 146, p. 834.
PROFESSIONAL CONFIDENCE—
Defendant may demur to bill if his answer would involve a breach of, § 348, p. 1759.
see also EVIDENCE; PHYSICIAN.

Vol. II begins at § 197, page 1125; Vol. III begins at § 453, page 2201; Vol. IV begins at § 670, page 3597.

PROHIBITION—
Concurrent criminal jurisdiction under, § 483b.
Evidence in cases of, § 523 l, p. 2805.
Prosecution may be by information, § 494, p. 2629.
Writs of prohibition, § 455e, pp. 2248-2252.
by Supreme Court, § 3a, p. 9.
distinguished from injunction to stay proceedings in other courts, § 268, p. 1335.
definition of, § 456, p. 2248.
issuance of, § 456, p. 2248, 2252.
jurisdiction to review, § 456, p. 2249, 2250.
when writ will not issue § 456, p. 2251.
when writ cannot be used, § 456, p. 2252.
Prohibition Law
compromise under, § 522b, p. 2782.
indictments under, § 506q, p. 2717.
injunctions to enforce, § 274a, p. 1361.
place of trial of offense under, § 525f, p. 2821.
proceedings under, § 430e, p. 2140.
presumptions under, § 333q, p. 1695.
search warrants under, § 487a, p. 2570.
see SEIZURES; INDICTMENTS; INTERSTATE COMMERCE.
PROHIBITORY INJUNCTIONS (see INJUNCTIONS).
PROOF (see EVIDENCE; PRACTICE AT COMMON LAW).
PROPERTY—
Attachment of, § 470, pp. 2385-2397.
Bill to set aside fraudulent transfer of property under order of court, § 54, p. 204.
Claims
right to assert, claims against, when the United States sues *in rem*, § 95, p. 595.
suits by person claiming, from a common source, § 116, p. 707.
Custody of
another court of co-ordinate jurisdiction, in general, § 52, pp. 189-198.
does not prevent action *in personam*, § 52, p. 194.
Federal court, what rules apply, § 52, p. 190; § 60, p. 223.
in custody of State court, jurisdiction of Federal court over, § 52, pp. 189-198.
what court deemed to have custody of, § 52, pp. 194-196.
when custody acquired by fraud, § 52, p. 191.
by another court, of person of accused, § 58, pp. 218-220.
of property by State court, where Federal courts exercise jurisdiction, § 59, p. 221.
of State courts of probate, § 54, pp. 199-205.
receivers, § 55, pp. 206-211.
of debtor, remains in custody of court after his death, § 54, p. 205.
Death, removal or expiration of term of marshal after taking property in execution, § 427a, p. 2089.
Delivery of, suits for, brought by assignee, § 63, pp. 257, 258, n. 1.
Equity
as conferring jurisdiction in, § 78, p. 543.
principle that no question affecting a person's, to be decided without his presence, applicable to, § 110, p. 677.
which cannot be reached by execution may be reached in, § 79, p. 551.

Vol. II begins at § 197, page 1125; Vol. III begins at § 453, page 2201; Vol. IV begins at § 670, page 3597.

PROPERTY (continued)—
Infant
petition to maintain infant out of his, § 253, p. 1267.
Injunction
to compel delivery of personal property, § 267, p. 1334; § 282, p. 1412.
to restrain the alienation of, § 272, pp. 1356, 1357.
Insolvent assignment, covered by, § 53, p. 198.
Jurisdiction of another court over same cause, effect of, § 57, pp. 215-218.
Parties
held in trust, who necessary parties in suits affecting, § 113, pp. 692, 698, 700.
necessary parties in suits affecting partnership, § 113, p. 696.
person in possession never a formal party to a suit to recover, § 118, p. 714.
Receivers appointed, over which, § 306, pp. 1535-1541.
Relief
alternative relief for, obtained by fraud, § 138, p. 776.
prayer for, against threatened injury, § 154, p. 917.
State and United States officials, controversies between, § 56, pp. 211-215.
arising out of attachments, garnishee process and executions, § 56, pp. 211-215.
remedy in case of dispute as to custody of, § 56, p. 214.
State having an interest in, suits concerning, § 105, pp. 659, 660.
State court decisions, how far local rules of property established by, are binding upon the Federal tribunals, § 477b, p. 2459.
Supersedeas, security required on applying for, § 703, p. 3810.
Title to
claimed by persons under inconsistent titles, § 112, p. 683.
person claiming title or interest in, when necessary party to suit affecting, § 120, p. 729.
Value of matter in dispute to confer jurisdiction, § 6, pp. 34-42.
see also RECEIVER.
PROSECUTING OFFICER—
In Federal Courts, § 483f, p. 2546.
PROSECUTION—
Dismissal of bills for want of, § 362, p. 1815.
Criminal, see CRIMINAL PROSECUTION.
PROVISIONAL INJUNCTIONS—
Distinguished from other forms, § 262, p. 1321; § 287, p. 1426.
see also INJUNCTIONS.
PROVISIONAL REMEDIES—
Common-law procedure respecting, § 453, p. 2204.
PUBLICATION—
Service of process by, § 166, p. 953.
see SERVICE.
PUBLIC AUCTION—
Sales at, by masters, § 394, pp. 1931-1964.
By marshals, § 427, p. 2091.
By trustees and receivers in bankruptcy, § 394, pp. 1936, 1937.
By referees in bankruptcy, § 638, p. 3390.
PUBLIC LAWS—
How introduced in evidence, see EVIDENCE.
PUBLIC MINISTERS—
Where sued, § 3, p. 4.

Vol. II begins at § 197, page 1125; Vol. III begins at § 458, page 2201; Vol. IV begins at § 670, page 3597.

PUBLIC OFFICE—
Defendant may demur to bill if his answer would involve a breach of confidence obtained in a, § 348, p. 1759.
PUBLIC OFFICER—
Mandamus to compel performance of a duty by, § 105a, p. 661.
How far the authority of the State is a defense for his acts, § 105a, pp. 660-662.
PUBLIC POLICY—
Ground for withholding injunction in patent cases, § 277, pp. 1386, 1387.
in other cases, § 284, p. 1417.
Ground for refusing application for receiver, § 303, p. 1499.
Ground for preference in receivership, § 305, p. 1508; § 308, p. 1547.
PUBLIC PROPERTY—
When receiver cannot be appointed over, § 306, p. 1537, n. 21.
PURCHASERS—
Suit against some in behalf of all, of land by one claiming an equitable title, § 116, p. 708.
When not necessary parties to bill to set aside a deed for sale of land, § 119, p. 719.
At master's sales, § 394, p. 1931-1963.
PURE FOOD AND DRUGS ACT—
Interventions under, § 258i, p. 1299.
Place of trial of offenses against, § 525g, p. 2822.
Proceedings *in rem* under, § 411, p. 2010.
Seizures under, § 607, pp. 3250-3253.
see INDICTMENTS; ADMIRALTY.
PURE PLEA—
Defined, § 176, p. 1006.
PURPRESTURES—
Defined, distinction between nuisances and, § 274, p. 1359.

Q.

QUALIFICATIONS—
Of receiver, § 318, pp. 1603-1607.
Of master, § 385, pp. 1873, 1874.
QUIBUSDAM CERTIS DE CAUSIS—
Writ of, § 160, p. 929.
QUI TAM—
Survivability of actions to recover penalty under United States statute, § 216, p. 1191.
QUO WARRANTO—
Removal of proceedings upon, from State to Federal court, § 468a, p. 2376; § 538d, p. 2911.
Writ of *quo warranto*
in general, § 468, pp. 2368-2389; § 5, p. 17.
in the District Courts, § 468a, pp. 2369-2377.
original jurisdiction, of, § 468a, pp. 2369-2374.
disabilities imposed by Fourteenth Amendment removed, § 468a, p. 2374.
removal to District Court, § 468a, p. 2376.
Jurisdiction of Supreme Court to review decision in proceedings of *quo warranto*, § 468b, p 2377.
Writs of *quo warranto* in the Supreme Court of the District of Columbia, § 468c, pp. 2377-2379.
jurisdiction regulated by District Code, § 468c, pp. 2377-2379.
review of final judgment or order, § 468c, p. 2379.

Vol. II begins at § 197, page 1125; Vol. III begins at § 453, page 2201; Vol. IV begins at § 670, page 3597.

R.

RAILROAD BOARDS OF LABOR ADJUSTMENT—
Jurisdiction of the, § 77e, p. 508.
Jurisdiction of the Railroad Labor Board, § 77f, p. 510.
RAILROAD BONDHOLDERS—
Parties to suits on behalf of themselves and others similarly situated, § 114, p. 703.
RAILROAD COMMISSIONERS—
Proceedings before, not removable, § 538f, p. 2914.
Enforcement of order of, unless an unconstitutional law, § 105d, p. 668.
RAILROAD FORECLOSURE—
Parties to, § 112, p. 684; § 113, p. 698; § 114, p. 703; § 118, p. 713; § 119, p. 721; § 120, p. 730.
Service by publication in cases of, § 166a, p. 954.
Decrees in, § 394, p. 1932; § 400, p. 1977.
Sales under, § 394, p. 1932; § 404, p. 1987.
Appointing receiver in, § 302c, pp. 1490, 1491.
Terms upon appointing receivers in, § 305, p. 1508.
see FORECLOSURE; PREFERENCES; RECEIVERS.
RAILROAD LEASE—
Practice of receivers in regard to, § 305a, p. 1519; § 308, pp. 1547-1551.
Specific performance enforced, § 151e, pp. 898, 899.
Parties to suits affecting, § 113, p. 700.
Parties to suit to restrain construction under, § 120, p. 727.
RAILROAD MORTGAGE—
Trustees under, when necessary parties to suits affecting property covered by, § 113, pp. 698, 699.
When trustees of, need not be made parties to bondholder's foreclosure suit, § 118, p. 713.
Bill to set aside foreclosure to contain an offer, § 153, p. 909.
Necessary parties in suits by stockholders to set aside foreclosure of, § 120, p. 730.
Sales under, § 394, p. 1932.
see MORTGAGE; FORECLOSURE; APPEALS; RECEIVERS.
RAILROADS—
Bill for specific performance of contract to construct, § 151e, p. 898.
Compliance with Interstate Commerce Act compellable in certain cases by injunction, § 283, p. 1413.
by mandamus, § 457c, p. 2263.
Contracts
not compelled to perform contract to keep terminus or principal office in particular place, § 151e, p. 898.
Corporations, residence of, § 61d, p. 248.
Interstate Commerce Commission
suit by, against, § 119, p. 721.
Parties
company not necessary party to suit against the receiver, § 119, p. 719, n. 33.
Power of receivers of, § 308, pp. 1547-1551.
Receivers to manage, § 306, p. 1536; § 307, p. 1544.
Value of matter in dispute, suit to enjoin overcharges, § 7, p. 43.
Value of matter in dispute in a suit to enjoin the use of, § 13, p. 54.
REAL ACTIONS—
Cannot be revived, § 216, p. 1190.
Security required on applying for *supersedeas* in, § 703, p. 3814.
REAL PROPERTY—
Bill for possession of, § 79, p. 553, n. 39.

Vol. II begins at § 197, page 1125; Vol. III begins at § 453, page 2201; Vol. IV begins at § 670, page 3597.

REAL PROPERTY (continued)—
Suit for delivery of, § 63, p. 257.
Person in possession never a formal party, § 118, p. 714.
Service by publication in action for, § 166, p. 953.
Required for United States government, practice in condemnation proceedings to acquire, § 482, p. 2517.
see also EXECUTION; LAND.
REARGUMENT—
In Supreme Court, § 705a, p. 3843; § 708, pp. 3868-3871.
RECEIPTS—
To be taken by receivers, § 312, p. 1580.
RECEIVER—
Accounts of, § 321, pp. 1616-1620.
Advice to receivers, § 310, pp. 1561-1563.
Ancillary jurisdiction, § 51, pp. 180-189.
Ancillary receivers, § 204, pp. 1158, 1159.
appointment of, by District Court, § 60, p. 223.
Appeals by, § 311, p. 1577; § 697, p. 3767.
Appointment of
appeals from orders appointing, § 300, p. 1464; § 325, p. 1631.
disapproval of, § 317a, p. 1603.
effect of State statute authorizing, § 82, p. 569.
manner of applying for the, § 315, pp. 1598-1602.
manner of, § 317, pp. 1602, 1603.
motion for, when can be made, § 315, pp. 1598-1600.
property of corporation, § 302a, p. 1483.
property over which receivers may be appointed. § 306, pp. 1535-1541.
rules regulating, § 303, p. 1499.
terms upon, and preferences in foreclosure suits, § 305, pp. 1508-1535.
time when will be appointed, § 55, p. 206; § 303, p. 1499.
who may apply for, § 316, p. 1602.
who should be appointed, § 318, pp. 1603-1607.
Assignees, receivers, not admitted to be, § 63, p. 264.
Certificates, § 309, pp. 1552-1561.
Compensation of, § 322, pp. 1620-1624.
Corporations, reorganization of, whose assets are held by, § 310a, p. 1563.
Counsel of, selection and compensation of, § 321a, p. 1618.
Defined, § 301, p. 1479.
Discharge of, § 324, pp. 1626-1630.
Duties of, § 312, pp. 1579-1583.
Extension of receiverships, § 302b, p. 1489.
Federal corporations, suits by and against, § 36, p. 121.
Federal courts, suits by and against, § 37, p. 122.
Jurisdiction in suits against, § 37, p. 122; § 313, pp. 1586-1590.
Foreign, capacity of, to sue, § 93, pp. 590-592.
Infant, funds of, in hands of
when expenses for infant will not be advanced out of funds in hands of, § 106, p. 674.
Liability of, § 313, pp. 1584-1590.
Litigation by receivers, § 311, pp. 1569-1579.
interference with duties of, § 311, p. 1574.
National banks
bill by, of national bank for loss caused by negligence of directors, § 137, p. 766, n. 1.

Vol. II begins at § 197, page 1125; Vol. III begins at § 458, page 2201; Vol. IV begins at § 670, page 3597.

RECEIVER (continued)—
suits by, § 5, p. 15; § 35, p. 120.
suits by and against, § 35, p. 120.
National Banking Association of, § 302c, p. 1491.
Parties
cases where law has furnished a representative, § 113, pp. 691-701.
of an estate, parties to suit by creditor of the estate, § 113, p. 693.
of a corporation, parties in suit against to foreclose a lien, § 113, p. 693.
of national bank, necessary parties to suit to recover assessment erroneously made by the comptroller, § 113, p. 693.
upon a creditors' bill, not a necessary party to an ancillary foreclosure suit, § 113, p. 693.
of a corporation, when a necessary party to suit, § 113, p. 693.
of a bank, when a proper party to suit against the bank, § 113, p. 693.
railway company not a necessary party to suits against, § 119, p. 719, n. 33.
who necessary parties on a bill to foreclose a mortgage praying for, § 112, p. 683.
Petition for leave to sue, § 253, p. 1267; § 314, p. 1590.
Powers of receivers in general, § 307, pp. 1541-1546.
of railroads, § 308, pp. 1547-1551.
Preferences in foreclosure suits, § 305a, p. 1509.
practice upon application for, § 305b, p. 1532.
Property in the custody of, § 55, pp. 206-211.
Federal court cannot interfere with property in State receivers' hands, § 55, p. 206.
receiver appointed by State court cannot be sued, without permission of his court, § 55, p. 209.
Removal of, § 323, pp. 1624-1626.
Rights of purchasers from, § 270, p. 1041.
Security by, § 319, pp. 1607-1609.
Service of
process on agent of, § 163, p. 937.
subpœnas on receiver of foreign railroad, § 163, p. 937.
Suits against, § 35, p. 120; § 314, pp. 1590-1598.
of Federal corporations, suits by and against, § 36, pp. 121, 122.
ancillary jurisdiction over, § 51, pp. 180-189.
Writ of assistance, may be put in possession by means of, § 440, p. 2160.
RECEIVER OF NATIONAL BANK—
Suits by and against, § 35, p. 120.
Value of matter in dispute in suit against, § 9, p. 47.
see RECEIVERS.
RECEIVERS' CERTIFICATES (see RECEIVERS).
RECITALS—
In decrees, § 404, p. 1982.
RECOGNIZANCE—
By receiver, § 319, p. 1607.
RECONVENTIO—
Of the later civil law, the origin of cross-bill, § 197, p. 1125.
RECORDING ACTS—
How far Federal tribunals follow recording acts of the States in which they are held, § 82, p. 573; § 477c, p. 2468.

Vol. II begins at § 197, page 1125; Vol. III begins at § 453, page 2201; Vol. IV begins at § 670, page 3597.

RECORDS—
Affidavits to show value of matter in dispute where the same does not appear in the record, § 696, p. 3766.
Authentication on return of writ of error, § 704, p. 3833.
Defendant in error may, if he chooses, docket the cause and file the record, § 704, p. 3835.
Failure of plaintiff in error to docket case and file record in time, § 704, p. 3835.
Filing of, after removal to Federal court, § 553, pp. 3035-3041.
Introduction of, in evidence, § 333, p. 1059.
Pleas of matter of, § 186, pp. 1064-1102.
Printing, on appeals and writs of error, § 706, p. 3854.
Proof of, § 333, pp. 1057, 1058.
REDEMPTION—
Of mortgaged property, § 83, p. 574.
State statute giving mortgagor right of, enforceable in Federal courts, § 82, p. 573.
When mortgagor who has sold equity of, is a necessary party to foreclosure, § 112, p. 683.
Bill for, must contain offer to pay what is due thereon, § 153, p. 909.
REFERENCES—
Bills for scandal and impertinence, § 237, p. 1236; § 238, p. 1240.
Common law cases, § 475, pp. 2442, 2443.
State practice, when followed, § 475, pp. 2442, 2443.
when auditor may be appointed, § 475, p. 2443.
State statute providing for a compulsory reference, effect of, in Federal court, § 475, p. 2442.
motion for new trial after report of referee, § 475, p. 2444.
exceptions, § 475, pp. 2444, 2445.
judgment on exception to award, § 475, p. 2445.
judgment upon referee's report, § 475, p. 2446.
stipulation to refer case to special master, same as one within terms of State statute, § 475, pp. 2445, 2446.
Costs where master reports in favor of plaintiff for nominal damages, § 410, p. 2004.
Ordered upon hearing to master to take accounts and assess damages, § 377, p. 1862.
Suit by next friend for an infant, § 90, p. 585.
Suit for injunction to protect copyright, § 278, p. 1403.
see also MASTER; BANKRUPTCY.
REFORMATION—
Of instruments, § 671a, p. 3608.
Of insurance policy, when bill for, is ancillary, § 51, p. 183.
Bill for, and also for enforcement of the reformed agreement is not multifarious, § 142, p. 799.
REHEARING—
In Supreme Court and Circuit Courts of Appeals, § 708, pp. 3868-3871
see also CORRECTIONS OF DECREE OTHERWISE THAN BY APPEAL.
RE-ISSUED PATENT—
Allegations as to, in bill to enjoin infringement, § 146, p. 839, n. 52.
Demurrer to bill for injunction to restrain infringement of, § 367, p 1834.
Plea to bill for injunction to restrain infringement of, § 188, p. 1116.
REJECTED CLAIMS—
When suits lie as against United States, § 5, p. 1920; § 96, pp. 598-633; § 671, p. 3599.

Vol. II begins at § 197, page 1125; Vol. III begins at § 453, page 2201; Vol. IV begins at § 670, page 3597.

RELATOR—
Under English practice, § 131, p. 744.
Effect of death of, upon proceeding, § 131, p. 745.
Motion on behalf of, under an information, § 251, pp. 1261, 1262.
On application for mandamus, § 459, p. 2276.
RELIEF—
Consent to, as affecting necessary parties, § 122, p. 735.
Decision to provide for all the rights which different persons have in the matters decided, § 110, p. 677.
Prayer for, § 54, pp. 913-918.
Classification of demurrers to, § 367, p. 1832.
Distinction between courts of law and equity as to affording complete, § 110, p. 678.
Demanded, may be stated in the alternative, § 138, p. 775; § 154, p. 913.
Notice of motion for general, § 21, p. 1260.
RELIGIOUS FEELINGS—
Injunction will not be issued to prevent mere outrage of, § 284, p. 1418.
REMAINDER-MEN—
Whether necessary parties in suits affecting estate, § 113, pp. 697, 698.
May join tenant for life to protect estate, § 140, p. 785.
REMAND—
In general, § 556, pp. 3075-3084.
causes improperly or collusively removed to Federal court, § 556, p. 3075.
no contradiction of complaint when showing value of matter in dispute, § 556, p. 3080.
previous attachment bonds or orders, § 556, p. 3075.
statements not required by court, § 556, p. 3078.
transcript not filed in time gives Federal court discretionary power, § 556, p. 3079.
want of jurisdiction, § 556, p. 3076.
whether a second petition can be filed for removal after a case has been remanded, § 554, p. 3051.
Costs upon remand, § 556c, p. 3090.
Evidence upon motion to remand, § 556b, pp. 3087-3090.
Order to remand, § 556d, p. 3091.
Proceedings after remand, § 559, p. 3098.
Review of order denying remand, § 558, pp. 3095-3098.
Review of order of remand, § 557, p. 3092.
no appeal from order for remand, § 557, p. 3092.
Review of proceedings of the State courts when the right of removal has been denied, § 557a, pp. 3093-3095.
Second motion to remand, § 556e, pp. 3091, 3092.
Supreme Court, § 693, p. 3735.
Waiver of right to a remand, § 556a, pp. 3084-3087.
REMEDIAL WRITS—
As distinguished from other forms of injunctions, § 262, p. 1321.
see INJUNCTIONS.
REMEDY—
Dismissal of bill for plaintiff's failure to elect whether he will proceed at law or in equity, § 368, p. 1839.
How far State statutes affecting, are followed in Federal tribunals, § 477b, p. 2459.
REMEDY AT LAW—
Injunctions to prevent irreparable injury for which the remedy at law is inadequate, § 267, p. 1333.

Vol. II begins at § 197, page 1125; Vol. III begins at § 458, page 2201; Vol. IV begins at § 670, page 3597.

REMEDY AT LAW (continued)—
Injunctions will not be issued when party has a, § 284, p. 1418.
see also INJUNCTIONS.
Objection that plaintiff has an adequate, must be specifically raised in answer, § 376, p. 1858.
Statement that plaintiff is without, no longer necessary in bills, § 133, p. 753.
That which existed when judiciary act of 1789 was adopted is the test, § 81, p. 562.
When there is no adequate, equity relieves, § 79, p. 544; § 82, p. 567.
What is deemed an adequate, § 79, p. 555; § 81, p. 563.
When same or adequate at law by statutes as in equity, § 81, p. 563; § 82, p. 567.
REMITTITUR—
Not considered as amendment of pleading, § 480, p. 2504.
Plaintiff filing, § 480, p. 2504; § 555a, p. 3060.
REMOVAL—
From office by *quo warranto*, § 468, p. 2368.
Of receivers, § 323, pp. 1624-1626.
REMOVAL OF CAUSES TO FEDERAL COURT—
In general, § 544, pp. 2976-2980.
"The proper district" for a removal, § 537i, pp. 2899, 2900.
Allegations to show that suit comes under Constitution or laws of the United States, § 545b, pp. 2993, 2994.
Allegations as to value of matter in dispute, § 545c, pp. 2994, 2995.
Amendment of petition, § 546, pp. 2995-3000.
to show diversity of citizenship, § 546, pp. 2995, 2996.
to correct mistake through which party prayed removal, § 546, p. 2999.
answer by defendant, § 546, p. 3000.
Amendment of pleadings after removal, § 555c, pp. 3064-3067.
Ancillary and supplemental suits, removal of, § 538k, pp. 2917-2922.
cases not removable, § 538k, pp. 2917-2919.
cases removable, § 537k, pp. 2919, 2920.
where necessary diversity of citizenship exists, § 538k, p. 2921.
Betterments, removal of proceedings to assess, § 538h, p. 2915.
Bond, § 547, pp. 3000-3007.
Cases which are the subject of removal, § 538, pp. 2907, 2908.
Claims against counties, removal of proceedings to collect, § 537i, p. 2916.
Condemnation proceedings, removal of, § 538f, pp. 2913-2915.
Costs in actions on removal, § 407, p. 1994.
Counter-claims, § 537j, pp. 2900, 2901.
Creditors' bills, removal of, § 538j, pp. 2916, 2917.
Criminal proceedings, § 538a, pp. 2908-2910.
Dismissal of bill for collusive jurisdiction, § 363, p. 1817.
Divorce suits, removal of, § 538m, p. 2922.
Effect of removal, § 555, pp. 3052-3074.
attachments in the State court, § 555e, pp. 3069, 3070.
contempt proceedings, § 555i, p. 3072.
depositions and examinations in the State court, § 555h, p. 3072.
injunctions previously granted, § 555f, pp. 3070, 3071.
previous proceedings in State courts, § 555d, pp. 3067-3069.
receivers previously appointed, § 555g, pp. 3071, 3072.
see ATTACHMENTS; INJUNCTIONS.
Filing of record after removal, § 553, pp. 3035-3041.

Vol. II begins at § 197, page 1125; Vol. III begins at § 453, page 2201; Vol. IV begins at § 670, page 3597.

REMOVAL OF CAUSES TO FEDERAL COURT (continued)—
Habeas corpus proceedings, removal of, § 538c, p. 2910; § 461, pp. 2292, 2293.
Improper parties defendant, § 540, pp. 2923-2927.
to negligence cases, § 540a, pp. 2927-2930.
Improper parties plaintiffs, § 539, pp. 2922, 2923.
Injunctions to stay proceedings in a State court after a removal, § 555j, pp. 3073, 3074.
Mandamus, application for writ of, § 538b, p. 2910.
Notice of application, § 544a, pp. 2980-2982.
Order of State court upon removal, § 548, pp. 3007, 3008.
Order of State court directing an examination of witnesses, when avoided by, § 359, p. 1807; § 555, p. 3072.
Quo warranto proceedings, removal of, § 538e, p. 2911.
Parties, who may remove cases, § 542, pp. 2952-2959.
intervenors, § 542, p. 2953.
suits between citizens of same State, § 542, pp. 2954, 2956.
condemnation proceedings, pending appeal, § 542, p. 2955.
suits and prosecutions against revenue officers, § 542, p. 2956; § 551, pp. 3025-3032.
causes against persons denied civil rights, § 542, p. 2956.
Petition for removal in ordinary cases, § 545, pp. 2982-2993.
statement of facts, § 545, pp. 2982-2984.
difference of citizenship, § 545, pp. 2985, 2987, 2988, 2990.
verification, § 545, p. 2986.
when one party is an alien, § 545, pp. 2989, 2990.
when a corporation is a party, § 545, pp. 2990, 2991, 2992.
whether filing petition for, constitutes an appearance, § 169, p. 978.
Second petition for removal, § 545a, p. 2993.
Pleading to a petition, § 555a, pp. 3059-3061.
Practice upon removal for fraudulent joinder of parties, § 548a, pp. 3008-3012.
Prejudice or local influence, § 549, pp. 3012-3024.
order upon removal for prejudice or local influence, § 549, p. 3023.
presentation and filing of petition for removal for prejudice or local influence, § 549, p. 3012.
petition and affidavit as to prejudice or local influence, § 549, pp. 3020, 3021.
notice of application for removal because of prejudice or local influence, § 549, p. 3022.
hearing and rehearing upon application for removal because of prejudice or local influence, § 549, p. 3023.
Probate in State courts, administration of decedent's estate, § 538e, pp. 2911-2913.
Proceedings against officers and soldiers of the United States, court officers, house officers and persons having defenses under the revenue laws, § 551, pp. 3025-3032.
see REMAND.
Renewing motion in Federal court after removal of cause, § 555d, p. 3068.
Repleader after removal, § 555b, pp. 3061-3064.
Residence of parties, § 537h, pp. 2898, 2899.
Right to removal, § 537k, pp. 2901, 2902.
interference by State, § 537 l, pp. 2902, 2903.
waiver of, § 537n, pp. 2904-2906.
stipulation against, § 537m, pp. 2903, 2904.

Vol. II begins at § 197, page 1125; Vol. III begins at § 453, page 2201; Vol. IV begins at § 670, page 3597.

REMOVAL OF CAUSES TO FEDERAL COURT (continued)—
Separable controversies, § 541, pp. 2930-2941.
plaintiff cannot remove in any case, § 541, pp. 2932, 2933.
how case must be separated, § 541, p. 2934.
default of defendant, § 541, p. 2935.
determined on plaintiff's pleading, § 541, p. 2935.
allegations in petition immaterial, § 541, p. 2937.
when removal is because of, § 545, p. 2992.
in suits for accounting, § 541a, pp. 2941, 2942.
in suits affecting the title to land, § 541b, pp. 2942, 2943.
in condemnation proceedings, § 541c, pp. 2943-2945.
in foreclosure suits, § 541d, pp. 2945, 2947.
in stockholders' suits, § 541e, pp. 2947, 2948.
in suits to enforce the liability of stockholders, § 541f, pp. 2948, 2949.
in suits for the administration of assets of debtor, § 541g, p. 2949.
in actions upon promissory notes, § 541h, p. 2949.
in negligence cases, § 541i, pp. 2950, 2951.
in suits affecting subrogation to fire insurance, § 541j, p. 2952.
in suits affecting wills, § 541k, p. 2952.
Suits arising under the Constitution of laws of the U. S., § 537b, pp. 2889-2891.
Suits between citizens of the same State claiming land under grants of different States, § 550, p. 3024.
Suits brought against receiver, § 51, p. 184.
Suits from one Federal court to another, § 537a, pp. 2887-2889.
Suits arising under Employers' Liability Law, § 537d, pp. 2891, 2892.
Suits against common carriers for loss in transportation, § 537e, pp. 2892, 2893.
Suits to which aliens are parties, § 537f, pp. 2893-2895.
Suits between citizens of different States, § 537g, pp. 2895-2898.
Taxes, removal of proceedings to assess and collect, § 538 l, p. 2922.
Time of removal, § 543, pp. 2959-2965.
amendments by plaintiff, § 543c, pp. 2968, 2969.
extensions of time as affecting right to removal, § 543a, pp. 2965-2966.
effect of consolidation upon time for removal, § 543d, p. 2969.
effect of new parties upon time for removal, § 543e, pp. 2969-2970.
effect upon right to removal of dismissal as to other defendants, § 543f, pp. 2970-2972.
change of venue affecting time of removal, § 543g, p. 2972.
removals after defaults, § 543b, pp. 2967, 2968.
removals before trial, § 543h, pp. 2972-2976.
prejudice or local influence, § 543h, p. 2972; § 549, pp. 3012-3024.
criminal prosecutions, § 543h, p. 2975.
cases before trial or final hearing, § 543h, p. 2975.
Warrants of removal, see PRACTICE IN CRIMINAL CASES.
Water rights, removal of proceedings to settle, § 538g, p. 2915.
REPLEVIN—
Jurisdiction over, § 63, p. 257; § 79, p. 552.
Security required on applying for *supersedeas* in, § 703, p. 3814.
REPLICATION—REPLY—
Amendments of, § 203, p. 1156.
Definition and history of, § 202, pp. 1154, 1155.
Effect of, § 204, p. 1158.

Vol. II begins at § 197, page 1125; Vol. III begins at § 453, page 2201; Vol. IV begins at § 670, page 3597.

REPLICATION—REPLY (continued)—
Form of, § 205, p. 1159.
Frame of, and requisites, § 205, pp. 1158, 1159.
Signature to, § 205, p. 1159.
Special, not allowed, § 202, p. 1154.
When should be filed, § 203, pp. 1155-1158.
REPLY CLAUSE—
In bills, see BILLS.
REPORT—
Of master, § 392, pp. 1925, 1926.
REPRESENTATIVES—
When necessary to suits for specific performance, § 112, p. 685.
General rules as to making parties where the law has furnished, § 113, pp. 691-701.
Exemption of, from service of process, § 167, pp. 967, 968.
When writ of *ne exeat republica* cannot be issued against Federal, § 327, p. 1635.
see also ADMINISTRATORS; EXECUTORS; PERSONAL REPRESENTATIVES.
REPRESENTATIVES OF A CLASS—
Suits by, § 114, pp. 701-705.
To what extent the absent members of the class are bound by a decree against, § 115, p. 707.
RES ADJUDICATA—
Adjudication
as to custody of child, § 186i, p. 1072.
in bankruptcy proceedings, § 186j, p. 1072.
of mental incompetency, § 186h, p. 1072.
matters concluded by, § 186p, p. 1082.
Beneficiaries of trust, § 186u, p. 1095.
Corporations, § 186w, p. 1097.
effect of proceedings against public, § 186x, p. 1099.
Criminal prosecution, decisions upon, § 186u, p. 1080.
Dismissals and non-suits, § 186m, p. 1077.
Extraterritorial proceedings, § 186f, p. 1071.
Interlocutory decrees and orders, § 186l, p. 1075.
Joint parties, § 186zz, p. 1102.
Judgments
direct and collateral attacks upon, § 186o, p. 1080.
Federal courts by judgments of State courts, § 186d, p. 1069.
in rem, § 186g, p. 1071.
in lower courts, § 186a, p. 1065.
of law and equity, § 186e, p. 1070.
matrimonial actions, § 186b, p. 1066.
Mortgagees against, § 186v, p. 1096.
Party in different capacities, § 186t, p. 1095.
Patent and trademark cases, § 186q, p. 1088.
Persons not parties nor privies, § 186y, p. 1099.
Privies, § 186s, p. 1094.
Probate court of, by decision of, § 186c, p. 1068.
Special proceeding, by order in, § 186k, p. 1074.
Splitting, cause of action, effect of, § 186r, p. 1092.
Suits on behalf of a class, § 186z, p. 1101.
RESALE—
When will be ordered, § 394d, p. 1953.
RESIDENCE—
Averments as to, in bills, § 135, p. 755.

Vol. II begins at § 197, page 1125; Vol. III begins at § 453, page 2201; Vol. IV begins at § 670, page 3597.

RESIDENCE (continued)—
Citizenship, not conclusive of, § 46, p. 159.
Defect in bill on account of, waived by appearance, § 170, p. 982.
Defendant, as affecting right to remove cause from State to Federal court, § 537g, pp. 2895, 2896.
Demurrer
when defects of, can be raised by, § 367, pp. 1835, 1836.
failure to state in bill a ground of, § 367, pp. 1835, 1836.
Failure to allege, § 62a, p. 254.
In what State corporation deemed to have a, § 47, p. 169.
Limitation upon jurisdiction, § 61, pp. 226-249.
when limitation does not apply, § 61c, p. 246.
in judicial divisions, § 61d, p. 248.
of Federal courts by, § 61d, p. 248.
Objection
who may object, § 62a, p. 254.
when objection waived, § 62a, p. 254.
Petitioner to be stated in petition for intervention, § 254, p. 1268.
RESTITUTION—
When judgment reversed, mandate should include direction to compel, § 712, p. 3908.
May be enforced by contempt proceedings, § 712, p. 3908.
RESTRAINTS—
Bill to protect trade and commerce against, § 5, p. 21.
see MONOPOLIES.
RESULTING TRUSTS—
As subjects of equity jurisdiction, § 79, pp. 545, 546.
RETURN—
Of service of subpœna, § 167a, p. 970.
Of process in admiralty, § 568, p. 3153.
By marshal to writ of attachment for contempt, § 433, p. 2151.
To writ of *habeas corpus*, § 466, p. 2354.
To writ of error or appeal, § 704, pp. 3824-3836.
Motion to dismiss writ of error because no assignment of errors is attached to return, § 704, p. 3833; § 707, pp. 3858-3868.
see APPEAL AND ERROR.
RETURN DAY—
Of writ of error or appeal, § 699, pp. 3786, 3787.
Writs of error to be served before, § 699, p. 3792.
see AMENDMENT.
REVENUE APPEALS—
May be advanced on calendar of Supreme Court by motion of Attorney-General, § 707, p. 3860.
REVENUE LAW—
Suits under, § 5, p. 15.
Writs of error in civil action brought by the United States in the District Court for enforcement of, § 688, p. 3673; § 707, p. 3860.
REVENUE OFFICER—
Recovery against, execution, § 42f, p. 2092.
Practice on removal of suits against, § 551, pp. 3025-3032.
Writs of error in actions against, § 688, p. 3672.
see also APPEAL AND ERROR.
REVERSAL—
Power of appellate court to order, § 687, p. 3655.
REVIEW—
Bills of, § 132, pp. 751, 752.
Bills of, and bills in nature of, §§ 446-450, pp. 2177-2195.
see also APPEAL AND ERROR.

Vol. II begins at § 197, page 1125; Vol. III begins at § 453, page 2201; Vol. IV begins at § 670, page 3597.

REVIVING SUIT—
Dismissal of bill for failure to perfect or revive suit, § 362, p. 1815.
see BILLS OF REVIVOR.
REVIVOR—
Bills of, not original, § 132, pp. 751, 752.
Dismissal of bill for failure to perfect or revive suit, § 362, p. 1815.
Common-law procedure respecting, § 453, p. 2204.
Of suits, § 218, pp. 1196-1198.
Of writs of error and appeals, § 692, pp. 3701-3722.
Bill in Federal court, § 51, p. 180.
When to be filed to cross-bill, § 201, p. 1153.
see also BILLS OF REVIVOR; SERVICE.
RHODE ISLAND—
Constitutes one judicial district, § 66, p. 323.
times and places of holding court therein enumerated, § 66, p. 323.
The District of, included within First Circuit, § 4, p. 10.
RIGHT—
Privilege or immunity secured by Constitution of United States, § 5, p. 18.
Bill praying for relief against invasion of a political and a property, § 154, p. 917.
ROMAN LAW (see CIVIL LAW).
RULES OF DECISION—
In trials at common law, § 477, pp. 2448-2472.
Of State court made prior to removal to Federal court will usually be followed in the latter after removal, § 555, p. 1893.
Upon a hearing, § 375, pp. 1853-1858.
see INTERLOCUTORY INJUNCTION.
RULES OF PRACTICE—
Promulgated by United States Supreme Court, Circuit Court of Appeals, Circuit and District Courts, § 84, pp. 577-579.
Cannot enlarge the jurisdiction, § 84, p. 578.
In equity, pp. 4607-4631.
For courts of the United States in admiralty, pp. 4631-4644.
Of the Supreme Court, pp. 4644-4664.
Of the Circuit Court of Appeals, pp. 4665-4723.
Admiralty rules of the Circuit Court of Appeals for the Second and Ninth Circuits, pp. 4724-4728.

S.

SAFETY APPLIANCE ACT—
Petitions by the United States against railway companies to recover penalties for violations of, § 454o, p. 2240.
SALARY—
Suits to recover, against United States, § 5, p. 20; § 95, p. 598; § 671, p. 3602.
SALE—
Bill to set aside, what to contain, § 153, p. 909.
Injunctions to prevent sale and transfers of chattels, § 272, p. 1357.
Injunction to prevent sale of land, § 270, pp. 1341, 1343, 1345.
By masters and other officers, § 394, pp. 1931-1963.
In admiralty, § 586, pp. 1975, 1976; § 587, pp. 3188-3189.
Bill against executor to set aside a sale made by decedent, some of the heirs being unknown, § 116, p. 708.
Alternative relief from a fraudulent, § 138, p. 776.
see ADMIRALTY; FORECLOSURE; JUDICIAL SALE.

Vol. II begins at § 197, page 1125; Vol. III begins at § 458, page 2201; Vol. IV begins at § 670, page 3597.

SALE OF LAND—
Injunctions to restrain, § 267, p. 1334.
SCALPERS—
When may be enjoined from selling tickets, § 79, p. 325, § 267, p. 1334.
SCANDAL—
And impertinence in pleadings, §§ 237, 238, pp. 1236-1242.
striking out, § 239, pp. 1242-1244.
Party in contempt moving to expunge scandal from record, § 251, p. 1261.
Allowing costs against pauper for, § 413, p. 2017.
Petitions to be free from, § 254, p. 1268.
Remedy by one not a party to the suit, § 258, p. 1283.
SCILICET—
In affidavit, § 337, p. 1711.
SCIRE FACIAS—
Subpœna in the nature of a, the ancient practice of reviving suits, § 221, p. 1202.
Writs of, § 469, pp. 2379-2385; § 3, p. 95.
power to issue, § 469, pp. 2379, 2380.
kinds of, § 469, p. 2379.
State practice when followed, § 469, pp. 2380, 2381.
use in revivor of actions, § 220, pp. 1199-1202; § 469, p. 2380.
purpose of, § 469, p. 2381.
State statute of limitation a defense to, § 469, p. 2383.
trial by jury if surety forfeited, § 469, p. 2384.
when barred by State statute of limitation, § 218, p. 1197; § 469, p. 2383.
SEAL—
To bond, on removal, § 547, pp. 3001-3003.
Of court to writs of error, § 699, p. 3789.
Warrant void unless under seal, § 486, p. 2556.
SEARCH WARRANTS—
In general, § 487, pp. 2557-2570.
who may make searches, § 487, p. 2558.
removal of documents, § 487, p. 2559.
importation of obscene books, lottery tickets, etc., forfeiture, § 487, p. 2560.
aiding or abetting violation of law a misdemeanor, punishment, § 487, p. 2560.
proceedings for seizure condemnation and destruction of articles, § 487, p. 2560.
for suspected counterfeits, § 487, p. 2561.
searches by inspectors of post office, § 487, p. 2562.
searching vessels for letters, § 487, p. 2563.
disposition of seizures, § 487, p. 2563.
authority to issue, § 487, p. 2564.
grounds for issue, § 487, pp. 2567, 2572.
affidavits, examination or witness and depositions, § 487, pp. 2568, 2569.
perjury, § 487, p. 2570.
Manner of making objections to, § 487d, p. 2578.
Under prohibition law, § 487a, pp. 2570-2574.
possession of liquor or property intended for use in violation of prohibition law, § 487a, p. 2570.
arrests, § 487a, p. 2571.
who may issue, § 487a, p. 2571.
in case of transportation of liquors, § 489a, p. 2572.

Vol. II begins at § 197, page 1125; Vol. III begins at § 453, page 2201; Vol. IV begins at § 670, page 3597.

SEARCH WARRANTS (continued)—
all liens against property sold, transferred from property to proceeds of sale of property, § 487a, p. 2572.
intoxicating liquors subject to be destroyed, § 487a, p. 2573.
description and location of premises must be contained in warrant, § 487a, p. 2574.
searches made at night, § 487a, p. 2574.
see PRACTICE IN CRIMINAL CASES; SEIZURES.
SECOND PETITION—
Whether can be filed for removal of cause to Federal court after case has been remanded, § 554, p. 3051.
SECRETARY OF INTERIOR—
When enjoined from selling certain land, § 100, p. 640.
SECRETARY OF TREASURY—
Recovery against collector or revenue officer acting under orders of execution, § 427f, p. 2093.
Condemnation proceedings by, § 482, p. 2513.
Claims approved by, § 96, p. 600.
SECURITY—
Admiralty, § 562, p. 3135; § 570, p. 3155.
Receiver, by, § 319, pp. 1607-1609.
Removal to Federal court, given in a cause prior to, effect of removal on same, § 555, p. 3052.
State statute, when required upon injunction by, § 83, p. 575.
Writ of error or appeal, § 702, pp. 3807-3809.
requisite to obtain *supersedeas*, § 703, p. 3809.
not required in writs of error in criminal prosecutions, § 702, p. 3809.
on writ of error from Supreme Court to State courts, § 692, pp. 3706, 3707.
motion to dismiss appeal or writ of error for frivolousness denied when united with motion to dismiss for defect in bond, § 705, p. 3838.
an appeal is taken when it is allowed, although security is not filed till after the statutory limit, § 698, p. 3784.
bond in error and on appeal, § 702, p. 3807; § 703, p. 3810.
judge's failure to approve bond does not make bond void, § 702, p. 3808; § 703, p. 3813.
when bond not required, § 702, pp. 3808, 3809.
amendment of bond, § 702, p. 3809.
from District court, § 493, p. 2617.
see BAIL; RECOGNIZANCE; UNDERTAKING; APPEAL AND ERROR.
SECURITY FOR COSTS—
Plaintiff in error or appellant to give undertaking or other security to clerk of United States Supreme Court, § 702, p. 3808.
For costs, § 425, pp. 2079-2083.
see also COSTS.
SEIZURE—
Suit for seizures on land and water, § 5, p. 27.
Under unconstitutional law, § 96a, p. 602.
see PRACTICE IN CRIMINAL CASES.
SELECTIVE SERVICE OR DRAFT ACT—
Duplicity of counts under, § 506r, p. 2724.
SENATE—
Introducing in evidence extracts from journal of, § 333j, p. 1683.
Proof of documents published by authority of, § 333j, p. 1683.

Vol. II begins at § 197, page 1125; Vol. III begins at § 453, page 2201; Vol. IV begins at § 670, page 3597.

SENATORS—
Exemption of, from service of process, § 167, p. 967.
When writ of *ne exeat republica* cannot be issued against, § 326, p. 1633.
SEPARABLE CAUSES OF ACTION—
Accountings, in suits for, § 541a, p. 2941.
Condemnation suits, § 541c, p. 2943.
Debtor, for administration of the assets of, § 541g, p. 2949.
Fire insurance, in suits affecting subrogation in, § 541j, p. 2952.
Foreclosure suits, § 541d, p. 2945.
Lands, in suits affecting title to, § 541b, p. 2942.
Negligence cases, § 541i, p. 2950.
Promissory notes, in actions upon, § 541h, p. 2949.
Removal to District court in certain cases of, § 541, p. 2930.
Stockholders' suits, § 541e, p. 2947.
Stockholders, in suits to enforce liability, § 541f, p. 2948.
Wills, in suits affecting, § 541k, p. 2952.
SEPARABLE CONTROVERSIES (see REMOVAL OF CAUSES).
SEPARATE ESTATE—
Of married women, see MARRIED WOMEN; BILL.
SEQUESTRATION—
Definition of, § 439, p. 2159.
Writ of, when will be issued, § 189, p. 1116.
Of goods, effect upon, of removal of cause to Federal court, § 555d, p. 3067.
see also ENFORCEMENT OF DECREES AND ORDERS.
SEQUESTRATORS—
Appointment of, § 439, p. 2159.
May be put in possession by means of writ of assistance, § 440, p. 2160.
SERVICE—
Affidavit of, formalities in, § 336, p. 1710.
Claims against the United States, in suits for, § 97, p. 633; § 98, p. 636.
Corporations, § 164, p. 936.
upon Federal, § 164a, p. 937.
upon domestic, § 164b, p. 938.
upon foreign, § 164c, p. 939.
Fact of service of process upon defendant should appear affirmatively upon face of decree, § 404, p. 1983.
Fraudulent means, § 167, p. 969.
Petition, of a, § 254, pp. 1268, 1269.
Pleading, of, § 453, p. 2207.
Process
amendment of, § 455b, p. 2247.
in suits against States, § 3a, p. 8.
how far State practice followed respecting, § 453, p. 2206; § 455, pp. 2242-2245.
service of, § 455a, p. 2245.
Publication, § 166, pp. 952-966.
in what cases allowed, § 166a, pp. 954-959; § 201, p. 1150.
order for, must be served personally, § 166, pp. 952, 953; § 166b, pp. 959, 960.
what the affidavit must contain, § 166b, pp. 961-964.
State practice
of pleading, how far State practice respecting is followed, § 453, p. 2207.
of writ and process, how far State practice followed respecting, § 453, p. 2206; § 455, p. 2243; § 455a, pp. 2245, 2246.

Vol. II begins at § 197, page 1125; Vol. III begins at § 453, page 2201; Vol. IV begins at § 670, page 3597.

SERVICE (continued)—
Subpœnas
ad respondendum, rules relative to, §§ 163-167, pp. 933-975.
ad testificandum, § 342, pp. 1740-1743.
substituted, of, § 165, pp. 948-952.
upon an attorney out of the jurisdiction, § 165, p. 949.
of bills, not original, § 165, p. 949.
of cross-bills, § 165, p. 950.
Sunday, § 163, p. 935.
Writs and process, § 455a, p. 2245.
writ of attachment for contempt, § 433, p. 2149.
Writ of error, § 699, p. 3792.
failure to serve citation on defendants in error, § 699, p. 3787.
of subpœna, see also PROCESS; SUBPŒNAS TO APPEAR AND ANSWER; TIME.
SET-OFF—
In suit brought by the United States, § 95, p. 594.
In answer, § 198, pp. 1130, 178b, 1143; § 200, p. 1149.
In bankruptcy, § 648, pp. 3481-3488.
As a subject of jurisdiction in equity, § 79, p. 322.
Time of filing, § 200, p. 1149.
When allowed, § 198b, p. 1143.
SHAREHOLDERS—
Efforts of plaintiffs to secure action by directors or trustees or on part of stockholders to be set forth, § 145, p. 809.
Obtaining injunction in suit affecting corporation, § 264, p. 1324.
see also STOCKHOLDER.
SHERIFF—
Remedy of, when goods in his custody seized by marshal, § 56, p. 212.
Injunction against, § 270, p. 1343.
see RETURN.
SHERMAN ANTI-TRUST ACT—
See ANTI-TRUST ACT.
SHIP—
Injunction to restrain sailing of a, § 267, p. 1334.
SICKNESS—
Of judge, who to act in case of, § 256, p. 1277.
SIGNATURE—
Of plaintiff, § 155, p. 918.
Of solicitor to pleading, § 155, p. 918.
Of counsel to bill, § 155, p. 918.
Of solicitor to amendments, § 210, p. 1166.
To notice of motion, § 251, p. 1259.
Of counsel, when necessary to petition for intervention, § 254, p. 1268.
To affidavit, § 338, p. 1714.
To bills of exceptions, § 479, pp. 2487, 2488.
Of clerk to authentication of record on appeal, § 704, p. 3824.
SIX MONTHS' RULE—
Preferences in railroad foreclosure suits regulated by, § 305a, p. 1521.
SLANDERS—
Rarely if ever enjoined, § 79, p. 552, n. 35; § 284, p. 1524.
SLAVE TRADE—
Jurisdiction of suits under laws relating to, § 5, p. 15.
SMUGGLING (see INDICTMENTS).
SOLICITOR—
Signature of, to bill, § 155, p. 919.

Vol. II begins at § 197, page 1125; Vol. III begins at § 453, page 2201; Vol. IV begins at § 670, page 3597.

SOLICITOR (continued)—
To sign notice of motion, § 251, p. 1259.
Signature of, to petition for intervention, § 254, p. 1268.
Costs as between solicitor and client, § 422, pp. 2071-2076.
SOLICITOR-GENERAL—
Right of precedence, § 252, p. 1262.
When he may sign a bill in place of the attorney-general, § 131, p. 750.
SOLICITOR OF THE TREASURY—
Introduction of papers, etc., in the office of, in evidence, § 383, p. 1659.
SOUTH CAROLINA—
Divided into two districts, § 66, p. 248.
counties, times and places of holding court therein enumerated, § 66, p. 249.
Districts of, included within Eighth Circuit, § 4, p. 10.
SOUTH DAKOTA—
Constitutes one judicial district, § 66, p. 323.
Times and places of holding court in, § 66, pp. 323, 324.
Districts of, included within Eighth Circuit, § 4, p. 10.
SOVEREIGNS—
When cannot be sued, § 94, p. 592.
SPECIAL APPEARANCE—
Defined, § 168, p. 976.
SPECIAL DAMAGE—
Necessity of alleging, to obtain injunction, § 264, p. 1324.
SPECIAL INJUNCTIONS—
Distinguished from other forms, § 262, p. 1321, § 288, p. 1427.
see also INJUNCTIONS.
SPECIAL RELIEF—
Pending suit, prayer for, § 133, p. 755; § 154, pp. 913-918.
SPECIAL REPLICATIONS—
Not allowed, § 202, p. 1154.
Long obsolete, § 202, p. 1154.
SPECIFIC CHATTEL—
Injunction to restrain alienation of, § 267, p. 1334.
SPECIFIC PERFORMANCE OF CONTRACT—
Bills
what to contain, § 153, p. 911.
to enforce against officer of state, § 120, p. 725.
Bills for specific performance, § 151e, pp. 898-900.
to build, § 151e, p. 898.
to build bridge, when not enforced, § 151e, p. 898.
of contract of insurance, § 151e, p. 900.
for purchase of stock of merchandise, § 151e, p. 900.
for sale of patent right, § 151e, p. 900.
for maintenance and operation of telegraph line upon railroad company's right of way, § 151e, p. 898.
to sell corporate stock, when not enforced, § 151e, p. 900.
as a ground of equitable jurisdiction, § 81, p. 563; § 151e, pp. 900, 901.
Injunctions
to enforce, of covenants and other contracts affecting land, § 265, p. 1331.
to compel the performance or prevent the breach of contracts not affecting land, § 281, pp. 1409-1412.
Joinder of complainants, of a decree, § 140, p. 783, 784.
Limitations on jurisdiction over suit for, by assignee, § 63, p. 260.

Vol. II begins at § 197, page 1125; Vol. III begins at § 453, page 2201; Vol. IV begins at § 670, page 3597.

SPECIFIC PERFORMANCE OF CONTRACT (continued)—
Lord St. Leonard's Act permitting master to execute deed or other written instrument in the name of party who refuses to do so, § 441, p. 2162, n. 1.
Parties
who necessary parties to suits for, § 112, p. 685; § 120, p. 725.
for land by an heir, § 119, p. 718.
against joint tenants, § 119, p. 718.
Relief, alternative in action for, § 138, pp. 776, 778.
Revocation, not enforced when defendant has power of, § 151e, p. 899.
State, as against, § 105, p. 662.
State statute, effect of, § 82, p. 571.
SPONSIO JUDICIALIS—
The possible origin of feigned issues, § 381, p. 1866.
STARE DECISIS—
Rule of, how far applied in equity, § 78, p. 542.
STATES—
Amendments, liberal, in favor of, § 206, p. 1161.
Appearance of, cannot compel in certain cases, § 3, p. 5.
Bills
bill by, § 3, pp. 5, 6.
cannot maintain bill to protect political right, § 3, pp. 4, 5; § 79, p. 328.
Boundaries, controversies as to, § 3, pp. 5, 9; § 104, p. 654.
Consent of State to be sued in State court only, does not give right to be sued in Federal court, § 105, p. 658.
Court of, has not power to grant a writ of *habeas corpus* to a person held under color of authority from the United States, § 461, p. 2292.
Cross-bill may be brought against, § 105, pp. 658, 659.
Defendants, liability of, to suits by private persons, § 105, p. 659.
Eleventh Amendment to the Constitution of the United States, effect of, on suits against, § 105, pp. 657, 658.
Fugitive, cannot obtain order against another State to require return of, § 3, p. 5.
Jurisdiction
of controversies between, § 1, p. 1; § 3, p. 4; § 5, p. 27; § 104, p. 654.
of controversies between citizens of different, § 1, p. 1; § 5, p. 14.
of Federal courts in cases of conflicting grants by different, § 50, pp. 178, 179.
of Federal courts in controversies between citizens of different, § 40, p. 126.
Laches, states not affected by, § 181, p. 1048.
Laws of
declaring person civilly dead, as preventing filing bill in equity, § 85, p. 580.
when to be regarded as rules of decision, § 477, p. 2448.
Liability of a State to a suit by another State, § 104, p. 654.
controversies between, confined to questions of property, § 104, p. 654.
not political questions, § 104, p. 654.
suits by, to enforce payment of bonds by another State, § 104, p. 655.
as defendant, liability to suit by another State, § 104, p. 655.
whether a tribe of Indians constitutes a foreign, § 104, p. 657.
boundaries, § 104, p. 654.

Vol. II begins at § 197, page 1125; Vol. III begins at § 453, page 2201; Vol. IV begins at § 670, page 3597.

STATES (continued)—
Liability of States to suits by private persons, § 105, p. 657.
cannot be sued without consent, § 105, p. 657.
Parties
necessary parties to suit against, to restrain illegal tax, § 119, p. 724.
suits where State is interested, though not a formal party, § 105, p. 660.
when indispensable party, § 120, p. 725.
when not necessary parties, § 105b, p. 662; § 120, p. 724.
when necessary party to a decree, § 105b, p. 662; § 120, p. 724.
Plaintiffs to bill in equity, § 86, p. 580.
Practice of the State courts, how far followed in Federal courts, § 453, pp. 2202, 2203.
Preference given to certain cases wherein a State is interested, § 707, p. 3860, n. 2.
Public acts of, how introduced in evidence, § 333m, p. 1688.
Statute of, authorizing one or more members of unincorporated association to represent the others in the courts, § 113, p. 695.
Supbœna on, service of, § 164, p. 937.
Sue, right to
effect of statute giving right to sue in State courts, § 105, p. 658.
when cannot be sued, § 94, p. 592; § 105a, p. 661.
Suits against State officers that are not suits against States, § 105a, p. 660.
Supreme Court, original jurisdiction and terms of, § 3, pp. 4-7.
bill by, § 3, pp. 5, 6.
where sued, § 3, pp. 5, 6.
practice when sued in Supreme Court, § 3, p. 6.
controversies affecting, jurisdiction of United States Supreme Court over, § 3, pp. 4-9.
see also PRACTICE AT COMMON LAW.
STATE COURTS—
Custody of
acquired by fraud, § 52, p. 191.
property in, jurisdiction of Federal court over, § 52, pp. 192-198.
Decisions of
binding upon Federal tribunals, § 477, p. 2452.
rules of decisions made by, prior to removal to Federal tribunals, will usually be followed in the latter after removal, § 555, pp. 3052, 3053.
Federal courts, how far, can interfere by injunction with matters in, § 269, p. 1337.
Jurisdiction
over cases affecting ambassadors, ministers and consuls, § 1, p. 1.
concurrent jurisdiction, § 5, pp. 23-26; § 57, p. 217; § 60, p. 223.
Practice of, how far followed in Federal courts, § 453, pp. 2202, 2203.
Remedy in case of dispute between State sheriff and Federal marshal as to custody of property, § 56, p. 214.
Suits pending in State and Federal courts for the same cause, § 57, p. 216.
Writs of error from Supreme Court to State courts, § 692, pp. 3701-3709.
see also REMOVAL OF CAUSE.
STATE OF FACTS—
Inconsistent, in bills, § 138, pp. 775, 779.
Using, on references before master, § 390, p. 1922.
see also FACTS; FINDINGS.

Vol. II begins at § 197, page 1125; Vol. III begins at § 453, page 2201; Vol. IV begins at § 670, page 3597.

STATE OFFICER—
Actions at common law against, § 105a, pp. 660-662.
jurisdiction of suits against, § 105a, p. 660.
mandamus to compel performance of duty, § 105a, pp. 661, 662.
how far he can use the authority of the State as a defense for his acts, § 105a, p. 661.
Injunctions against, § 105c, p. 664.
Practice on application for injunctions against, § 105d, p. 668.
Quo warranto affecting, § 5, p. 18; § 468, p. 2376.
Removal not enjoined, § 79, p. 329.
STATE PRACTICE—
see PRACTICE AT COMMON LAW; CONDEMNATION PROCEEDINGS.
STATE STATUTE—
Admissibility of evidence, how far followed in Federal courts, § 339, p. 1716.
Bill, set forth in a, § 237, p. 1237.
Federal courts of equity, influence on, §§ 82, 83, pp. 567-576; § 181, pp. 1045-1052.
Federal courts of equity, State statutes cannot impair the jurisdiction nor regulate the practice of, § 83, pp. 574-577.
authorizing examination before trial, § 83, p. 576.
authorizing submission on stipulation, § 83, p. 576.
authorizing a suit transferred from equity side to law side, followed, § 83, p. 576.
authorizing appearance by general guardian of infant not served, § 83, p. 575.
concerning suits pending by or against consolidated corporations, § 83, p. 576.
determining what shall constitute notice of pending suit, § 83, p. 575.
diminishing or destroying an equitable remedy, § 83, p. 574.
enlarging powers of courts of common law, § 83, p. 574.
forbidding an injunction against the collection of illegal taxes, § 83, p. 575.
giving courts of probate exclusive jurisdiction, § 83, p. 574.
providing for suits against a county in a specified court, § 83, p. 576.
regulating suits against municipal corporations, § 83, p. 575.
regulating suits by foreign corporations, § 83, p. 576.
regulating security for injunctions, § 83, p. 575.
regulating practice in courts of equity, § 83, p. 574.
requiring tender by mortgagor before filing bill for redemption, § 83, p. 574.
regulating foreclosure of mortgages, § 82, p. 570; § 83, p. 574.
regulating redemption of mortgages, § 82, p. 567, § 83, p. 574.
requiring bond upon injunction, § 83, p. 575.
requiring leave from a State court before suing upon judgment, § 83, p. 575.
requiring presentation of claim to comptroller before suing, § 83, p. 575.
How far followed in Federal tribunals, § 477, p. 2448.
Laws creating new rights are enforced by Federal courts at law or equity, § 82, pp. 567-574.
authorizing suit to set aside will for fraud, § 82, pp. 567, 568.
authorizing suit to set aside probate of will for fraud, § 82, pp. 567, 568.

Vol. II begins at § 197, page 1125; Vol. III begins at § 453, page 2201; Vol. IV begins at § 670, page 3597.

STATE STATUTE (continued)—
authorizing suit to quiet title by person out of possession of land, § 82, pp. 568, 569.
authorizing suit to establish title after destruction of public records, § 82, p. 5.
authorizing mechanics' lien, § 82, p. 570.
authorizing bill for partition of equitable claim to land where the legal title is in the United States, § 82, pp. 569-571.
authorizing creditor's bill before judgment, § 82, p. 569.
authorizing appointment of receiver, § 82, p. 569.
authorizing injunction to be granted, § 82, pp. 569, 570.
authorizing vendors' liens, § 82, p. 571.
authorizing suit by debtor to compel cancellation of securities for a usurious debt, § 82, p. 570.
authorizing decree of specific performance, § 82, p. 571.
concerning assignees of insolvents, § 82, p. 571.
creating a new right, enforced by Federal courts in law or equity, § 82, p. 567.
creating an exclusive remedy, § 82, p. 573.
empowering guardian to mortgage ward's estate, § 82, p. 570.
imposing assessments upon streets, § 82, p. 569.
imposing individual liability on stockholders of corporations, § 82, p. 567.
providing for enforcement of remedy in specific court, § 82, p. 568.
Remedy at law does not affect Federal equity jurisdiction, § 81, p. 565.
see PRACTICE AT COMMON LAW; STATUTES.
STATE STATUTES OF LIMITATION—
In general, § 181, pp. 1046-1052.
do not bar the United States, § 181, p. 1048.
followed by Federal courts of equity in foreclosure suits, § 181, p. 1051.
followed in equity in suits against executors and administrators, § 181, p. 1051.
followed as to actions on judgments, § 181, p. 1046.
followed as to actions against Federal officers, § 181, p. 1046.
when followed in actions at common law, § 181, p. 1045.
when followed in actions at common law upon patents and copyrights, § 181, p. 1045.
affecting jurisdiction, § 181, p. 1045.
usually followed by analogy, § 181, p. 1050, n. 51.
not when manifest wrong would follow, § 181, p. 1051.
not always controlling, § 181, p. 1050.
cannot bar the United States, § 181, p. 1048.
effect of, as to patents and copyrights, § 183, p. 1055.
when Federal Statutes of Limitations followed, § 181, p. 1050.
STATE TAXES—
Bill to restrain collection of, what to contain, § 153, pp. 909, 910.
STATING PART—
Of bill, § 136, p. 762.
STATUTE—
Allegations
conformity with, allegations as to, in bills, § 144, p. 807.
conformity in, allegations as to, indictments, § 497, p. 2641.
Construction of State statute by State court, how far binding upon Federal tribunals, § 477c, pp. 2464-2471.

Vol. II begins at § 197, page 1125; Vol. III begins at § 453, page 2201; Vol. IV begins at § 670, page 3597.

STATUTE (continued)—
Evidence, introducing in, § 333m, p. 1688.
of the United States, introducing in evidence, § 333k, p. 1683.
how introduced in evidence, see also EVIDENCE; PRACTICE AT COMMON LAW; STATE STATUTE.
Federal court
whether a State statute has been passed by the legislature is a question as to which the Federal courts will follow the decisions of such State, § 477c, p. 2467.
Injunctions
authorized by, § 283, pp. 1417-1423.
authorizing injunctions in a new class of cases, § 82, pp. 569, 570.
necessity of private party alleging special damage on applying for injunction founded on violation of statute, § 264, p. 1324.
Libel of information, § 606, p. 3245.
Limitation of the States as affecting jurisdiction of Federal courts, § 181, p. 1045.
Pleas of, § 183, pp. 1055-1057.
Setting forth, in bills, § 237, p. 1237.
State creating new rights enforceable in Federal courts, § 82, p. 573.
of State, rulings upon, at hearing, § 375, pp. 1855-1857.
States cannot by, impair the jurisdiction of Federal courts of equity, § 83, p. 574.
nor regulate the practice therein, § 83, p. 574.
Statutes of the States, when to be taken as rules of decision, § 477, p. 2448.
Writ of error
United States, review by writ of error of decision affecting, § 692, p. 3701.
of United States, writs of error to State courts in cases affecting, § 692, p. 3701.
STATUTE OF FRAUDS—
Could be raised by demurrer, § 367, p. 1835.
Federal courts follow, formerly, § 184, p. 1057; § 477c, p. 2468.
Pleas of, § 183, p. 1057.
Court may not allow it brought in by amendment, § 214, p. 1181.
STATUTE OF LIMITATION (see LIMITATION).
STATUTORY PRESUMPTIONS (see PRACTICE IN CRIMINAL CASES).
STATUTORY SERVICE—
Of subpœna, see SUBPOENAS TO APPEAR AND ANSWER.
STAY—
Filing bill in Federal court to stay proceedings, under a decree of State court, § 52, p. 197.
Where suits are pending in State and Federal courts for the same cause, § 52, p. 197.
Bill to obtain stay of proceedings at law, § 132, p. 752; § 156, p. 920.
Injunctions to stay proceedings in other courts, § 267, p. 1334; § 268, pp. 1334-1336.
Bill to suspend or avoid the operation of decrees, § 452, p. 2198.
Of execution, § 427b, p. 2089.
On appeal from order granting or containing injunction, § 703, pp. 3816, 3817.
Writ of error to judgment of conviction operates as stay of proceedings without filing security, § 703, p. 3819.
see SUPERSEDEAS.

Vol. II begins at § 197, page 1125; Vol. III begins at § 453, page 2201; Vol. IV begins at § 670, page 3597.

STIPULATION—
Bill to set aside for fraud, § 51, p. 186.
Evidence, § 330, p. 1649.
Next friend of infant, § 330, p. 1648.
Relief from stipulation found, § 330, p. 1649.
Removal to Federal court, in cause made before, effect of removal on same, § 555, p. 3057.
not to remove a specified suit into a Federal court, § 537, p. 2886.
Rule in admiralty, § 571, p. 3155.
Rulings, § 311, p. 996; § 330, p. 1649.
State statute, to submit cause in accordance with, § 83, p. 575.
Effect of, State statute authorizing, § 83, p. 575.
Writing, must be in, § 330, p. 1649.
STOCK—
Specific performance of contract for sale, § 151e, p. 900.
When contract for sale of, not specifically enforced, § 151e, p. 900.
Injunction to restrain transfer of, § 267, p. 1334.
Bill to compel issue of, misjoinder of plaintiffs, § 140, p. 783.
Bill to cancel subscription, joinder of plaintiff, § 140, p. 787.
STOCKHOLDERS—
Allegations, special, by, § 145, pp. 825-827.
Averments in suits by
necessary averments in suits by, § 79, pp. 545, 547; § 145, p. 819.
must aver in bill a demand of and refusal by the directors to sue, § 145, p. 817.
suit by minority stockholder, necessary averments, § 145, pp. 817, 818.
Bill by, § 79, pp. 545, n. 1, 547, n. 11; § 120, p. 730.
certainty in pleading, § 137, p. 773.
Discontinuance
when can have suit discontinued as against majority of directors, § 361, p. 1813.
Injunction in suit affecting corporation, § 264, p. 1323.
Joinder of, in bill, § 140, p. 787; § 141, p. 791.
Liability to creditors upon, State statutes imposing, § 28, p. 103.
Parties
directors not necessary parties to suit against the corporation by, § 119, p. 721.
necessary parties in suits to set aside foreclosure of railroad mortgages, § 120, p. 730.
to suits by, on behalf of others similarly situated, § 114, p. 705.
to suits by, to pool stock, § 113, p. 694.
when necessary parties to suits affecting corporation, § 113, p. 694.
when might be made a party to suit against corporation under English practice, § 111, p. 681.
Represented by the corporation, § 113, p. 694.
Receivers
appointing receivers of corporation property, in suits by, § 302a, p. 1484.
not usually appointed receiver, § 318, p. 1605.
Sued by creditor of the corporation which had dissolved, as one of a class, § 115, p. 706.
Suing committee of, as representatives of a class, § 115, p. 706.
Suits by and against
against, when in equity, § 81a, pp. 565, 566.
allowing them to intervene in suits affecting corporations, § 258b, p. 1287.

Vol. II begins at § 197, page 1125; Vol. III begins at § 453, page 2201; Vol. IV begins at § 670, page 3597.

STOCKHOLDERS (continued)—
by, when to be verified, § 156, p. 919.
suit to enforce by assignee of debt, § 63, p. 262.
value of subject-matter in, § 16, p. 57.
see also PARTIES.
STRANGERS—
Whether to be made parties, § 111, p. 679.
Enjoining, from committing trespass, § 275, p. 1364.
STREETS—
State statutes imposing assessments upon, § 82, p. 569.
Bill for betterment of, § 79, p. 325.
STRIKE—
Member of trades union engaged in, suing as representing a class, § 115, p. 706.
Joinder of parties in a bill for trespass because of a, § 141, p. 798.
Injunctions against, § 276, p. 1366.
SUBCONTRACTOR—
Suit against, without joining contractor, § 119, p. 718.
SUBJECT-MATTER—
Failure of plaintiff to have interest in, a ground of demurrer, § 367, p. 1833.
Value of, beneath dignity of court, a ground of demurrer, § 367, p. 1833.
SUBMISSION—
Of cases on printed arguments, § 707, p. 3858.
SUBPOENA—
Ad testificandum, § 340, pp. 1733-1735.
To answer amendments, § 213, p. 1178.
Upon a bill of revivor, § 224, p. 1206.
Duces tecum, § 341, pp. 1736-1739.
Failure to serve, upon parties against whom process prayed not ground of demurrer, § 367, p. 1836.
Motion to set aside, the proper remedy where process is prayed.
Defects in, waived by general appearance, § 170, p. 982.
Prayer of, in bills, § 154, p. 918.
In the nature of a *scire facias* the ancient practice of reviving suits, § 221, p. 1202.
Service of, § 342, pp. 1740-1743.
Witnesses to attend before master, § 391, p. 1924.
SUBPOENA DUCES TECUM—
For books and papers, § 332, p. 1654; § 339a, p. 1725; § 341, pp. 1736-1739.
For other articles, § 341, p. 1736.
see also PRACTICE AT COMMON LAW.
SUBPOENAS TO APPEAR AND ANSWER—
Bill taken *pro confesso*, § 160, p. 931.
Defined and form of, § 160, pp. 929-931.
defined, § 160, p. 929.
requisites of, § 160, pp. 929-931.
form of, § 160, p. 931.
Issue of, § 161, p. 931.
bill first to be filed, § 161, pp. 931, 932.
Motions
for leave to file a bill, § 161, p. 932.
to set aside service, § 163, pp. 578-579; § 165, pp. 950, 951.
Necessary, § 162, p. 933.
Return of, § 160, p. 929.

Vol. II begins at § 197, page 1125; Vol. III begins at § 453, page 2201; Vol. IV begins at § 670, page 3597.

SUBPOENAS TO APPEAR AND ANSWER (continued)—
Service
service in case of amended bill, § 162, p. 933.
in case of revivor, § 162, pp. 933-935.
domestic corporations, § 164b, p. 938.
exemptions from
return and proof of service of process, § 167a, p. 970.
objections to the service of process, § 167b, p. 973.
Federal corporations, § 164a, p. 937.
foreign corporations, § 164c, p. 939.
how to be made, generally, § 163, pp. 933-937, § 455a, p. 2246.
upon corporation, § 164, pp. 937-948.
substituted, § 165, pp. 948-952.
statutory, § 166a, b, pp. 952-966.
exemptions from, § 167, pp. 966-975.
personal service of, § 163, pp. 933-937.
return to service, § 163, p. 934.
service on Sunday, § 163, p. 735.
service by marshal, § 163, p. 933.
public corporations
when a corporation is subject to service of, § 164, pp. 937-948.
statutory service of
cases in which statutory service can be made, § 166a, p. 954.
practice in statutory service of a subpœna, § 166b, p. 959.
Summons
blank summons may be issued by clerk, § 161, p. 932.
Toties quoties, § 161, p. 932.
Waiver of, by appearance, § 162, p. 933.
see TIME.
SUBROGATION—
Creditor who is subrogated to rights of State against its debtors cannot plead State's exemption from statute of limitations, § 181, pp. 1048, 1049.
A party who has assigned rights by subrogation is not treated as an assignee, § 63, p. 264.
SUBSEQUENT LIENORS—
Not indispensable parties to foreclosure suit, § 119, p. 716.
SUBSEQUENT MATTER—
Bill to impeach decree for, § 132, p. 752.
SUBSTITUTED SERVICE—
Of subpœnas, § 165, pp. 948-952.
Of notice of motions, § 251, p. 1257.
see SERVICE.
SUITS—
Alien property custodian, against, § 96k, p. 630.
Assignees, § 63, p. 256.
Bonds, on judicial and official, § 33, p. 118.
Citizenship
to cancel certificates of, and to set aside naturalization, § 151b, p. 885.
Federal corporations, where the parties are, § 27, p. 98.
Federal courts, arising out of litigation in, § 39, p. 124.
Idiots, lunatics, and persons of weak mind, on behalf of, § 91, p. 587.
Infants, on behalf of, § 90, p. 584.
Internal Revenue Officers to recover taxes paid under duress, suits against, § 96g, p. 610.
Lands, to prevent unlawful occupancy of, § 81, p. 567.

Vol. II begins at § 197, page 1125; Vol. III begins at § 453, page 2201; Vol. IV begins at § 670, page 3597.

SUITS (continued)—
Multiplicity of
injunctions to prevent, § 266, pp. 1332, 1333.
as a ground of equitable jurisdiction, § 79, p. 554.
Nature of, in equity, § 81, pp. 561-567.
Railroads, Director General of, suits against, § 96i, p. 615.
Receivers, suits by, § 311, p. 1569.
of national banks, § 35, p. 120.
of federal corporations, § 36, p. 121.
of federal courts, § 37, p. 122.
Telegraph and telephone companies when under Federal control, against, § 96j, p. 629.
Trustees in bankruptcy, § 38, p. 123.
United States, suits by and against, § 95, pp. 593-598.
against, for damages for use of, and injury to, real property, § 96b, p. 602.
for money had and received through mistake, § 96d, p. 606.
to recover money paid under duress, § 96e, p. 606.
to recover taxes unlawfully collected, § 96f, p. 608.
for torts and upon implied contracts when a tort is waived, § 96a, p. 600.
treaties of the United States, arising under, § 26, p. 97.
by and against officers of, § 34, p. 119.
Collectors of Ports to recover duties paid under duress, § 96h, p. 615.
Constitution or laws of, arising under, § 5, p. 14; § 25, p. 84.
SUMMARY ORDERS (see BANKRUPTCY).
SUMMARY PROCEEDINGS—
Under State law, § 82, p. 571.
SUMMONS—
Indorsement of, how far State practice respecting, followed, § 453, p. 2206.
see PRACTICE IN CRIMINAL CASES.
SUNDAY—
Bill to enjoin the opening of an exhibition on, § 79, p. 551, n. 35.
Issue of warrant of arrest on, § 163, p. 935.
Service of subpœna on, § 163, p. 935.
Injunction refused to prevent the running of cars on, § 284, p. 1418.
Writ of attachment for contempt not to be served on, § 433, p. 2149.
SUPERSEDEAS—
When judgment can be executed despite, § 697, p. 3771.
How obtained, § 703, pp. 3809-3824.
see APPEAL AND ERROR.
SUPPLEMENTAL ANSWER—
Objects of, and when allowed to be filed, § 195, p. 1122.
see also AMENDMENTS.
SUPPLEMENTAL BILL—
Jurisdiction of, § 51, p. 188.
Not original, § 132, pp. 751, 752; § 212, p. 1176.
In general, § 231, p. 1218.
Bills in the nature of, § 230, p. 1216; § 234, p. 1231.
In the nature of bills of revivor, § 229, p. 1215.
Proceedings upon, § 233, pp. 1228-1231; § 236, p. 1234.
see also CORRECTION OF DECREE OTHERWISE THAN BY APPEAL; BILLS OF REVIVOR; SERVICE.
SUPPLEMENTARY PROCEEDINGS—
Jurisdiction over, § 51, p. 188.
State practice followed, § 427g, p. 2095.

Vol. II begins at § 197, page 1125; Vol. III begins at § 453, page 2201; Vol. IV begins at § 670, page 3597.

SUPREME COURT OF THE DISTRICT OF COLUMBIA—
Appeals
from interlocutory orders, § 69, p. 347.
in patent cases, § 69, pp. 347, 348.
appeals from and writs of error to, § 691, pp. 3695-3698; § 698, p. 3779; § 711, p. 3874.
parties to such appeal, § 69, pp. 344, 348.
practice upon such appeals, § 69, pp. 347, 348.
Jurisdiction, § 68, pp. 345-347.
Writs of
mandamus, § 458, pp. 2270-2275.
quo warranto in, § 468c, p. 2377.
prohibition in, § 456, p. 2250.
SUPREME COURT OF THE UNITED STATES—
Costs in, when judgment or decree is reversed for want of jurisdiction in court below, § 412, p. 2010, 2011.
see COSTS.
Habeas corpus proceedings, appeals to, § 467, pp. 2360-2367.
Jurisdiction
affecting ambassadors, ministers and consuls, § 1, p. 1.
authorized by Constitution, § 1, p. 1.
appellate jurisdiction, § 688, pp. 3657-3672.
equitable jurisdiction in, § 81a, p. 565.
exclusive jurisdiction, § 3, p. 4.
when not exclusive, § 3, p. 4.
original jurisdiction, § 3, pp. 4-9.
original jurisdiction and terms of, § 3, pp. 4-9.
practice when exercising original jurisdiction, § 3a, p. 7; § 161, p. 932; § 453, p. 2201.
writs of error to State courts, § 692, pp. 3701-3709.
Motions in, § 248, p. 1255.
Power to issue writs, § 3, p. 9.
Practice in, as to the granting of orders, § 256, p. 1277.
rules of practice promulgated by, § 84, pp. 577-579.
Terms of
provisions as to holding in cases of contagious or epidemic disease, § 3, p. 9.
see WRITS OF ERROR AND APPEALS; BANKRUPTCY.
SURETIES—
Of administrator, suit against, § 79, p. 544; § 119, p. 715.
Necessity of joining principal with, in suit against, § 110, p. 678.
Parties to demand against, which is joint and several, § 112, pp. 690, 691.
when demand is joint, § 112, p. 690.
Parties to suit against, § 120, pp. 731, 732.
Of receiver, § 319, pp. 1607, 1609.
Of receiver, discharge of, § 319, p. 1608.
To stipulation in admiralty, § 571, pp. 3155-3158.
SURPRISE—
Bill to impeach decree for, § 451, p. 2196.
SURVIVAL OF ACTIONS (see ABATEMENT AND REVIVOR).
SURVIVORS—
Right of, to proceed with appeal, § 697, pp. 3767-3778.
SUSPENDING DECREES—
Bills for, § 132, p. 752.
SWEARING—
To affidavits, formalities regulating, § 335, pp. 1709, 1710.

Vol. II begins at § 197, page 1125; Vol. III begins at § 453, page 2201; Vol. IV begins at § 670, page 3597.

T.

TAKING BILLS PRO CONFESSO—
Appeals from decrees, § 172, p. 995.
Default, when will be opened, § 172, p. 991.
Guardian *ad litem.*
guardian *ad litem* appointed, not before, § 171, p. 990.
case where guardian refuses to answer, § 171, p. 990.
Motion to set aside decrees obtained by, § 172, p. 991.
Practice in, § 172, pp. 990-995.
When may be done, § 171, pp. 987-990.
upon an amended bill, § 171, pp. 988, 989.
as against persons under disability, § 171, p. 990.
TAKING TESTIMONY (see also DEPOSITIONS; EVIDENCE).
TAXATION—
Of costs, § 423, pp. 2076, 2077.
TAXES—
Assessment
State statute concerning unjust, § 82, p. 569.
bill to enjoin board of equalization from certifying an unequal, § 153, p. 910.
Collection of
bill to collect, not sustained, § 79, p. 552, n. 36.
bill to restrain collection of, what to contain, § 151g, p. 906; § 153, pp. 909, 910; § 284, p. 1419.
State not a necessary party to, bill to restrain collection, § 119, p. 724.
value of matter in dispute in an action to enjoin the collection of, § 14, pp. 55-57.
Injunctions
to restrain collection of Federal, § 100a, p. 645.
Shipping Board of United States, injunctions against, § 100e, p. 651.
Levy of
bill to levy, not sustained, § 79, p. 552.
bill to enjoin levy of illegal, § 96f, p. 608.
TAXPAYER'S APPEAL—
When removable, § 538 l, p. 2922.
Proceedings to assess taxes not removable, § 538 l, p. 2922.
TAXPAYER'S BILL—
As a subject of jurisdiction in equity, § 79, p. 329.
Public officers, when considered on same side of controversy as plaintiff, § 42, p. 143.
Value of matter in dispute in, § 7, p. 44.
TAX SALE—
Bill to set aside, what to contain, § 153, p. 909.
TENANT—
Whether a necessary party in suits affecting estate, § 113, p. 697.
Suits by one or more on behalf of others, § 116, p. 708.
In common, may sue without joining co-tenant, § 119, p. 722.
In common, necessary parties to partition suit, § 120, p. 725.
In common, jurisdiction of suits where the United States is one tenant, § 5, p. 22; § 98, p. 636.
In tail, parties to suits concerning the estate of, § 113, p. 697.
For life, as representing the inheritance in suit for specific performance, § 113, p. 697.
For life, may join with the remainder-men in a bill to protect estate, § 140, p. 785.

Vol. II begins at § 197, page 1125; Vol. III begins at § 453, page 2201; Vol. IV begins at § 670, page 3597.

TENDER—
Omission of, when ground for demurrer, § 153, p. 912.
In admiralty, § 577, p. 3168.
When no actual, general offer is sufficient, § 153, p. 913.
TENNESSEE—
Divided into three districts, § 66, p. 325.
counties, times and places of holding court therein enumerated, § 66, pp. 325-327.
Districts of, included within Sixth Circuit, § 4, p. 10.
TERMS—
Of Supreme Court, § 3, p. 7.
Of Circuit Courts of Appeals, § 4, pp. 9-13.
Of District Courts, in general, § 65, pp. 274-276.
Of holding District Courts, § 66, pp. 276-342.
Imposed upon the issue, denial, dissolution or continuance of an injunction, § 297, pp. 1452-1457.
Upon the appointment of receivers, and preferences in foreclosure suits, § 305, pp. 1508-1535.
Decrees can regularly be entered only during, § 403, p. 1982.
Correcting judgment during, § 481, p. 2508, 2509.
TERRITORIAL CORPORATIONS—
Suits by or against, § 27, p. 99.
TERRITORIAL COURTS—
Usually considered not to be courts of United States, § 2, p. 3.
Review of decisions of, by Supreme Court of United States, § 691b, p. 3699; § 691c, p. 3701.
Review of decisions of, by Circuit Courts of Appeals, § 693, pp. 3722, 3724, 3725.
see also WRITS OF ERROR AND APPEALS.
TERRITORIAL JURISDICTION—
Of Circuit Courts of Appeals, § 4, p. 10.
Of District Courts, § 64, p. 267; § 66, pp. 276-342.
TERRITORY—
Public acts and records of, how introduced in evidence, § 333m, pp. 1688, 1689.
TESTE—
Of writs of injunction, § 295, p. 1443.
Of writs in general, § 455, p. 2243.
Of writs of error, § 699, pp. 3785, 3786.
TESTIMONY—
Common-law procedure respecting, § 453, p. 2204; § 473d, pp. 2413-2417.
De bene esse
issuing subpoena in case of taking, § 340, p. 1755.
bill to take, § 346, p. 1750.
Experts, § 352, p. 1773; § 473a, p. 2415.
Perpetuation of
as a subject of jurisdiction in equity, § 79, p. 322.
bills for, § 132, p. 751; § 156, p. 920; § 345, pp. 1746-1750.
Taking
taking before cause is at issue, § 351, pp. 1771.
taken within jurisdiction after cause is at issue, § 352, pp. 1772-1779.
taken after a cause is at issue and beyond the jurisdiction of the court, § 353, p. 1779.
present method of, within the jurisdiction, § 352, pp. 1772-1776.
taken in equity which may be used in other courts, § 344, p. 1746.
see also DEPOSITIONS; DISCOVERY; EVIDENCE; EXAMINATION BEFORE TRIAL; EXPERT WITNESSES.

Vol. II begins at § 197, page 1125; Vol. III begins at § 453, page 2201; Vol. IV begins at § 670, page 3597.

TEXAS—
Divided into four districts, § 66, p. 327.
counties, times, places of holding court therein enumerated, § 66, pp. 327, 331.
Districts of, included within Fifth Circuit, § 4, p. 10.
Introducing in evidence transcripts from certain books of the District Courts in, § 333, p. 1691.
TIME—
Abatement, suspended by an, § 217, p. 1195.
Amendment, § 208, p. 1163.
To amend, see AMENDMENTS.
Answer, § 189, p. 1116.
effect of consent or order extending time to answer, on time to remove cause, § 543b, p. 2966.
extended by amendment, § 213, p. 1178.
to file exceptions to an insufficient answer, § 194, pp. 1121, 1122.
Appellate Court of United States
within which models, diagrams and exhibits of material must be transmitted to, § 704, p. 3832.
Argument in Supreme Court, allowed counsel on, § 707, p. 3866.
Attachment for contempt, returnable, § 432, p. 2149.
Bankruptcy
may be shortened in bankruptcy cases, § 614, p. 3291.
Bills
to file supplemental bills, § 232, p. 1228.
of revivor, § 224, p. 1206.
Cause docketed, within which plaintiff in error or appellant is to docket the cause, § 704, p. 3834.
Cross-bills, § 198c, pp. 1143, 1144; § 201, p. 1150.
Decrees
of entering, § 403, p. 1982.
for an account should specify the time from which the account is to be taken, § 404, p. 1986.
giving defendants a certain specified time within which to show cause against a decree, etc., § 401, p. 1977; § 402, p. 1982.
Depositions
and filing, in equity, § 352, pp. 1772, 1773.
Extensions of
granted *ex parte*, § 250, p. 1256.
as affecting removal, § 543a, p. 2965.
Filing of record
failure of plaintiff in error to docket case and file record in time, § 704, p. 3834.
Injunction
to serve writ of, § 295, pp. 1442-1446.
of application for interlocutory, § 289, p. 1428.
Judgments
may be corrected by the court that rendered them, § 481, p. 2508.
New trial, motion for, must be made, § 478, p. 2473.
Notice of motion, to be given by, § 251, p. 1259.
Pleading, how far State practice respecting, is followed, § 453, p. 2207.
Receiver, when may be appointed, § 315, p. 1598.
Reference to be brought on before master, § 386, p. 1875.
Rehearing, to move for, or reargument, § 708, pp. 3868-3871.
Removal
affected by amendment by plaintiff, § 543c, p. 2968.
change of venue affecting, § 543g, p. 2972.

Vol. II begins at § 197, page 1125; Vol. III begins at § 453, page 2201; Vol. IV begins at § 670, page 3597.

TIME (continued)—
effect of consolidation upon, § 543d, p. 2969.
effect of new parties upon, § 543e, p. 2969.
time of, § 543, pp. 2959-2976.
to move for an order requiring non-resident to give security for costs, § 425, pp. 2080, 2081.
when remand of cause improperly removed to Federal court may be demanded, § 556, pp. 3076-3080.
when right to replead, after removal to Federal court expires, § 554, p. 1888; § 555, p. 3052.
where there are several defendants, and time for removal has expired as to one, § 543b, p. 2964.
within which they must be removed, § 704, p. 3834.
Reply, § 203, pp. 1155-1158.
Rules concerning, for pleading in suits do not apply to suits between States, § 3, p. 8.
Supersedeas, to file security for costs on application for, § 703, p. 3810.
Testimony in equity, § 344, p. 1746.
Writs of error and appeal
effect of death of party before time allowed for taking appeal or bringing writ of error has expired, § 697, p. 3776.
to return writ of error, § 699, p. 3788; § 704, p. 3824.
to serve papers, on motion to dismiss appeal or writ of error, § 705, pp. 3850, 3851.
to serve writs of error and citations, § 698, p. 3792.
within which appeals may be submitted on printed arguments, § 707, p. 3858.
within which appeal or writ of error must be taken, § 698, p. 3788.
when execution can be issued in a case where writ of error lies to the Supreme Court or Circuit Court of Appeals, § 427b, p. 2089.
TITLES—
Affidavit, § 336, pp. 1710, 1711.
Bills
to quiet, § 79, p. 555; § 81, p. 563; § 113, pp. 700, 701; § 138, pp. 775, 776.
performance of preliminary acts to make complete, must be alleged in bill, § 144, p. 806.
to remove a cloud may also seek a partition, who should be joined as defendants, § 141, p. 795.
Decree, § 404, p. 1982.
Evidence of, on removal of suits containing controversies between citizens of the same States, claiming land under grants of different States, § 550, p. 3024.
Parties
persons claiming property under inconsistent, when necessary parties to suits, § 112, p. 683.
joinder of, claiming under the same, § 140, p. 786.
Value of matter in dispute
in suit to remove clouds from, § 12, pp. 49, 50.
suit in which plaintiffs' claim under, what to be regarded as value of matter in dispute, § 696, pp. 3763-3766.
TOBACCO LAWS (see INDICTMENTS).
TOLLS—
Foreclosure of lien upon, § 79, p. 330.

Vol. II begins at § 197, page 1125; Vol. III begins at § 453, page 2201; Vol. IV begins at § 670, page 3597.

TONNAGE—
Jurisdiction of suits to collect, § 5, p. 15.
TORTS—
Suit by alien for, § 5, p. 19.
No suits against United States in cases of, § 5, pp. 19, 20; § 96, p. 598; § 671, p. 3598.
see PRACTICE AT COMMON LAW also.
TOTIES QUOTIES—
Subpœna to appear and answer, § 161, p. 932.
TOWN—
Is a corporation, § 63, p. 260.
TOWN BONDS—
Bill by holder of, § 63, p. 260; § 79, p. 320.
Taxpayer's bill to prevent payment of, § 120, p. 731.
see MUNICIPAL BOND.
TRADE—
Jurisdiction of suits to protect, § 5, p. 21; § 61, p. 233.
Injunction to prevent revelation of secrets of, § 263, p. 1322.
No injunction against corporation for merely diminishing private individual's profits of, § 264, p. 1324.
see also MONOPOLY.
TRADE-MARK—
Bills to obtain relief against interfering, § 149, p. 860.
Bill by persons interested in a geographical, § 116, p. 709.
Infringement of
suit for, where brought, § 61, p. 232.
bills to restrain, § 148, pp. 852-860.
Injunctions to restrain unlawful use of, § 267, p. 1334; § 279, pp. 1406-1409.
Jurisdiction of suits about, § 30, p. 107.
Joinder of defendants, § 141, p. 795.
Parties to suit by assignee of, § 112, p. 686.
Trade secrets, disclosure enjoined, § 263, p. 1322.
Value of matter in dispute in suit to enjoin use of, § 5, p. 16; § 13, p. 53.
TRADES UNION—
Suit against, engaged in a strike, § 115, p. 706.
Bills against members not multifarious, § 141, p. 798.
TRANSFER OF NOTES—
Injunction to prevent, § 272, p. 1356.
TRANSFER OF STOCK—
Injunction to restrain, § 267, p. 1334.
TRANSFER OF SUIT—
State statute authorizing transfer of suit from equity to law in case of mistake, § 83, p. 576.
Transfer from law to equity docket, § 377, p. 1862; § 453, p. 2202.
Transfer from equity to law docket, § 368, p. 1837.
TREASURER OF THE UNITED STATES—
Not necessary party to suit against a receiver of a national bank for money paid to, § 113, p. 693.
TREASURY—
Rejection of a claim by the Comptroller of, § 96, p. 600.
Introduction in evidence of papers in the office of the solicitors of the, § 333a, p. 1659.
Introduction in evidence of transcripts from department of the, § 333a, p. 1659.
see EVIDENCE.

Vol. II begins at § 197, page 1125; Vol. III begins at § 453, page 2201; Vol. IV begins at § 670, page 3597.

TREATIES—
Suits under, § 5, p. 21; § 26, pp. 97, 98.
Introducing in evidence, § 333k, p. 1684.
Review by writ of error of decision in State court affecting, § 692, p. 3718.
TRESPASS—
Value of matter in dispute in suits of, § 13, p. 52.
Injunctions to prevent, § 267, p. 1334.
Injunctions to restrain, § 275, pp. 1364-1366.
TRIAL—
Common-law procedure respecting, § 453, p. 2204; § 473, p. 2405.
Notice of, how far State practice respecting, is followed, § 453, p. 2207.
In admiralty, § 582, p. 3177.
Principles regulating the granting of new trials, § 478, p. 2472.
see also HEARING; PRACTICE AT COMMON LAW; PRACTICE IN CRIMINAL CASES; BANKRUPTCY.
TRUST—
Bill to set aside deeds, parties to, § 113, p. 700.
Bill to enforce, may also seek a partition, § 141, p. 795.
Impeaching decrees improperly obtained in cases of, § 451, p. 2196.
Injunctions to enforce, § 263, pp. 1321, 1322.
When receiver will be appointed in suits affecting, § 302, p. 1481.
see MONOPOLIES; BENEFICIARIES.
TRUST ESTATES—
As subjects of equity jurisdiction, § 79, p. 317.
Costs out of, § 421, pp. 2066-2071.
TRUST PROPERTY—
Who necessary parties in suits affecting, § 113, pp. 692, 697-701.
TRUSTEE—
Appointment, removal, or resignation of, petition for, § 253, p. 1266.
when can be appointed receiver of trust estate, § 318, p. 1605.
Bankruptcy, suits by and against, § 38, p. 123.
Beneficiaries of trust may intervene in suits affecting, § 258b, p. 1287.
Bills
bill individually and as, not multifarious, § 140, p. 782.
a bill making an accounting and also to set aside effects of a fraud on the trustor is multifarious, § 141, p. 793.
Bondholder's trustee on same side of suit as bondholder, § 41, p. 137.
Citizenship of, § 44, pp. 152, 153.
Defendant, facts showing that, is a, must be pleaded, § 137, p. 772; § 144, p. 807.
Liability is joint and several, § 119, p. 714.
Parties
of active trust, when necessary party to suit affecting trust estate, § 120, p. 725.
when not a necessary party in suit against colleagues for breach of trust, § 119, p. 714.
Suit against. of intestate to determine ownership of fund, parties, § 113, p. 692.
TRUSTEES OF RAILROAD MORTGAGE—
When not necessary parties to foreclosure suit, § 118, p. 713.
TUCKER ACT—
See U. S., § 96b, p. 604.
TURBARY—
Suit by one or more in behalf of others to establish the right of, § 116, p. 707.

Vol. II begins at § 197, page 1125; Vol. III begins at § 458, page 2201; Vol. IV begins at § 670, page 3597.

TWENTY-EIGHT HOUR LAW—
Violation of, treated as action of debt and the pleadings conform in general to State practice, § 454o, p. 2241.

U.

UBERRIMA FIDES—
Required on application for special injunction, § 292, p. 1435, n. 9.
ULTRA VIRES—
Acts when enjoined at suit of stockholder, § 16, p. 58.
Injunctions against acts *ultra vires*, § 264, pp. 1323-1331.
UNDERTAKING—
Sometimes required that party omitted from bill will conform to decree, § 122, p. 735.
To abide further orders of the court, given on special appearance, § 169, p. 982.
May be required on issue, dissolution, or continuance of injunction, § 297, p. 1452.
By receiver, § 319, p. 1608.
Plaintiff in error or appellant to give undertaking or other security to clerk of United States Supreme Court for costs, § 702, p. 3807.
see also SECURITY; SUPERSEDEAS.
UNINCORPORATED ASSOCIATION—
Citizenship of, § 48, p. 177.
Statute authorizing officers of, to represent all the members followed by Federal court, § 113, p. 695.
Suing members of, as representatives of all others, § 115, p. 706.
when a necessary party, § 120, p. 733.
Suing as a corporation, ground of demurrer, § 367, p. 1833.
see also VOLUNTARY ASSOCIATION.
UNITED STATES—
Bills, filing of, and information by, § 131, p. 745.
Boundaries of States
right of intervention in suits between States to settle boundaries, § 3a, p. 9.
Claims against, suits to collect, not exceeding $1,000, § 5, p. 14.
Condemnation proceedings by, § 5, p. 23.
Constitution or laws of, suits arising under, § 5, p. 14; § 24, pp. 73-84.
Contracts
suits on contracts with, § 5, p. 19.
Costs
when no judgment for costs against, § 95, p. 595.
when costs will be allowed in suits to adjust claims against, § 408, p. 1995.
Defendant, § 95, pp. 593-598.
Injunction cannot be issued against, § 284, p. 1419.
Land
a suit in ejectment for land for, § 95, p. 595.
multifariousness in bill by, to set aside land patent for fraud, § 153, p. 912.
bill filed by, to vacate patent to public lands, what to contain, § 153, p. 912.
Parties
when technically parties, § 95, pp. 594, 595.
service of subpœna, when United States is a party, § 164, p. 937.
President thereof can be sued, § 94, p. 692.
State statutes of limitation
not barred by any, § 181, p. 1048.
cannot bar, § 181, p. 1048.

Vol. II begins at § 197, page 1125; Vol. III begins at § 458, page 2201; Vol. IV begins at § 670, page 3597.

UNITED STATES (continued)—
Suits by and against
suits against
authorized by the Tucker Act, § 96b, p. 604.
what claims included within this act, § 96b, p. 604.
practice in enforcing such claims, § 96b, p. 604.
appeal in such cases, § 96b, p. 604.
suits by, in District courts, § 5, p. 13.
suits against and suits by, § 5, pp. 13, 14; § 34, p. 119; § 95, p. 593; § 97, p. 633; § 98, p. 636.
Waiver of exemption from suits, § 95, p. 594.
When cannot be sued, § 94, p. 692.
UNITED STATES COMMISSIONERS—
Fees of, § 418a, p. 2049.
In criminal cases, § 483f, p. 2546.
Fees, see ATTORNEYS' FEES; CLERKS' FEES; COUNSELS' FEES.
UNITED STATES COURTS—
How far can interfere by injunction with matters in State courts, § 270, p. 1340.
see also FEDERAL COURTS; COURT OF CLAIMS.
UNITED STATES SHIPPING BOARD—
Injunctions against, § 100a, p. 651.
Orders enforced, § 283c, p. 1414.
UNITED STATES STATUTES AND TREATIES—
Introducing in evidence, § 333k, p. 1684.
UNITED STATES SUPREME COURT (see SUPREME COURT OF THE UNITED STATES).
UNSOUND MIND—
Persons of, see PLAINTIFF AND DEFENDANT.
USURY—
An advancement not, § 19, p. 69.
Bill to cancel securities for, to contain an offer to return, § 153, p. 909.
UTAH—
Constitutes one judicial district, § 66, p. 331.
Times and places of holding terms, § 66, pp. 331, 332.
Is included in Eighth Circuit, § 4, p. 10.
Time within which cause to be docketed in United States Supreme Court in case of appeals or writs of error from, § 704, p. 3834.

V.

VALUE—
Of matter in dispute to confer jurisdiction, § 5, p. 14; § 6, pp. 34-42.
see MATTER IN DISPUTE.
Bill to show whether amount involved exceeds the jurisdictional amount, § 135, p. 760.
Of subject-matter that it is beneath dignity of court, former ground of demurrer, § 367, p. 1833.
Of matter in dispute as affecting removal of cause, § 545c, p. 2994.
Of matter in dispute as affecting removal of suits containing controversies between citizens of the same State, claiming land under grants of different States, § 550, p. 3024.
Of amount in dispute, as affected by subsequent events in relation to right to remove cause to Federal court, § 554, p. 3050.
Of matter in controversy as affecting right to appeal, § 696, pp. 3757-3767.
VARIANCE—
In criminal practice, § 497e, p. 2645; § 536a, pp. 2877, 2878.

Vol. II begins at § 197, page 1125; Vol. III begins at § 458, page 2201; Vol. IV begins at § 670, page 3597.

VENIRE FACIAS—
In criminal cases, § 508, pp. 2733-2736; § 510, p. 2742, n. 18.
grand jurors, when summoned, § 508, p. 2733.
indispensable prerequisite to summons of grand jury, § 508, p. 2734.
service of, § 508, p. 2736.
VENUE—
Of affidavit, § 337, p. 1711.
VERDICT—
Common law, § 473k, pp. 2431-2434.
form of, § 473k, pp. 2431-2433.
State practice, when followed, § 473k, pp. 2431, 2432.
issues raised, § 473k, p. 2432.
verdict altered after recall of jurors, § 473k, p. 2433.
allowing of interest, § 473k, pp. 2432, 2433.
Federal court, practice in, § 473, pp. 2419-2423.
trial judge, when he may direct, § 473h, p. 2419.
cause improperly removed to, may be remanded even after verdict, § 556a, p. 3086.
State statute regulating form of, effect of, § 473c, p. 2412.
Jury, upon an issue at law, how reviewed in equity, § 382, p. 1869.
VERIFICATION—
Of bill in suit affecting rights assertable by corporation, § 145, p. 817.
Of answer, § 192, p. 1120.
Answer denying facts stated in petition for intervention, to have a, § 254, p. 1268.
Of pleadings, how far State practice respecting, is followed, § 453, p. 2207.
Of affidavit, see also AFFIDAVIT; EVIDENCE; PRACTICE IN CRIMINAL CASES.
VERMONT—
Constitutes one judicial district, § 66, p. 332.
times and places of holding court therein enumerated, § 66, p. 332.
The district of, included within the Second Circuit, § 4, p. 10.
VEXATIOUS CONDUCT—
Dispaupering party of, § 413, p. 2018.
VICE-CONSUL—
Jurisdiction of District Courts in suit against, § 5, p. 19.
see also CONSUL.
VICTUS VICTORI IN EXPENSIS CONDEMNATUS EST—
A rule of the civil law applied to the payment of costs, § 409, p. 1998.
VIRGINIA—
Divided into two districts, § 66, p. 332.
counties, times and places of holding court therein enumerated, § 66, pp. 332, 333.
Districts of, included within Fourth Circuit, § 4, p. 10.
Terms of Circuit of Appeals held in, § 4, p. 10.
VIRGIN ISLANDS—
Jurisdiction of local tribunals, § 4, p. 10.
Review of decisions, § 4, p. 10; § 691b, p. 3701.
VOLSTEAD ACT (see PROHIBITION).
VOLUNTARY ASSOCIATION—
Citizenship of members of, § 113, p. 695.
When members of, are necessary parties to suits affecting, § 114, p. 701.
Suing members of, as representing, § 115, p. 706.
see UNINCORPORATED ASSOCIATION.

Vol. II begins at § 197, page 1125; Vol. III begins at § 453, page 2201; Vol. IV begins at § 670, page 3597.

W.

WAIVERS—
Answer under oath, § 153, p. 907; § 192, p. 1119; § 347, p. 1753.
Appearance in a suit, § 170, p. 982.
Bills, waiver in, § 153, pp. 907, 912.
Citation of failure to serve on defendants in error, § 705c, pp. 3845, 3846.
Defect in answer by setting cause down for a hearing, § 193, p. 1121.
Jurisdictional value, § 6, p. 41.
Jury trial, § 473, p. 2405.
Objection
as to residence, § 454d, p. 2217.
to lack of certainty in a bill, § 137, p. 774.
to issue warrant of removal, § 493, p. 2623.
Omission of, when ground for demurrer, § 153, p. 912.
Remand of right to, § 556a, p. 3084.
Reply, waiver of, § 203, p. 1158.
Right against a person, waiver of, § 123, pp. 735, 736.
United States, waiver by, of exemption from suit, § 95, p. 594.
WAR CLAIMS—
No suits for, against United States, § 5, p. 20; § 96, p. 598.
see COURT OF CLAIMS.
WARRANTS (see PRACTICE IN CRIMINAL CASES; SEARCH WARRANTS; BANKRUPTCY).
WASHINGTON—
Divided into two districts, § 66, p. 333.
District of, included within Ninth Circuit, § 4, p. 10.
Time within which cause to be docketed in United States Supreme Court in case of appeals or writs of error from, § 704, p. 3834.
Times and places of holding court in, § 66, pp. 333-335.
WASTE—
Injunctions to restrain commission, § 267, p. 1334; § 273, p. 1357.
WATERS—
Cases relating to navigable, § 32, p. 110.
WEAK MIND—
Capacity of persons of, to file bills in equity, § 85, p. 580; § 91, p. 587.
Suits against persons of, § 107, p. 675.
see also IDIOT; LUNATIC.
WEST VIRGINIA—
Constitutes two districts, § 66, p. 335.
times and places of holding court therein enumerated, § 66, pp. 335, 336.
District of, included within the Fourth Circuit, § 4, p. 10.
WHITE SLAVE ACT—
Count not bad for duplicity under, § 500, p. 2656.
Indictments under, § 506g, pp. 2703-2705.
WIFE (see MARRIED WOMAN).
WILL—
Averments as to, in bill filed by executor, § 144, pp. 806, 807.
Construction by Federal court, § 54, p. 202.
Estate conveyed by, to life tenant when remainder-man is not in existence, § 113, p. 697.
Persons desiring different constructions of, cannot unite in a bill, § 140, p. 784.
State statute authorizing setting aside of probate, enforceable in Federal courts, § 82, pp. 567, 568.
see also PROBATE OF WILL.

Vol. II begins at § 197, page 1125; Vol. III begins at § 453, page 2201; Vol. IV begins at § 670, page 3597.

WISCONSIN—
Divided into two districts, § 66, p. 336.
counties, times and places of holding court therein enumerated, § 66, pp. 336, 337.
Districts of, included within Seventh Circuit, § 4, p. 10.
Introducing in evidence transcripts from certain books of the District Courts in, § 333, p. 1691.
WITNESS—
Attendance of
summoned in behalf of United States, § 340, p. 1735.
procuring attendance of, before master, § 391, p. 1924.
Bills to perpetuate testimony of, § 132, p. 751; § 156, p. 920.
Compelling to testify, § 343, p. 1743.
may be compelled in Congressional investigation to give evidence tending to disgrace him, § 339b, p. 1729.
Competency of, in civil cases, § 339, pp. 1714-1723.
self-incrimination, § 339a, p. 1723.
statutory immunity, § 339b, p. 1729.
Defendant not prevented from being, in his own favor, § 523e, p. 2798.
Depositions *de bene esse*, § 354, pp. 1780-1786.
notice of taking deposition of, § 354a, p. 1786.
proceedings upon deposition of, § 354b, p. 1788.
Deposition taken in cause prior to removal of Federal court, whether witness can be compelled to sign same after removal, § 555h, p. 3072.
Exemption of, from service of process, § 167, pp. 969, 970.
Incriminate, tending to, § 339a, p. 1723.
see also EVIDENCE; SUBPOENA DUCES TECUM; EXPERT; PRACTICE IN CRIMINAL CASES.
WIVES (see MARRIED WOMEN).
WRITS—
In general, § 455, pp. 2245-2247.
Amendment of, § 455b, p. 2247.
Assistance of, to put receiver into possession, § 441, p. 2162.
Attachment of, § 432, p. 2148.
Certiorari, § 460, pp. 2285-2291.
Common-law procedure respecting writs, § 454, pp. 2209-2242.
Error *coram nobis*, § 481, p. 2510.
Form of, how far State practice followed respecting, § 454, p. 2210.
Habeas corpus, § 3, p. 9; §§ 461-467, pp. 2291-2367.
Indorsement of, § 454, p. 2210.
Issued by Supreme Court, § 3, p. 9.
Issued by Circuit Court of Appeals, § 4, p. 9.
Mandamus, § 3, p. 9; §§ 457, 458, pp. 2252-2275.
Ne exeat republica, §§ 326-328, pp. 1633-1639.
Prohibition, § 3, p. 9; § 456, pp. 2248-2252.
Quo warranto, § 468, pp. 2368-2379.
Scire facias, § 3, p. 9; § 469, pp. 2379-2384.
Sequestration, § 189, p. 1116.
Service of, § 454, p. 2210.
Writs and process, § 455, pp. 2242, 2245.
service of, § 455a, p. 2245.
amendment of, § 455b, p. 2247.
WRITS DUPLICATE—
Against different defendants, § 61, p. 226.
WRITS OF ASSISTANCE—
When and how issued, § 440, p. 2160.

Vol. II begins at § 197, page 1125; Vol. III begins at § 453, page 2201; Vol. IV begins at § 670, page 3597.

WRITS OF ERROR (see APPEAL AND ERROR).
WYOMING—
Constitutes one judicial district, § 66, p. 338.
Times and places of holding court in, § 66, p. 338.
Belongs to Eighth Circuit, § 4, p. 10.
Jurisdiction includes Yellowstone National Park, § 66, p. 338.

Y.

YELLOWSTONE NATIONAL PARK—
Included in the jurisdiction of the Federal courts of Wyoming, § 66, p. 338.

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